

such investigations, to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain communications records or business records of a member of the news media. The certification, which the Attorney General should take into account along with the other considerations identified in paragraph (c)(5) of this section, will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vi) Requests should be treated with care to avoid interference with newsgathering activities and to avoid claims of harassment.

(vii) The proposed subpoena or court order should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of material.

(viii) If appropriate, investigators should propose to use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(6) When the Attorney General has authorized the issuance of a subpoena to a member of the news media; or the use of a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media, members of the Department must consult with the Criminal Division before moving to compel compliance with any such subpoena or court order.

(d) *Applying for warrants to search the premises, property, communications records, or business records of members of the news media.* (1) Except as set forth in paragraph (d)(4) of this section, members of the Department must obtain the authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media.

(2) All requests for authorization of the Attorney General to apply for a warrant to search the premises, prop-

erty, communications records, or business records of a member of the news media must be personally endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) In determining whether to authorize an application for a warrant to search the premises, property, communications records, or business records of a member of the news media, the Attorney General should take into account the considerations identified in paragraph (c)(5) of this section.

(4) Members of the Department may apply for a warrant to obtain work product materials or other documentary materials of a member of the news media pursuant to the "suspect exception" of the Privacy Protection Act ("PPA suspect exception"), 42 U.S.C. 2000aa(a)(1), (b)(1), when the member of the news media is a subject or target of a criminal investigation for conduct not based on, or within the scope of, newsgathering activities. In such instances, members of the Department must secure authorization from a Deputy Assistant Attorney General for the Criminal Division.

(5) Members of the Department should not be authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, 42 U.S.C. 2000aa(a)(1), (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(6) A Deputy Assistant Attorney General for the Criminal Division may authorize, under an applicable PPA exception, an application for a warrant to search the premises, property, communications records, or business records of an individual other than a member of the news media, but who is reasonably believed to have "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. 2000aa(a), (b).

(7) In executing a warrant authorized by the Attorney General or by a Deputy Assistant Attorney General for the Criminal Division investigators should

use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams.

(e) *Notice to affected member of the news media.* (1)(i) In matters in which the Attorney General has both determined that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, and authorized the use of a subpoena, court order, or warrant to obtain from a third party the communications records or business records of a member of the news media pursuant to paragraph (c)(4)(i), (c)(5)(1), or (d)(1) of this section, members of the Department are not required to provide notice of the Attorney General's authorization to the affected member of the news media. The Attorney General nevertheless may direct that notice be provided.

(ii) If the Attorney General does not direct that notice be provided, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General every 90 days an update regarding the status of the investigation, which update shall include an assessment of any harm to the investigation that would be caused by providing notice to the affected member of the news media. The Attorney General shall consider such update in determining whether to direct that notice be provided.

(2)(i) Except as set forth in paragraph (e)(1) of this section, when the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk

grave harm to national security, or present an imminent risk of death or serious bodily harm.

(ii) The mere possibility that notice to the affected member of the news media, and potential judicial review, might delay the investigation is not, on its own, a compelling reason to delay notice.

(3) When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain communications records or business records of a member of the news media, and the affected member of the news media has not been given notice, pursuant to paragraph (e)(2) of this section, of the Attorney General's determination before the use of the subpoena, court order, or warrant, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the affected member of the news media notice of the order or warrant as soon as it is determined that such notice will no longer pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. In any event, such notice shall occur within 45 days of the government's receipt of any return made pursuant to the subpoena, court order, or warrant, except that the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. No further delays may be sought beyond the 90-day period.

(4) The United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations a copy of any notice to be provided to a member of the news media whose communications records or business records were sought or obtained at least 10 business days before such notice is provided to the affected member of the news media, and immediately after such notice is, in fact, provided to

the affected member of the news media.

(f) *Questioning, arresting, or charging members of the news media.* (1) No member of the Department shall subject a member of the news media to questioning as to any offense that he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General. The government need not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media, to trigger the requirement that the Attorney General must authorize such questioning.

(2) No member of the Department shall seek a warrant for an arrest, or conduct an arrest, of a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General.

(3) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, newsgathering activities, without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General.

(4) In requesting the Attorney General's authorization to question, to seek an arrest warrant for or to arrest, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media as provided in paragraphs (f)(1) through (3) of this section, members of the Department shall provide all facts necessary for a determination by the Attorney General.

(5) In determining whether to grant a request for authorization to question, to seek an arrest warrant for or to arrest, or to present information to a

grand jury seeking an indictment or to file an information against, a member of the news media, the Attorney General should take into account the considerations reflected in the Statement of Principles in paragraph (a) of this section.

(g) *Exigent circumstances.* (1)(i) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of a subpoena or court order, as described in paragraph (c) of this section, or the questioning, arrest, or charging of a member of the news media, as described in paragraph (f) of this section, if he or she determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a specified offense against a minor (for example, as those terms are defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16911), or an attempt or conspiracy to commit such a criminal offense; or incapacitation or destruction of critical infrastructure (for example, as defined in section 1016(e) of the USA PATRIOT Act, 42 U.S.C. 5195c(e)).

(ii) A Deputy Assistant Attorney General for the Criminal Division may authorize an application for a warrant, as described in paragraph (d) of this section, if there is reason to believe that the immediate seizure of the materials at issue is necessary to prevent the death of, or serious bodily injury to, a human being, as provided in 42 U.S.C. 2000aa(a)(2) and (b)(2).

(2) Within 10 business days of the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (g) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General and to the Director of the Office of Public Affairs a statement containing the information that would have been provided in a request for prior authorization.

(h) *Safeguarding.* Any information or records obtained from members of the

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news media or from third parties pursuant to this policy shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department should consult the United States Attorneys' Manual for specific guidance regarding the safeguarding of information or records obtained from members of the news media or from third parties pursuant to this policy.

(i) *Failure to comply with policy.* Failure to obtain the prior approval of the Attorney General, as required by this policy, may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(j) *General provision.* This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[AG Order No. 3486-2015, 80 FR 2820, Jan. 21, 2015]

**§ 50.12 Exchange of FBI identification records.**

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92-544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21 (b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be exchanged in other instances as authorized by federal law.

(b) The FBI Director is authorized by 28 CFR 0.85(j) to approve procedures relating to the exchange of identification records. Under this authority, effective September 6, 1990, the FBI Criminal Justice Information Services (CJIS)

**28 CFR Ch. I (7-1-16 Edition)**

Division has made all data on identification records available for such purposes. Records obtained under this authority may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities. Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. These officials also must advise the applicants that procedures for obtaining a change, correction, or updating of an FBI identification record are set forth in 28 CFR 16.34. Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so. A statement incorporating these use-and-challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record.

[Order No. 2258-99, 64 FR 52229, Sept. 28, 1999]

**§ 50.14 Guidelines on employee selection procedures.**

The guidelines set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to equal employment opportunity.

**UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)**

NOTE: These guidelines are issued jointly by four agencies. Separate official adoptions

follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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GENERAL PRINCIPLES

SECTION 1. *Statement of purpose*—A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

SEC. 2. *Scope—A. Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system

within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

SEC. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination—A. Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these

guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

SEC. 4. *Information on impact*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates.* The "bottom line." If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual com-

ponents, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to



maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

F. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

SEC. 5. *General standards for validity studies*—A. *Acceptable types of validity studies.* For the purposes of satisfying those guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection

procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the high or level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

SEC. 6. *Use of selection procedures which have not been validated—A. Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative ac-

tion program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

SEC. 7. *Use of other validity studies—A. Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of

section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (3) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* If validity evidence from a study covering more than one unit within an organization satisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

SEC. 8. *Cooperative studies—A. Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

SEC. 9. *No assumption of validity—A. Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedure, its author or its publisher, or casual reports of its validity be accepted in lieu of

evidence of validity. Specifically ruled out are: Assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

SEC. 10. *Employment agencies and employment services—A. Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

SEC. 11. *Disparate treatment.* The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group whose other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where

members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

SEC. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

SEC. 13. *Affirmative action—A. Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

#### TECHNICAL STANDARDS

SEC. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies—(1) Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular

concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance

on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cut-off scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard. Cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For

these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating those factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may

continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion related study (see section 10, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies.* (1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledge, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is

not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledge, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or

to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledge, skills, or abilities in the experience or training and the specific behaviors, products, knowledge, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(3) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with paragraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity

studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies paragraphs 14B (2) and (3) above for those jobs with criterion related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of paragraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

#### DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

SEC. 15. *Documentation of impact and validity evidence*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-1, *et seq.*, reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 1 above) constituting more than two



percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15A(2)(a) above until the information is sufficient to determine that the overall selection process does not have an

adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary

part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

**B. Criterion related validity studies.** Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the

rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 1A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less than perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined

to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure comparability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further informa-

tion about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of

the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the

accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form

and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies—*a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

**F. Evidence of validity from cooperative studies.** Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

**G. Selection for higher level job.** If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) A description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

**H. Interim use of selection procedures.** If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

#### DEFINITIONS

**SEC. 16. Definitions.** The following definitions shall apply throughout these guidelines:

**A. Ability.** A present competence to perform an observable behavior or a behavior which results in an observable product.

**B. Adverse impact.** A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

**C. Compliance with these guidelines.** Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

**D. Content validity.** Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

**E. Construct validity.** Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

**F. Criterion-related validity.** Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

**G. Employer.** Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1961, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

**H. Employment agency.** Any employment agency subject to the provisions of the Civil Rights Act of 1961, as amended.

**I. Enforcement action.** For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

**J. Enforcement agency.** Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

**K. Job analysis.** A detailed statement of work behaviors and other information relevant to the job.

**L. Job description.** A general statement of job duties and responsibilities.

**M. Knowledge.** A body of information applied directly to the performance of a function.

**N. Labor organization.** Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

**O. Observable.** Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

**P. Race, sex, or ethnic group.** Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

**Q. Selection procedure.** Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection

procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomotor act.

U. *Technical feasibility.* The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledge, skills, and abilities are not behaviors, although they may be applied in work behaviors.

#### APPENDIX

17. *Policy statement on affirmative action* (see section 13B). The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal

employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, Jr.,  
*Deputy Attorney General and Chairman of  
the Equal Employment Coordinating Council.*

MICHAEL H. MOSKOW,  
*Under Secretary of Labor.*

ETHEL BENT WALSH,  
*Acting Chairman, Equal Employment Opportunity Commission.*

ROBERT E. HAMPTON,  
*Chairman, Civil Service Commission.*



## Department of Justice

## § 50.15

ARTHUR E. FLEMMING,  
*Chairman, Commission on Civil Rights.*

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

RICHARD ALBRECHT,  
*General Counsel, Department of the Treasury.*

SECTION 18. *Citations.* The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section \_\_\_\_, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR \_\_\_\_ (August 25, 1978)."

The short form citation is:

"Section \_\_\_\_, U.G.E.S.P. (1978); 43 FR \_\_\_\_ (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission  
29 CFR Part 1607

Department of Labor  
Office of Federal Contract Compliance Programs

41 CFR Part 60-3  
Department of Justice  
28 CFR 50.14

Civil Service Commission  
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR \_\_\_\_, (August 25, 1978); 29 CFR part 1607, section 6A."

ELEANOR HOLMES NORTON,  
*Chair, Equal Employment Opportunity Commission.*

ALAN K. CAMPBELL,

*Chairman, Civil Service Commission.*

RAY MARSHALL,  
*Secretary of Labor.*

GRIFFIN B. BELL,  
*Attorney General.*

[Order No. 668-76, 41 FR 51735, Nov. 23, 1976, as amended at 43 FR 38295, Aug. 25, 1978]

**§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities.**

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the proceedings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for

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or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to

which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation generally is not available in federal criminal proceedings. Representation may be provided to a federal employee in connection with a federal criminal proceeding only where the Attorney General or his designee determines that representation is in the interest of the United States and subject to applicable limitations of § 50.16. In determining whether representation in a federal criminal proceeding is in the interest of the United States, the Attorney General or his designee shall consider, among other factors, the relevance of any non-prosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities. If representation is authorized, the Attorney General or his designee also may determine whether representation by Department attorneys, retention of private counsel at federal expense, or reimbursement to the employee of private counsel fees is most appropriate under the circumstances.

(5) Where representation is sought for proceedings other than federal criminal proceedings, but there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in

addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(6) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(7) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in that federal criminal proceeding or in any related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16, or provide reimbursement to employees for private attorney fees incurred in connection with such related civil, congressional, or state criminal proceeding, provided no decision has been made to seek an indictment or file an information against the employee.

(8) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed:

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraph (a) (6), (9) and (10) of this section, and by § 50.16.

(9) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(10) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld

so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(11) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(12) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will

take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(2) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

(c)(1) The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.

(2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Attorney General or his designee.

(3) Absent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

(4) The Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the head of his employing component, who shall thereupon submit to the appropriate Assistant Attorney General, in a timely manner, a recommended disposition of the request.

Where appropriate, the Assistant Attorney General shall seek the views of the U.S. Attorney; in all such cases the Civil Division shall be consulted. The Assistant Attorney General shall forward the request, the employing component's recommendation, and the Assistant Attorney General's recommendation to the Attorney General for decision.

(5) Any payment under this section either to indemnify a Department of Justice employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds of the employing component of the Department of Justice.

[Order No. 970-82, 47 FR 8172, Feb. 25, 1982, as amended at Order No. 1139-86, 51 FR 27022, July 29, 1986; Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

**§ 50.16 Representation of Federal employees by private counsel at Federal expense.**

(a) Representation by private counsel at federal expense or reimbursement of private counsel fees is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a) (4), (7), (10), and (11), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention and reimbursement procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel and the reimbursement to an employee of private counsel fees, including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel or to provide reimbursement of private counsel fees under this section, the Civil Division shall be consulted before the retention or reimbursement is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency

employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

(d) Where reimbursement is provided for private counsel fees incurred by employees, the following limitations shall apply:

(1) Reimbursement shall be limited to fees incurred for legal work that is determined to be in the interest of the United States. Reimbursement is not available for legal work that advances only the individual interests of the employee.

(2) Reimbursement shall not be provided if at any time the Attorney General or his designee determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment or that representation is no longer in the interest of the United States.

(3) Reimbursement shall not be provided for fees incurred during any period of time for which representation by Department of Justice attorneys was tendered.

(4) Reimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal

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charge relating to the conduct concerning which representation was undertaken.

[Order No. 970-82, 47 FR 8174, Feb. 25, 1982, as amended by Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

**§ 50.17 *Ex parte* communications in informal rulemaking proceedings.**

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, *ex parte* oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

(b) All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection.

(c) All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

(d) The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

(e) The Department may conclude that restrictions on *ex parte* communications in particular rulemaking pro-

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ceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 801-78, 43 FR 43297, Sept. 25, 1978, as amended at Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

**§ 50.18 [Reserved]**

**§ 50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.**

The determination to seek for any reason the disqualification or recusal of a justice, judge, or magistrate is a most significant and sensitive decision. This is particularly true for government attorneys, who should be guided by uniform procedures in obtaining the requisite authorization for such a motion. This statement is designed to establish a uniform procedure.

(a) No motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.*, 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) or agency counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall

be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977-82, 47 FR 22094, May 21, 1982]

**§ 50.20 Participation by the United States in court-annexed arbitration.**

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in

paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of \$100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial *de novo* in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case

from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR part 0, subpart Y and appendix to subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions



for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (e.g., the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109-85, 50 FR 40524, Oct. 4, 1985]

**§ 50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.**

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to the destruction of seized contraband drugs.

(b) *Purpose.* This policy implements the authority of the Attorney General under title I, section 1006(c)(3) of the

Anti-Drug Abuse Act of 1986, Public Law 99-570 which is codified at 21 U.S.C. 881(f)(2), to direct the destruction, as necessary, of Schedule I and II contraband substances.

(c) *Policy.* This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

(d) *Definitions.* As used in this subpart, the following terms shall have the meanings specified:

(1) The term *Contraband drugs* are those controlled substances listed in Schedules I and II of the Controlled Substances Act seized for violation of that Act.

(2) The term *Marijuana* is as defined in 21 U.S.C. 801(15) but does not include, for the purposes of this regulation, the derivatives hashish or hashish oil for purposes of destruction.

(3) The term *Representative sample* means the exemplar for testing and a sample aggregate portion of the whole amount seized sufficient for current criminal evidentiary practice.

(4) The term *Threshold amount* means:

(i) Two kilograms of a mixture or substance containing a detectable amount of heroin;

(ii) Ten kilograms of a mixture or substance containing a detectable amount of—

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

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

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

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (d)(4)(ii) (A) through (C) of this section;

(iii) Ten kilograms of a mixture or substance described in paragraph (d)(4)(ii)(B) of this section which contains cocaine base;

(iv) Two hundred grams of powdered phencyclidine (PCP) or two kilograms of a powdered mixture or substance containing a detectable amount of phencyclidine (PCP) or 28.35 grams of a liquid containing a detectable amount of phencyclidine (PCP);

(v) Twenty grams of a mixture or substance containing a detectable amount of Lysergic Acid Diethylamide (LSD);

(vi) Eight hundred grams of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny]propanamide (commonly known as fentanyl) or two hundred grams of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny]propanamide; or

(vii) Twenty kilograms of hashish or two kilograms of hashish oil (21 U.S.C. 841(b)(1)(D), 960(b)(4)).

In the event of any changes to section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1) as amended occurring after the date of these regulations, the threshold amount of any substance therein listed, except marijuana, shall be twice the minimum amount required for the most severe mandatory minimum sentence.

(e) *Procedures.* Responsibilities of the Federal Bureau of Investigation and Drug Enforcement Administration.

When contraband drug substances in excess of the threshold amount or in the case of marijuana a quantity in excess of the representative sample are seized pursuant to a criminal investigation and retained in the custody of the Federal Bureau of Investigation or Drug Enforcement Administration, the Agency having custody shall:

(1) Immediately notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor that the amount of seized contraband drug exceeding the threshold amount and its packaging, will be destroyed after sixty days from the date notice is provided of the seizure, unless the agency providing notice is requested in writing by the authority receiving notice not to destroy the excess contraband drug; and

(2) Assure that appropriate tests of samples of the drug are conducted to

determine the chemical nature of the contraband substance and its weight sufficient to serve as evidence before the trial courts of that jurisdiction; and

(3) Photographically depict, and if requested by the appropriate prosecutorial authority, videotape, the contraband drugs as originally packaged or an appropriate display of the seized contraband drugs so as to create evidentiary exhibits for use at trial; and

(4) Isolate and retain the appropriate threshold amounts of contraband drug evidence when an amount greater than the appropriate threshold amount has been seized, or when less than the appropriate threshold amounts of contraband drugs have been seized, the entire amount of the seizure, with the exception of marijuana, for which a representative sample shall be retained; and

(5) Maintain the retained portions of the contraband drugs until the evidence is no longer required for legal proceedings, at which time it may be destroyed, first having obtained consent of the U.S. Attorney, an Assistant U.S. Attorney, or the responsible state/local prosecutor;

(6) Notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor to obtain consent to destroy the retained amount or representative sample whenever the related suspect(s) has been a fugitive from justice for a period of five years. An exemplar sufficient for testing will be retained consistent with this section.

(f) *Procedures.* Responsibilities of the U.S. Attorney or the District Attorney (or equivalent state/local prosecutorial authority). When so notified by the Federal Bureau of Investigation or the Drug Enforcement Administration of an intent to destroy excess contraband drugs, the U.S. Attorney or the District Attorney (or equivalent) may:

(1) Agree to the destruction of the contraband drug evidence in excess of the threshold amount, or for marijuana in excess of the representative sample, prior to the normal sixty-day period. The U.S. Attorney, or the District Attorney (or equivalent) may delegate to his/her assistants authority to enter into such agreement; or

(2) Request an exception to the destruction policy in writing to the Special Agent in Charge of the responsible division prior to the end of the sixty-day period when retaining only the threshold amount or representative sample will significantly affect any legal proceedings; and

(3) In the event of a denial of the request may appeal the denial to the Assistant Attorney General, Criminal Division. Such authority may not be re-delegated. An appeal shall stay the destruction until the appeal is complete.

(g) *Supplementary regulations.* The Federal Bureau of Investigation and the Drug Enforcement Administration are authorized to issue regulations and establish procedures consistent with this section.

[Order No. 1256-88, 53 FR 8453, Mar. 15, 1988, as amended by Order No. 2920-2007, 72 FR 69144, Dec. 7, 2007]

#### § 50.22 Young American Medals Program.

(a) *Scope.* There are hereby established two medals, one to be known as the Young American Medal for Bravery and the other to be known as the Young American Medal for Service.

(b) *Young American Medal for Bravery.*

(1)(i) The Young American Medal for Bravery may be awarded to a person—

(A) Who during a given calendar year has exhibited exceptional courage, attended by extraordinary decisiveness, presence of mind, and unusual swiftness of action, regardless of his or her own personal safety, in an effort to save or in saving the life of any person or persons in actual imminent danger;

(B) Who was eighteen years of age or younger at the time of the occurrence; and

(C) Who habitually resides in the United States (including its territories and possessions), but need not be a citizen thereof.

(ii) These conditions must be met at the time of the event.

(2) The act of bravery must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) No more than two such medals may be awarded in any one calendar year.

(c) *Young American Medal for Service.*

(1) The Young American Medal for Service may be awarded to any citizen of the United States eighteen years of age or younger at the time of the occurrence, who has achieved outstanding or unusual recognition for character and service during a given calendar year.

(2) Character attained and service accomplished by a candidate for this medal must have been such as to make his or her achievement worthy of public report. The outstanding and unusual recognition of the candidate's character and service must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) The recognition of the character and service upon which the award of the Medal for Service is based must have been accorded separately and apart from the Young American Medals program and must not have been accorded for the specific and announced purpose of rendering a candidate eligible, or of adding to a candidate's qualifications, for the award of the Young American Medal for Service.

(4) No more than two such medals may be awarded in any one calendar year.

(d) *Eligibility.* (1) The act or acts of bravery and the recognition for character and service that make a candidate eligible for the respective medals must have occurred during the calendar year for which the award is made.

(2) A candidate may be eligible for both medals in the same year. Moreover, the receipt of either medal in any year will not affect a candidate's eligibility for the award of either or both of the medals in a succeeding year.

(3) Acts of bravery performed and recognition of character and service achieved by persons serving in the Armed Forces, which arise from or out of military duties, shall not make a candidate eligible for either of the

medals, provided, however, that a person serving in the Armed Forces shall be eligible to receive either or both of the medals if the act of bravery performed or the recognition for character and service achieved is on account of acts and service performed or rendered outside of and apart from military duties.

(e) *Request for information.* (1) A recommendation in favor of a candidate for the award of a Young American Medal for Bravery or for Service must be accompanied by:

(i) A full and complete statement of the candidate's act or acts of bravery or recognized character and service (including the times and places) that supports qualification of the candidate to receive the appropriate medal;

(ii) Statements by witnesses or persons having personal knowledge of the facts surrounding the candidate's act or acts of bravery or recognized character and service, as required by the respective medals;

(iii) A certified copy of the candidate's birth certificate, or, if no birth certificate is available, other authentic evidence of the date and place of the candidate's birth; and

(iv) A biographical sketch of the candidate, including information as to his or her citizenship or habitual residence, as may be required by the respective medals.

(f) *Procedure.* (1)(i) All recommendations and accompanying documents and papers should be submitted to the Governor or Chief Executive Officer of the State, territory, or possession of the United States where the candidate's act or acts of bravery or recognized character and service were demonstrated. In the case of the District of Columbia, the recommendations should be submitted to the Mayor of the District of Columbia.

(ii) If the act or acts of bravery or recognized character and service did not occur within the boundaries of any State, territory, or possession of the United States, the papers should be submitted to the Governor or Chief Executive Officer of the territory or other possession of the United States wherein the candidate habitually maintains his or her residence.

(2) The Governor or Chief Executive Officer, after considering the various recommendations received after the close of the pertinent calendar year, may nominate therefrom no more than two candidates for the Young American Medal for Bravery and no more than two candidates for the Young American Medal for Service. Nominated individuals should have, in the opinion of the appropriate official, shown by the facts and circumstances to be the most worthy and qualified candidates from the jurisdiction to receive consideration for awards of the above-named medals.

(3) Nominations of candidates for either medal must be submitted no later than 120 days after notification that the Department of Justice is seeking nominations under this program for a specific calendar year. Each nomination must contain the necessary documentation establishing eligibility, must be submitted by the Governor or Chief Executive Officer, together with any comments, and should be submitted to the address published in the notice.

(4) Nominations of candidates for medals will be considered only when received from the Governor or Chief Executive Officer of a State, territory, or possession of the United States.

(5) The Young American Medals Committee will select, from nominations properly submitted, those candidates who are shown by the facts and circumstances to be eligible for the award of the medals. The Committee shall make recommendations to the Attorney General based on its evaluation of the nominees. Upon consideration of these recommendations, the Attorney General may select up to the maximum allowable recipients for each medal for the calendar year.

(g) *Presentation.* (1) The Young American Medal for Bravery and the Young American Medal for Service will be presented personally by the President of the United States to the candidates selected. These medals will be presented in the name of the President and the Congress of the United States. Presentation ceremonies shall be held at such times and places selected by the President in consultation with the Attorney General.

(2) The Young American Medals Committee will officially designate two adults (preferably the parents of the candidate) to accompany each candidate selected to the presentation ceremonies. The candidates and persons designated to accompany them will be furnished transportation and other appropriate allowances.

(3) There shall be presented to each recipient an appropriate Certificate of Commendation stating the circumstances under which the act of bravery was performed or describing the outstanding recognition for character and service, as appropriate for the medal awarded. The Certificate will bear the signature of the President of the United States and the Attorney General of the United States.

(4) There also shall be presented to each recipient of a medal, a miniature replica of the medal awarded in the form of a lapel pin.

(h) *Posthumous awards.* In cases where a medal is awarded posthumously, the Young American Medals Committee will designate the father or mother of the deceased or other suitable person to receive the medal on behalf of the deceased. The decision of the Young American Medals Committee in designating the person to receive the posthumously awarded medal, on behalf of the deceased, shall be final.

(i) *Young American Medals Committee.* The Young American Medals Committee shall be represented by the following:

- (1) Director of the FBI, Chairman;
- (2) Administrator of the Drug Enforcement Administration, Member;
- (3) Director of the U.S. Marshals Service, Member; and
- (4) Assistant Attorney General, Office of Justice Programs, Member and Executive Secretary.

(Authority: The United States Department of Justice is authorized under 42 U.S.C. 1921 *et seq.* to promulgate rules and regulations establishing medals, one for bravery and one for service. This authority was enacted by chapter 520 of Pub. L. 81-638 (August 3, 1950).)

[61 FR 49260, Sept. 19, 1996]

**§ 50.23 Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents.**

(a) It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act (see Memorandum for Heads of Departments and Agencies from the Attorney General *Re: The Freedom of Information Act (Oct. 4, 1993)*).

(b) There may be rare circumstances that warrant an exception to this general rule. In determining whether an exception is appropriate, any such circumstances must be considered in the context of the public's strong interest in knowing about the conduct of its Government and expenditure of its resources. The existence of such circumstances must be documented as part of the approval process, and any confidentiality provision must be drawn as narrowly as possible. Non-delegable approval authority to determine that an exception justifies use of a confidentiality provision in, or seeking or concurring in the sealing of, a final settlement or consent decree resides with the relevant Assistant Attorney General or United States Attorney, unless authority to approve the settlement itself lies with a more senior Department official, in which case the more senior official will have such approval authority.

(c) Regardless of whether particular information is subject to a confidentiality provision or to seal, statutes and regulations may prohibit its disclosure from Department of Justice files. Thus, before releasing any information, Department attorneys should consult all appropriate statutes and regulations (e.g., 5 U.S.C. 552a (Privacy

Act); 50 U.S.C. 403-3(c)(6) (concerning intelligence sources and methods), and Execution Order 12958 (concerning national security information). In particular, in matters involving individuals, the Privacy Act regulates disclosure of settlement agreements that have not been made part of the court record.

(d) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 2270-99, 64 FR 59122, Nov. 2, 1999]

**§ 50.24 Annuity broker minimum qualifications.**

(a) *Minimum standards.* The Civil Division, United States Department of Justice, shall establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Those qualifications are as follows:

(1) The broker must have a current license issued by at least one State, the District of Columbia, or a Territory of the United States as a life insurance agent, producer, or broker;

(2) The broker must have a current license or appointment issued by at least one life insurance company to sell its structured settlement annuity contracts or to act as a structured settlement consultant or broker for the company;

(3) The broker must be currently covered by an Errors and Omissions insurance policy, or an equivalent form of insurance;

(4) The broker must never have had a license to be a life insurance agent, producer, or broker revoked, rescinded, or suspended for any reason or for any period of time;

(5) The broker must not have been convicted of a felony; and

(6) The broker must have had substantial experience in each of the past three years in providing structured settlement brokerage services to or on behalf of defendants or their counsel.

(b) *Procedures for inclusion on the list.*

(1) An annuity broker who desires to be included on the list must submit a

“Declaration” that he or she has reviewed the list of minimum qualifications set forth in paragraph (a) of this section and that he or she meets those minimum qualifications. A sample of the Declaration for annuity brokers to submit is available from the Civil Division’s Web site (<http://www.usdoj.gov/civil/home.html>) or by written request to the address in this section. These minimum qualifications must be continually met for a broker who has been included on the list to remain included when the list is updated thereafter. The Declaration must be executed under penalty of perjury in a manner specified in 28 U.S.C. 1746.

(2) Each broker must submit a new Declaration annually to be included on updated lists. For a broker to be included on the initial list to be established by May 1, 2003, the Torts Branch, Civil Division, must receive the broker’s Declaration no later than April 24, 2003. If the broker wishes to be included on updated lists, the Torts Branch must receive a new Declaration from the broker between January 1 and April 10 of each successive calendar year. After the Declaration is completed and signed, the original must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. The Department of Justice will not accept a photocopy or facsimile of the Declaration.

(3) A Declaration will not be accepted by the Department of Justice unless it is complete and has been signed by the individual annuity broker requesting inclusion on the list. A Declaration that is incomplete or has been altered, amended, or changed in any respect from the Declaration at the Civil Division’s Web site will not be accepted by the Department of Justice. Such a Declaration will be returned to the annuity broker who submitted it, and the Department of Justice will take no further action on the request for inclusion on the list until the defect in the Declaration has been cured by the annuity broker.

(4) The Department of Justice will retain a complete Declaration signed and filed by an annuity broker requesting to be on the list. Because this rule does

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not require the submission of any additional information, the Department retains discretion to dispose of additional information or documentation provided by an annuity broker.

(5) The Department of Justice will not accept a Declaration submitted by an annuity company or by someone on behalf of another individual or group of individuals. Each individual annuity broker who desires to be included on the list must submit his or her own Declaration.

(6) An annuity broker whose name appears on the list incorrectly may submit a written request that his or her name be corrected. An annuity broker whose name appears on the list may submit a written request that his or her name be removed from the list.

(7) To the extent practicable, a name correction or deletion will appear on the next revision of the list immediately after receipt of the written request for a name correction or deletion. A written request for a name correction or deletion must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. Facsimiles will not be accepted.

(8) The list of annuity brokers established pursuant to this section will be updated periodically, but not more often than twice every calendar year, beginning in calendar year 2004.

(c) *Disclaimers.* (1) The inclusion of an annuity broker on the list signifies only that the individual declared under penalty of perjury that he or she meets the minimum qualifications required by the Attorney General for providing annuity brokerage services in connection with structured settlements entered into by the United States. Because the decision to include an individual annuity broker on the list is based solely and exclusively on the Declaration submitted by the annuity broker, the appearance of an annuity broker's name on the list does not signify that the annuity broker actually meets those minimum qualifications or is otherwise competent to provide structured settlement brokerage services to the United States. No preferential consideration will be given to an annuity broker appearing on the list

except to the extent that United States Attorneys utilize the list pursuant to section 11015(b) of Public Law 107-273.

(2) By submitting a Declaration to the Department of Justice, the individual annuity broker agrees that the Declaration and the list each may be made public in its entirety, and the annuity broker expressly consents to such release and disclosure of the Declaration and list.

[Order No. 2667-2003, 68 FR 18120, Apr. 15, 2003]

### § 50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) *Assumption of concurrent Federal criminal jurisdiction.* (1) Under 18 U.S.C. 1162(d), the United States may accept concurrent Federal criminal jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for assumption of concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe that is located in any of these "mandatory" Public Law 280 States, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

(2) Under 25 U.S.C. 1321(a)(2), the United States may exercise concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed "optional" Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by

the Attorney General. The Department's view is that such concurrent Federal criminal jurisdiction exists under applicable statutes in these areas of Indian country, even if the Federal Government does not formally accept such jurisdiction in response to petitions from individual tribes. This rule therefore does not establish procedures for processing requests from tribes under 25 U.S.C. 1321(a)(2).

(b) *Request requirements.* (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official may include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The first page of the tribal request shall be clearly marked: "Request for United States Assumption of Concurrent Federal Criminal Jurisdiction." The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe. The tribal request shall also identify each local or State agency that currently has jurisdiction to investigate or prosecute criminal violations in the Indian country of the tribe and shall provide contact information for each such agency.

(c) *Process for handling tribal requests.*

(1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

- (i) Acknowledge receipt; and
- (ii) Open a file.

(2) Within 30 days of receipt of a tribal request, the Office of Tribal Justice shall:

(i) Publish a notice in the FEDERAL REGISTER, seeking comments from the general public;

(ii) Send written notice of the request to the State and local agencies identified by the tribe as having criminal jurisdiction over the tribe's Indian country, with a copy of the notice to

the governor of the State in which the agency is located, requesting that any comments be submitted within 45 days of the date of the notice;

(iii) Seek comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request; and

(iv) Seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(3) As soon as possible but not later than 30 days after receipt of a tribal request, the Office of Tribal Justice shall initiate consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

(4) To the extent appropriate and consistent with applicable laws and regulations, including requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, governing personally identifiable information, and with the duty to protect law enforcement sensitive information, the Office of Tribal Justice may share with the requesting tribe any comments from other parties and provide the tribe with an opportunity to respond in writing.

(5) An Indian tribe may submit a request at any time after the effective date of this rule. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible. The Department will seek to complete its review of prioritized requests within these time frames, recognizing that it may not be possible to do so in each instance.

(d) *Factors.* Factors that will be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include the following:

(1) Whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in



the Indian country of the requesting tribe.

(2) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(5) Other comments and information received from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(6) Other comments and information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(7) Other comments and information received from tribal consultation.

(8) Other comments and information received from other sources, including governors and State and local law enforcement agencies.

(e) *Decision.* (1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation.

(2) The Deputy Attorney General will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, effective as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the FEDERAL REGISTER;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information or comment before making a final decision.

(3) The Deputy Attorney General shall explain the basis for the decision in writing.

(4) The decision to grant or deny a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after a denial of such a request, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis for the prior denial. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(f) *Retrocession of State criminal jurisdiction.* Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d).

[AG Order No. 3314-2011, 76 FR 76042, Dec. 6, 2011]

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Media Relations at FBIHQ and in Field Offices Policy Guide

# Media Relations at FBIHQ and in Field Offices Policy Guide



**Federal Bureau of Investigation**

**Office of Public Affairs**

**0809PG**

**October 13, 2015**

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### Media Relations at FBIHQ and in Field Offices Policy Guide

## 1. Introduction

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The requirements for effective media relations have evolved significantly in the twenty-first century due to various factors, including 24/7 news coverage, an expansive cable market, channels dedicated solely to law enforcement programming, social media, Internet sites with original programming and articles, and the growth of opinion-driven, citizen-generated journalism. This changed environment requires intensive public affairs activities by dedicated public affairs specialists and media coordinators (MC), and it requires adaptability in the ways the Federal Bureau of Investigation (FBI) engages media outlets.

### 1.1. Purpose

As the principal voice of the FBI, the Office of Public Affairs (OPA) works to enhance the public's trust and confidence in the FBI by releasing and promoting information about the FBI's responsibilities, operations, accomplishments, policies, and values. In support of this objective, OPA works to improve public understanding and perceptions of the FBI through liaisons with traditional and nontraditional media. Effective work in media relations and media outreach also supports FBI operational priorities through efforts to mobilize, educate, and protect the public. The public can be a powerful force multiplier for law enforcement, serving as additional eyes and ears on the ground, calling in tips, notifying law enforcement of the location of fugitives or missing persons, and taking steps to protect themselves, their families, and their communities from becoming victims of crime.

### 1.2. Intended Audience

This policy guide (PG) is intended for OPA employees, MCs in field offices (FO), and all FBI personnel engaged in media relations.

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## 2. Roles and Responsibilities

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### 2.1. Federal Bureau of Investigation Office of Public Affairs

#### 2.1.1. Assistant Director (AD), Office of Public Affairs

The AD, OPA serves as the FBI's national spokesperson and provides leadership, oversight, and direction for OPA and FBI-wide media relations, community outreach, history, executive speeches, and employee communications functions. The AD must brief and advise the Director and senior executives on a range of public affairs and communication matters, including the current news environment and the impact of their decisions on public opinion, the FBI's public image, and communication to the FBI workforce. The AD must ensure that public affairs matters are closely coordinated with the AD of the Office of Congressional Affairs (OCA) and public affairs executives at the Department of Justice (DOJ), White House, Department of Homeland Security (DHS), Office of the Director of National Intelligence (ODNI), and other agencies. The AD must maintain high-level liaison with news and entertainment industry leaders, executive producers, managing editors, and current and retired FBI executives. The AD must also approve requests for use of the FBI's name, initials, and seal in media whose content has been specifically reviewed and approved by the FBI (e.g., in public service announcements [PSA] and official letters to the editor). (See Corporate Policy Directive (PD) 0625D, FBI Seal Name Initials and Special Agent Gold Badge.)

#### 2.1.2. Section Chief (SC), Media and Investigative Publicity Section, Office of Public Affairs

The SC must manage the FBI-wide media relations and community outreach programs, directly overseeing the National Press Office (NPO), Investigative Publicity and Public Affairs Unit (IPPAU), Executive Writing Unit (EWU), and coordinating various field office and FBI Headquarters (FBIHQ) components that contribute to these programs. The SC must act as a high-level media relations and outreach expert to interact with the national news media, national-level community-based groups, and counterparts in other government agencies (OGA) on a daily basis.

#### 2.1.3. Section Chief, Strategic Communications Section, Office of Public Affairs

The SC has oversight of the OPA units in the Strategic Communications Section, including the FBI.gov and Internet Operations Unit (FIOU), formerly the Online/Print Media Unit, Employee Communications Unit (ECU), Community Relations Unit (CRU), and Executive Staff and Education Center Unit (ESECU). The SC must ensure that OPA's activities support and are aligned with FBI strategic objectives and priority initiatives. The SC must work in coordination with the unit chief (UC) of ESECU on goals, objectives, performance measures, and strategic planning. The SC is responsible for policies, compliance matters, and personnel professional development matters for OPA and the FBI's larger public affairs workforce in FOs and throughout FBIHQ divisions.

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#### 2.1.4. National Press Office

NPO must manage daily relations with the national and international media and ensures timely responses to all media requests, with the exception of requests from monthly publications and nontraditional media outlets, which are handled by IPPAU. (See subsection 2.1.5. of this PG.)

NPO must:

- Coordinate interview requests.
- Draft and issue written press releases and responses.
- Produce analytical and briefing products for executives.
- Produce public affairs guidance (PAG), talking points, questions and answers (Q&A), and other materials to help guide FBI communications on issues in the news.
- Design, recommend, and, upon the approval of the AD, OPA, execute media strategies using print, broadcast, Internet, and social media platforms.
- Provide on-site and remote assistance for major media events involving the FBI.
- Serve as the FBI's external public communication center during a major incident or crisis, managing dissemination of all FBI public information via a number of methods, including, but not limited to, telephone, electronic mail (e-mail), and social media.
- Provide general program management of media relations and provide daily guidance to FOs.
- Coordinate media relations training for key executives and MCs and serve as their point of contact (POC) for the support and coordination of issues pertaining to the media.
- Maintain staff-level liaison contacts with the public affairs offices of DOJ, the White House, DHS, ODNI, and other federal entities.

#### 2.1.5. Investigative Publicity and Public Affairs Unit

IPPAU must oversee and manage publicity efforts that directly support investigations or intelligence activities. IPPAU must manage media relationships with national and international monthly publications and magazines. In addition, IPPAU must connect with media outlets not traditionally handled by NPO, such as authors, publishers, documentary productions, podcasts, and the radio, television, motion picture, and other entertainment industries, including those in foreign languages and those aimed at women, ethnic, religious, industry, and specific age groups.

IPPAU must:

- Coordinate with operational FBIHQ divisions and FOs on national and international investigative publicity matters.
- Approve and coordinate press releases and other public disclosures to solicit public assistance in fugitive, missing person, unknown bank robber, and cold cases.
- Develop national publicity campaigns.

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- Create Wanted posters and other fugitive publicity.
- Manage the Ten Most Wanted Fugitives and the Most Wanted Terrorists programs.
- Manage the “Most Wanted” pages of <www.fbi.gov>.
- Manage the “FBI Most Wanted” Twitter account.
- Manage the Wanted Bank Robbers Web site, a national system for publicizing the FBI’s unknown bank robbery suspects.
- Manage the relationships with digital outdoor advertisers.
- Oversee the creation of PSAs.
- Coordinate approval for the recording of live-action FBI operations (also known as media ride-alongs) with appropriate input from the FO, applicable United States Attorney’s Office (USAO), and DOJ.
- Coordinate “FBI 101s” (or workshops to educate different segments of the media on FBI jurisdiction and operations) by planning the agenda, coordinating speakers, and producing presentations, talking points, Q&As, fact sheets, and/or other background materials for these workshops, in coordination with subject matter experts (SME).
- Offer briefings and training classes to both traditional and nontraditional media to promote the development of positive feature stories.

#### **2.1.6. FBI.gov and Internet Operations Unit**

FIOU is responsible for content, security, compliance, and technical support for <www.fbi.gov>, the Web sites of the FBI’s 56 FOs, the FBI’s presence on all social media sites (such as Facebook and YouTube), and all other external FBI Web sites, unless they are exempted by FIOU. The unit vets and posts information from all FBIHQ divisions, oversees FO postings, and creates original stories and videos to keep the public informed on FBI news and issues.

#### **2.2. Office of the General Counsel (OGC)**

OGC must review all requests for authorized recordings of FBI operations and related activities. OGC must review and approve releases and waivers that any members of the media or production companies ask FBI employees to sign. In addition, OGC must advise OPA on the potential impact of public comment on FBI policies and proposed and pending litigation.

#### **2.3. Individuals in Federal Bureau of Investigation Headquarters Branches and Divisions Outside of the Office of Public Affairs**

Individuals in other FBIHQ branches and divisions engaged in public affairs activities such as those in the Criminal Justice Information Services Division (CJIS), Training Division (TD), Laboratory Division (LD), National Security Branch (NSB), do not have the full autonomy afforded to FOs pursuant to these guidelines to conduct liaison with the news media.

Accordingly, such individuals must:

- Maintain close working relationships with OPA.



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- Coordinate all media relations with OPA.
- Keep NPO advised of any significant cases or programs that could result in national press or media attention at the earliest practicable time.
- Refer any media inquiries related to recent or breaking news or matters requiring immediate attention to NPO.
- Refer any media inquiries on long-term projects and any requests from authors or filmmakers to IPPAU.

#### **2.4. Field Offices**

##### **2.4.1. Assistant Director in Charge (ADIC) or Special Agent in Charge (SAC)**

The ADIC or SAC is responsible for overseeing and participating in media relations in his or her FO, including appointing or hiring an MC who reports directly to the ADIC or SAC, as well as a back-up MC and/or a supervisory senior resident agent (SSRA), as appropriate. The ADIC or SAC must give interviews to the media, hold press conferences, and make appropriate FO personnel available to the news media. The FO head must approve any memoranda of understanding (MOU), following OGC review, that are executed between the FBI and media outlets, such as those governing the authorized recording of FBI operations and related activities. The FO head must be involved in the MOU negotiations for live-action recording, must execute the MOUs once all parties are in agreement, and must oversee the approval process outlined in subsection 4.2.2. of this document.

##### **2.4.2. Media Coordinators**

All FBI FOs must have at least one MC, either professional staff or special agent (SA), who functions as a liaison for the FO and as an official spokesperson, coordinating media activities and information with his or her USAO(s), which exercises independent discretion as to investigative matters affecting its own districts. MCs should not be the sole spokesperson for the FO and, to the extent practical, should respond to requests for information by coordinating interviews with managers, SMEs, or case agents.

MCs must:

- Respond orally or in writing to inquiries from members of the media.
- Focus on proactive activities that highlight the priorities, mission, and accomplishments of the FBI.
- Build relationships with local media outlets and with other law enforcement MCs in their area of responsibility (AOR).
- Provide materials such as speeches and talking points to assist the ADICs or SACs with press events and other public affairs efforts.
- Coordinate press conferences.
- Draft press releases.

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- Update press releases and other information on their public-facing FO Web sites and, if applicable, on their OPA-approved Twitter account.
- Work with the media in crisis and emergency situations.
- Coordinate national or significant media matters with NPO.
- Coordinate investigative publicity matters through IPPAU.
- Coordinate all interaction with authors, publishers, documentary productions, television, motion picture, and other entertainment industries through IPPAU.
- Coordinate with the community outreach specialist (COS) to publicize community programs. (See *Community Outreach in Field Offices Corporate Policy Directive and Policy Implementation Guide* [DPG], 0575DPG.)
- Brief new SAs on how to interact with the media.
- Brief new professional staff on the FBI media policy in the event that they have contact with members of the media.
- Ensure that the provisions in MOUs for media ride-alongs are followed by the production companies. This responsibility cannot be delegated to a squad supervisor or any other employee.

#### **2.5. All Federal Bureau of Investigation Employees**

All employees must have an understanding of the FBI's media relations program and its guidelines, as contained in this policy. Employees must immediately contact NPO or their FO MC if contacted by any member of the traditional or nontraditional media about FBI matters and refer the media to NPO or the applicable FO MC. Additionally, employees must inform NPO or the FO MC when there is an issue, a situation, or an event with the potential to generate significant media coverage. FBI employees may contact NPO via the main telephone line or e-mail address. (See Appendix C, "Contact Information," of this PG.)

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### 3. Policies

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#### 3.1. Authorization of Federal Bureau of Investigation Personnel to Make and Coordinate Disclosures and Information Releases to the Media

At FBIHQ, the Director, deputy director (DD), associate deputy director (ADD), AD for OPA, and OPA personnel designated by the AD are authorized to speak to the media. FBI executives, including executive assistant directors (EAD), ADs, deputy assistant directors (DAD), and SCs are authorized to speak to the media and must do so in coordination with OPA at FBIHQ. Other FBIHQ personnel, such as managers and SMEs, must only speak to the media at OPA's request or following coordination with, and approval by, OPA at FBIHQ.

In an FO, only the ADIC or SAC, assistant special agent in charge (ASAC), and the designated MC or other personnel specifically authorized by the head of office may communicate with the media on behalf of the FBI. On particularly sensitive issues or stories that may garner national attention, media contact must be coordinated with OPA at FBIHQ. Other FBI FO personnel, such as managers and SMEs, may communicate with the media at the request of the SAC, ASAC, or MC or following coordination with, and approval by, the SAC, ASAC, or MC.

Legal attachés (LEGAT) are authorized to speak to the media, but each request for media contact must be evaluated and considered by the LEGAT in coordination with the chief of mission and OPA. No media interviews or other cooperation with the media should go forward without a representative of the embassy present. OPA must coordinate with the International Operations Division (IOD) and any other applicable FBIHQ division for any additional consideration on behalf of the LEGAT.

Across the FBI, employees interested in planning national publicity campaigns or PSA initiatives must first coordinate with OPA at FBIHQ.

Across the FBI, if there is any doubt regarding a disclosure (see Appendix D, "Definitions and Acronyms," of this PG) to (or any interaction with) the media, the contents of the disclosure must be coordinated with OPA or the MC and with the FO's chief division counsel (CDC) or OGC, as applicable. In all cases, employee contacts with the media that are not authorized and not part of the employee's official duties are governed by FD-291, "FBI Employment Agreement."

OPA must consult with OGC's Litigation Branch on proposed media contacts that involve FBI personnel policies or that may impact proposed or pending litigation.

#### 3.2. The Federal Bureau of Investigation's Open Stance with the Media

Authorized FBI personnel must be as responsive as appropriate to inquiries and requests made by media representatives within the bounds of applicable law and policy. Other than by reason of a court order, the FBI must not interfere with efforts to photograph, tape, record, or televise events that take place in public. This may include, for example, taking pictures of a sealed crime scene from outside the sealed perimeter (the perimeter must be no larger than absolutely necessary for operational needs) or recording other activities engaged in by FBI personnel.

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**3.3. Constraints on the Sharing of Information with Media Outlets**

All releases of information by public affairs specialists, MCs, and any FBI personnel (see Appendix D, "Definitions and Acronyms," of this PG) authorized to speak to the media must conform with all applicable laws and regulations, as well as policies issued by DOJ, as itemized in Section 5, "Summary of Legal Authorities," of this PG.

All releases of information must be fair, accurate, and sensitive to the rights of defendants. The criteria of fairness, accuracy, and sensitivity to the rights of defendants, as well as to the public's right to know, must prevail in all dealings with the news media. (See subsection 4.2.3, "Freedom of the Press," of the Domestic Investigations and Operations Guide [DIOG], 0667DPG.)

Releases of information involving juveniles must not contain personally identifiable information (PII). Title 18 United States Code (U.S.C.) Section (§) 5038(e), the Federal Juvenile Delinquency Act, as amended, provides in part, "Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." The Department has advised that a news release concerning the arrest of a juvenile would not violate any restrictions of the act so long as it contains no identifying information. (See DIOG subsection 19.12.2[H].)

All FBI personnel authorized to release information must comply with Privacy Act provisions. The Privacy Act of 1974 (5 U.S.C. § 552(a)) prohibits the FBI from disclosing PII about an individual without his or her written consent or, in the case of a juvenile, the consent of a parent or a legal guardian, unless disclosure is authorized by an exemption or an exception contained in the Privacy Act. One such exception authorizes the disclosure of information pursuant to a published routine use so long as the disclosure is compatible with the purpose for which the information was collected. The FBI has published in the *Federal Register* one or more routine uses authorizing the disclosure of information subject to the Privacy Act. Blanket Routine Use (BRU) 3, Appropriate Disclosures to the Public, published at 66 *Federal Register* 33559 (June 22, 2001), authorizes the FBI to disclose information "To the news media or members of the general public in furtherance of a legitimate law enforcement or public safety function as determined by the FBI, e.g., to assist in locating fugitives; to provide notifications of arrests; to provide alerts, assessments, or similar information on potential threats to life, health, or property; or to keep the public appropriately informed of other law enforcement or FBI matters or other matters of legitimate public interest where disclosure could not reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Privacy Act also requires agencies to maintain an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person and the agency to whom the disclosure was made. This accounting must be retained for five years or the life of the record, whichever is longer. All disclosures of PII must be documented. When PII is disclosed for the purposes as stated in the paragraph above, the information is documented in 80-HQ-C1144322, Investigative Publicity Matters. The disclosure may also be referenced in 80-HQ-C1702378, NA - Ten Most Wanted Fugitive Matters, or 80-HQ-C1353047, Most Wanted Terrorists Program – Most Wanted Terrorists Program.

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**3.4. Content of Disclosures**

Disclosures must not prejudice an adjudicative proceeding and, except as indicated below, must not address an ongoing investigation.

Disclosures must not be erroneous, deceptive, or misleading. Any facts disseminated to the media must be validated to the extent practicable.

Material posted to an Internet Web site, a social media page, or a publicly-available mobile software application can reach audiences worldwide and must be given the same scrutiny and vetting that would typically be afforded a written statement to the press. Such releases are governed by the same legal and policy framework as other releases of information to the press (see Section 5, "Summary of Legal Authorities" of this PG) and the same restrictions regarding disclosures and requirements to coordinate with the USAO and/or OPA apply.

In some instances, it is permissible to [redacted] but only with the prior approval of FBIHQ entities (OGC and operational FBIHQ divisions, as appropriate, coordinated by OPA) and under the careful supervision of OPA. This does not include the release of any classified information, which is governed by *Safeguarding Classified National Security Information Corporate Policy Directive and Policy Implementation Guide*, 0632DPG.

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For example, it may be permissible to [redacted] to assure the public that an investigation is in progress.

- It may be permissible to [redacted] to protect the public interest, welfare, or safety.

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- It may be permissible to [redacted]  
[redacted] In an FO, these releases must be approved by both the MC and the applicable USAO. At FBIHQ, these releases must be approved by both OPA and DOJ Office of Public Affairs (DOJ-OPA), and, if applicable, any relevant operational FBIHQ divisions.

## 4. Procedures and Processes

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### 4.1. Administration and Management of Media Relations

#### 4.1.1. Office of Public Affairs and the Department of Justice

OPA interacts closely with DOJ-OPA, and its operations are governed by DOJ-OPA's instructions, located at Title 28 Code of Federal Regulations (CFR) § 50.2, and by the *United States Attorneys' Manual* [USAM], Title 1-7.000, "Media Relations."

#### 4.1.2. "The Horizon"

MCs must submit to NPO any activities and matters that could potentially draw or are drawing significant media attention in their area of operations. The inclusion of such activities or matters in "The Horizon" is at the discretion of the MC.

NPO must compile and publish these activities each business day in "The Horizon" report and disseminate the report to internal audiences, including all MCs and FBI senior leadership. NPO must maintain records of "The Horizon" in 80-HQ-A1199962-HORIZON in Sentinel.

#### 4.1.3. Biannual Reports

NPO must review and use biannual reports from every FO's MC to program manage the media relations program across FOs. The MC in each FO must submit these biannual reports by the designated deadline to NPO. NPO must maintain records of these biannual reports in 80-HQ-A1199962-FO MED REP in Sentinel.

#### 4.1.4. Waivers and Releases

Producers and publishers occasionally ask FBI personnel who participate in television, film, or book projects on behalf of the FBI to sign releases, waivers, or other written agreements. Through the use of releases, waivers, and other agreements (e.g., "life rights contracts"), production companies may attempt to secure authorization to use recorded material, including an employee's interviews, statements, likeness, and biographical data, in connection with a particular project, or limit the employee's or FBI's ability to share the story with other media outlets. Such documents often contain provisions rendering them legally objectionable or otherwise inappropriate for an FBI employee to sign.

Accordingly, employees participating in media projects in their official capacity must not sign releases, waivers, or other types of agreements provided by a producing or publishing entity. OPA has developed standard authorization letters that can be tailored to fit individual projects, which are maintained in 80-HQ-1077659, Public Affairs Matters Documentaries Television Movies. FBI employees or their FO MCs, on their behalf, must contact IPPAU to coordinate a review of the request for releases or other agreements and to prepare an appropriate authorization letter. FBI personnel asked to participate in television, film, or book projects for personal reasons and on personal time, unconnected to their FBI affiliation, must consult with the Office of Integrity and Compliance (OIC) since this may constitute outside employment and thus require OIC's review and approval.

FBI personnel who speak to a non-FBI audience or who participate as a panelist at a non-FBI conference, seminar, or other event in which the public or media have access, may also be asked

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to sign a release, waiver, or other written agreement authorizing publicity, promotion, or sharing of information related to that event. Those personnel must advise OPA of the participation and must consult with OGC and OIC to ensure that legal and ethical considerations are addressed.

#### **4.1.5. Office of Public Affairs and Media Coordinator Teleconferences**

OPA must hold monthly teleconferences with MCs in FOs to discuss specific issues and matters of timely interest. Depending on the topic, OPA may invite the FO community outreach specialists to participate in the teleconferences.

#### **4.1.6. Public Affairs Guidance**

NPO will determine when a media issue warrants a PAG. NPO will issue PAG on significant and/or emerging issues for appropriate dissemination. MCs are permitted to use the language in PAGs as preapproved statements that can be offered in response to a media inquiry.

NPO must draft a PAG by coordinating information with the appropriate substantive FBIHQ division(s) to establish appropriate responses. NPO must also obtain approvals from the appropriate FBIHQ division(s), OPA executives, and, as required, DOJ-OPA. NPO must e-mail the PAG to all MCs and upload it to the SharePoint site, Media Representatives Learning Community.

#### **4.1.7. Federal Bureau of Investigation Social Media Accounts**

All employees authorized to use FBI social media accounts must abide by federal privacy, accessibility, and recordkeeping laws.

Employees using the FBI social media accounts must not share or “retweet” non-FBI information without first obtaining approval from the NPO UC (or the acting designee).

#### **4.1.8. Press Releases**

NPO must draft press releases of executive appointments of SACs, ADs and above in coordination with the selectee.

NPO must consult with DOJ-OPA regarding any national press releases about pending cases or investigations that may result in an indictment.

IPPAU must approve and coordinate any press releases or other public disclosures regarding soliciting public assistance for the Ten Most Wanted Fugitives program, Most Wanted Terrorists program, and other fugitive, missing person, unknown bank robbers, and cold cases.

##### **4.1.8.1. Single Office Local Press Releases**

MCs must obtain their SAC’s approval before publishing and disseminating press releases. If a press release involves cases or investigations that may result in an indictment, MCs must also obtain the approval of the relevant USAO. If a press release involves significant or particularly sensitive issues or stories that may garner national attention, MCs must consult with NPO to determine if OPA’s and the substantive FBIHQ division’s approval is necessary.

MCs must use a uniform format for press releases, write them with both the media and public in mind, and simultaneously disseminate the press release by e-mail to media outlets and FIOU to post on <www.fbi.gov>.

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MCs must e-mail FIOU any press release issued by the relevant USAO on FBI operational matters as quickly as possible for posting on <www.fbi.gov>.

When the FO's ADIC or SAC decides to issue a national press release locally, MCs must not expand on the content without the approval of both the substantive FBIHQ division and OPA.

MCs do not need prior approval from NPO to issue press releases regarding noninvestigative matters, such as community outreach initiatives, employee award announcements, PSAs, transfers of FO executives, and other administrative matters.

#### **4.1.8.2. Multioffice Local Press Releases**

In the event that a wide-ranging investigation requires close coordination and simultaneous press releases to the media by two or more FOs, MCs must consult OPA before issuing a press release. OPA may opt to release the information as a national press release. In joint or multidistrict cases, the approving official must consult with the other districts or FOs affected. (See the USAM, Title 1-7.400, for more information.)

#### **4.1.8.3. Recordkeeping of Press Releases**

Each FO must maintain a control file containing all press releases issued by the FO. Press releases concerning investigative matters must be also filed in the investigative case file noting the time and date the release was made and where it was released.

NPO must file FBIHQ press releases into 80-HQ-A1 199962-PR.

#### **4.1.9. Press Conferences**

NPO must request approval to hold a press conference in advance from DOJ-OPA for any case or investigation that may result in an indictment. NPO must coordinate with DOJ-OPA on any materials, quotes, or information to be released in the press conference.

MCs in FOs must request approval in advance for press conferences from their SAC and, for issues relating to federal investigations and/or prosecutions, the applicable USAO. If a press conference involves significant or particularly sensitive issues or stories that may garner national attention, MCs must consult with NPO to determine if OPA's and the substantive FBIHQ division's approval is necessary.

Local press conferences about pending cases or investigations that may result in an indictment must be approved by the appropriate assistant Attorney General (AAG) or by the United States attorney (USA) responsible for the case. In joint or multidistrict cases, the approving official must consult with the other districts or FOs affected. (See the USAM, Title 1-7.401, for more information.)

NPO and MCs hosting press conferences must:

- Choose the time, location, and physical layout to accommodate spokespersons and the news media.
- Alert the media to the event by distributing a media advisory or inviting them to attend via e-mail, phone, or other form of communication.



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- Create and provide press releases, media packets, and/or other materials to attendees before the press conference begins.
- Explain the ground rules at the onset of the press conference, such as whether the event is on or off the record and whether cameras are permitted.
- Introduce the names and titles of the FBI officials who will speak and take reporters' questions.
- Write and/or coordinate the public statements by the speakers.
- Close the press conference when its preset time is reached or when questions taper off.
- Address follow-up media inquiries as needed.

#### 4.1.10. Pen-and-Pad Briefings

NPO must coordinate pen-and-pad briefings (informal, on-the-record briefings to press regulars) with any FBIHQ entity that may be a relevant stakeholder. If the pen-and-pad briefing will address ongoing investigations that may result in an indictment, NPO must consult with DOJ-OPA in advance.

NPO must:

- Issue a media advisory announcing the pen-and-pad briefing by e-mail, as appropriate.
- Secure room and security access for invited members of the media.
- Identify and schedule the briefer from the appropriate FBIHQ division.
- Escort attending media to and from the briefing location, at the scheduled times.

#### 4.2. Media Inquiries and Requests

##### 4.2.1. Media Inquiries

When NPO staff or MCs receive media inquiries, they must:

- Respond to media inquiries within the shortest possible time frame.
- Provide responses that are factual, courteous, and helpful.
- Not address hypothetical questions nor express personal opinions.
- Never ask or suggest that a journalist withhold information from the public without the concurrence of the substantive FBIHQ division and OPA.

NPO staff members may refer media requests to an FO, as appropriate.

MCs must:

- Coordinate all media contacts with the USAO on any matters that might affect that office, including any federal investigations and/or prosecutions.
- Advise NPO immediately of any media contacts that could result in national media attention.

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- Refer to NPO any inquiries related to recent or breaking news or that require a short turnaround time.

All other FBI employees must immediately contact their FO MC or NPO if contacted by any member of the traditional or nontraditional media about FBI matters.

#### 4.2.2. Recording of Live-Action Federal Bureau of Investigation Operations

In an effort to mitigate the legal and operational risks of filming live-action FBI operations (also known as media ride-alongs), the following rules must be followed:

- MCs must direct all requests for media ride-alongs to IPPAU for coordination. The media recording of live FBI events should be approved in rare instances and should not become the norm.
- If IPPAU approves the request in concept, IPPAU and the FO, including the FO's CDC, must collaboratively negotiate an MOU that will be executed between the FBI and the production company and/or media outlet. A standard model MOU was created and approved by OGC and can be found in Appendix B of this PG. The MOU must ensure that the applicable statutes, regulations, and guidelines pertaining to the filming of law enforcement activities are followed. The MOU is an important vehicle for formally communicating to the production companies the legal limitations and requirements placed on the FBI, as well as the many considerations relevant to the FBI's mission as a law enforcement agency.
- MCs, by virtue of their responsibility for media relations within their FOs, must be present for all filming activities and must ensure that the parameters set forth within the MOU are followed by the production companies. This responsibility must not be delegated to a squad supervisor or any other employee.
- Production company employees and others acting on behalf of the company must sign appropriate liability acknowledgements and nondisclosure agreements. All MOUs, nondisclosure agreements, and liability agreements must be maintained in 80-HQ-1077659 and the relevant investigative file. Examples of the MOU and nondisclosure agreements can be found in Appendix B of this PG.
- Production companies must agree to indemnify the FBI and hold it harmless for liabilities arising from the FBI's actions.
- OPA, in consultation with OGC, the substantive FBIHQ division, other affected FOs, and the participating FO's CDC must review and approve a production company's proposed video project, as well as the text of the MOU, prior to signature by any FBI official and any filming of FBI operations and related activities. The focus of the review must be whether the proposed project appears to be in the best interests of the FBI after considering the circumstances and attendant risks, and whether the MOU adequately addresses the risks.
- OPA must also ensure that the FBI has conducted the required coordination with DOJ-OPA in accordance with DOJ policy.

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- Production companies, their employees, and others acting on their behalf must comply with their obligations under these agreements. The FBI may enforce these agreements by requiring additional controls, limiting participation, terminating the agreement, or any other lawful means it determines to be appropriate. However, the involved FBI officials must understand that once a violation occurs, it may be difficult or impossible for the FBI to adequately remedy any harm done to FBI mission interests.
- The appropriate USAO must approve filming of any cases selected in accordance with the USAM.
- Filming must not be permitted in an area where an individual has, or may have, a reasonable expectation of privacy, such as within a residence or an enclosed yard, even if the FBI has obtained consent to enter the area. Production company personnel are not permitted to accompany FBI personnel into such locations.
- Law enforcement personnel must not reenact a law enforcement action for the purpose of creating footage for a production company.
- Production companies must not film FBI personnel or disclose their identities in a production without the employees' consent. The responsible FO must verify and document such consent. The FBI may provide a letter to a production company authorizing use of the footage and identification of specified employees. FBI personnel may not sign releases or waivers without prior consultation with, and written approval by, OGC.
- The FBI must always guard the privacy of victims and witnesses. (See *The Attorney General Guidelines for Victim and Witness Assistance*, Article II(C), pp. 3-4, "Privacy and Confidentiality Considerations for Victims and Witnesses," and Article V(J), pp. 47-48, "Right to Fairness and Respect for Dignity and Privacy.") To ensure "best efforts" to protect the dignity and privacy of victims and witnesses, the FBI must alert the relevant production personnel as soon as practical whenever FBI personnel are aware that there is a reasonable likelihood of encountering a victim or a witness in a given situation. The production personnel, in turn, must agree to make their best efforts not to film victims or witnesses whenever it receives such notice from the FBI.
- If a production company uses film of an arrested individual in a production, IPPAU must provide a written consent form to the individual, including an acknowledgement that nothing has been given or promised to him or her in return for consent. IPPAU must retain the original, signed consent form, with a second original copy routed to the USAO.
- A production company must provide DOJ and the FBI an opportunity to review the final production before it is publicly screened. This check is to ensure that legally protected or sensitive investigative information is not disclosed and that the requirements of the signed agreement are followed.
- A production company must agree to provide, without the necessity of a subpoena or other legal order, a copy of the entire unedited film to DOJ or the FBI, the prosecution, defense, or court if requested by DOJ or the FBI.

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- A production company must not publicly screen footage until after the case is fully adjudicated.

**4.2.3. Handling Requests from Television Series, Movies, Documentaries, Radio, or Authors for Federal Bureau of Investigation Assistance**

MCs must direct all requests from authors or the entertainment industry for FBI assistance and cooperation to IPPAU.

Once IPPAU receives a detailed description of the type of assistance or cooperation needed in writing, including a detailed treatment or a script in the case of movie industry requests, an IPPAU staff member must evaluate the quality, scope, and viability of each project.

If IPPAU approves the request in concept, IPPAU must prepare a communication to the substantive FBIHQ division and/or FO with a recommendation on the level of support the FBI will offer, as well as a request for input and concurrence from either the FBIHQ division or FO. In some instances, the substantive FBIHQ division or FO may have knowledge of the case or issue that would preclude participation in the project at a given time. Support can include guidance on content, assistance with props and costumes, interviews with SMEs, and/or assistance in identifying supporting material.

If all relevant parties approve cooperation with the requestor, IPPAU must coordinate the execution of the request with the appropriate entities.

IPPAU must direct authors to submit a Freedom of Information Act (FOIA) request via <[www.foia.fbi.gov](http://www.foia.fbi.gov)> for access to or information from FBI investigative files.

**4.2.4. Ongoing Liaison with Television Series Depicting the Federal Bureau of Investigation**

IPPAU must coordinate all ongoing liaisons with television series depicting FBI personnel, investigations, and/or services.

All liaison activity must be approved by IPPAU, the substantive FBIHQ division, and any relevant FO head.

IPPAU supports and coordinates ongoing liaison with television writers and producers in an effort to ensure a more realistic portrayal of FBI investigations, operations, and personnel.

Once IPPAU receives a detailed description of the type of assistance or cooperation needed in writing from the writer, producer, or other production personnel, an IPPAU staff member must evaluate the quality, scope, and viability of each project. If IPPAU approves the request in concept, IPPAU must prepare a communication to the substantive FBIHQ division and/or FO with a recommendation on the level of support, as well as a request for input and concurrence.

If all relevant parties approve cooperation with the television production, IPPAU must coordinate the fulfillment of the request with the appropriate entity or SME. Support can include guidance on content, fact checks, assistance with costumes and props, liaison and coordination with FOs, coordination of location shots, access to FBI facilities for filming scenes, interviews with SMEs, and/or supporting film footage.

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IPPAU must direct television personnel to submit a FOIA request via <[www.foia.fbi.gov](http://www.foia.fbi.gov)> for access to or information from FBI investigative files.

#### **4.3. Publicity and Proactive Campaigns**

##### **4.3.1. Managing Proactive Campaigns**

IPPAU must create and coordinate national proactive program or investigative publicity campaigns.

MCs must contact IPPAU for guidance on proactive program communications efforts or investigative publicity with the local media. MCs must contact IPPAU at the idea stage to request concept approval, strategic guidance, and content review for local proactive program or investigative publicity campaigns.

IPPAU must ensure that all facets of a campaign comply with federal laws regulating the dissemination of information to the public and the receipt of gifts from prohibited sources. IPPAU will assist in the production and design of the campaign, assist with script writing, provide guidance on the nature and timing of the release, and help MCs navigate through the restrictions on endorsements by outside entities.

IPPAU may leverage the following elements for a national publicity campaign: press releases, television, radio, podcasts, newspapers, magazines, outreach to international and nontraditional media, PSAs, digital outdoor advertisements, print advertisements, Wanted posters, and social media.

##### **4.3.2. Producing Radio Shows and Podcasts**

IPPAU will leverage its FBI radio programs for proactive publicity purposes.

IPPAU must coordinate all requests and necessary approvals for program or investigative publicity via FBI radio programs.

##### **4.3.3. Creating Public Service Announcements**

IPPAU coordinates the creation of all PSAs, including the concept, design, content approval, and production to ensure consistent messaging and approval by all internal and external stakeholders. IPPAU must coordinate and seek approval from other federal entities, as applicable.

##### **4.3.4. Fugitive Publicity**

MCs must obtain approval from IPPAU for investigative publicity related to a fugitive, a missing person, or other active investigation.

MCs may draft press releases and other public disclosures designed to solicit public cooperation in the apprehension of FBI fugitives. MCs may include more facts about the fugitive's criminal background than are otherwise permissible in press releases and announcements regarding arrests or indictments.

MCs must avoid prejudicial statements in these public disclosures. These statements may include, but are not limited to, statements that brand a fugitive as guilty of a crime for which he or she has not been convicted or photographs that show arrest numbers or other data that identifies a subject's past arrest or imprisonment.

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MCs must send written requests for publicity related to a fugitive, a missing person, or other active investigation to IPPAU. For fugitive cases, MCs must provide the following information:

- A detailed summary of the case
- Descriptive information about the fugitive, including eye and hair color, height, weight, date and place of birth, scars, tattoos or other marks, medical problems, locations where the fugitive might travel, hobbies or habits, occupations, and any known aliases
- If the fugitive should be considered armed and dangerous
- Any rewards being offered by the FBI

MCs must also submit the following enclosures with the request:

- Any applicable state or federal warrants, including when, where, and in which judicial districts the state and federal warrants were issued. Sealed indictments and warrants must not be submitted.
- Photographs of the best possible quality and highest resolution must be submitted electronically or on a disk and must be in .jpg format. If available, MCs must provide the date(s) when the photographs were taken.
- Relevant videos, if available. Video is extremely beneficial in cases with potential coverage by media outlets.
- Certification that “all other law enforcement authorities involved with this investigation have been contacted and have no objections to the requested national/international publicity.” This must include contact with the FBI Legat office and foreign authorities, as appropriate.

IPPAU must obtain the concurrence of the applicable operational FBIHQ division for the investigative publicity.

After receipt of the appropriate documentation, IPPAU must consult with the case agent and MC to determine the most impactful avenues of publicity. At a minimum, IPPAU must create a Wanted poster for posting on <www.fbi.gov> and the affected FO’s Intranet site. IPPAU may also suggest pitching the case to national and international media outlets, creating a podcast or a radio show, using digital billboard publicity, and/or engaging with the public via social media.

The case agent, in coordination with the MC, must approve all materials created by IPPAU prior to publication on <ww.fbi.gov> or on the FO’s Intranet site or prior to dissemination to the media.

#### **4.4. Crisis Situations**

##### **4.4.1. Crisis Planning**

FOs’ and OPA’s crisis response plans (CRP) must include an outline of how OPA or the FO will deal with the media during the course of a crisis, including specific potential situations, agreed allocation of personnel and financial resources to handle media requests, and planned coordination with federal, state, and local agencies.

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FOs' and OPA's Continuity of Operations Plans (COOP) must include guidance on media relations issues.

MCs must develop professional relationships with other federal, state, and local law enforcement public information officers to develop strategies and protocols in responding to the news media in joint law enforcement operations or in a crisis event. MCs may also proactively meet public information officers in local military, academic, and/or private sector environments, as appropriate.

MCs must foster healthy relationships with reporters to build trust and to ensure that reporters are aware of the dangers of speculation about tactical situations. MCs must encourage reporters to confine reports to facts released by authorized law enforcement officials in such situations.

#### 4.4.2. During Crises

MCs must train SAs on situational awareness in fast-moving situations. SAs are authorized to identify themselves as "an SA of the FBI," identify their FO, state the general nature of the operation (e.g., "we are here to serve an arrest warrant"), and refer further media questions to the MC or management. In an emergency situation, SAs are permitted to call media questions directly in to the SAC or ASAC and may relay the answers in that SAC's or ASAC's name.

In major crisis situations, MCs must:

- Coordinate the establishment of a broadcast area for the news media near the incident but apart from a regular law enforcement perimeter and apart from any victim services staging area.
- Establish a joint information center, if practical, to consolidate the flow of information between local, state, and other federal agencies.
- Engage regularly with their SACs and other management.
- Participate in operational briefings to remain fully informed.
- Maintain regular communication with NPO.
- Request media not telephone or otherwise attempt to contact a hostage taker or a hostage.
- Request media to advise law enforcement of any calls received from hostage takers or hostages and to not publish those conversations without advice and approval of an on-scene commander and hostage negotiators, via the MC.
- Request media to limit live broadcasting with no close-ups of locations of tactical personnel during the course of the incident.
- Request that media not identify groups claiming responsibility for the incident.

##### 4.4.2.1. On-Site Assistance

NPO may provide on-site assistance for major media events involving the FBI, as appropriate and as resources allow, with the concurrence of the AD of OPA and the FO head. On-site NPO personnel will assist the local MC and FO head and will function as a liaison with relevant individuals at FBIHQ. NPO may assist the MC with:

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- Shaping a media strategy.
- Working with on-scene members of the media.
- Staffing a 24/7 command post such as a joint operations center or a joint information center.
- Liaising with state and local law enforcement.
- Liaising with relevant individuals at FBIHQ.
- Liaising with other on-scene federal agencies.

#### 4.4.2.2. Off-Site Assistance

NPO must also provide off-site assistance as the FBI's external public communications center during a major incident or a crisis by managing the dissemination of all FBI public information. NPO's responsibilities during a major incident may include:

- Preparing written statements for the press.
- Monitoring news and social media coverage.
- Responding to incoming press inquiries.
- Gathering Q&As from SMEs and executives.
- Providing briefing materials to senior executives.

NPO must also function as the primary liaison between all interested parties during a major media event. NPO must:

- Coordinate information with other OPA units, as appropriate, and provide briefs as needed to OPA leadership.
- Coordinate with senior FBI executives at FBIHQ.
- Coordinate with the FO in whose AOR the incident occurred.
- Maintain an open line of communication between FBIHQ and the FO, including with any on-site personnel.
- Coordinate with the White House, DOJ, and other federal or national-level partners.

If appropriate, NPO will establish a presence in the Strategic Information and Operations Center (SIOC) command post to liaise with operational FBIHQ divisions.

#### 4.5. Training

##### 4.5.1. Training for Internal Audiences

NPO must provide training to key internal groups, including, but not limited to, any new Senior Executive Service (SES) employees, on their roles and responsibilities with regard to media guidelines and policies.



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IPPAU must provide training to employees within FOs on effectively using investigative publicity to assist with cases and to all employees on their responsibility to report requests to OPA for any media research assistance from any traditional or nontraditional media sources.

MCs must brief new SAs, intelligence analysts (IA), and professional staff on media matters when they arrive in an FO. On an annual basis, they must brief the FO population on the FBI's media policy, as stated herein, in the event that employees are contacted by members of the media. MCs must also train FO personnel selected for media exposure on handling press interviews.

Any records on training that OPA provides should be retained in 1Y-HQ-1702408.

#### **4.5.2. Training for External Audiences**

NPO must review and evaluate requests for public affairs trainings and exercises to domestic and international intelligence agencies, law enforcement agencies, and community groups and deliver any approved training, with the following exceptions:

- If the training falls under the purview of the National Academy Unit (NAU), then TD is responsible for reviewing the request and delivering any approved training.
- If the requestor is a foreign law enforcement entity, the request should first be submitted to IOD, who must evaluate the training request and, if approved, forward the request to NPO to deliver the training.
- If MCs receive local requests, they must evaluate the requests and must provide any approved training. MCs may contact NPO for advice and resources to assist in any such training.

Any records on training that OPA provides must be retained in 1Y-HQ-1702408.

#### **4.6. Special Circumstances**

##### **4.6.1. Investigations Involving Members of the Media**

Investigations of members of the news media are considered sensitive investigative matters (SIM) and are governed by special provisions in the DIOG, including, but not limited to:

- Subsection 6.10, "Sensitive Investigative Matters (SIM) in Preliminary Investigations"
- Subsection 7.10, "Sensitive Investigative Matters (SIM) in Full Investigations"
- Subsection 8.8, "Sensitive Investigative Matters (SIM) in Enterprise Investigations"
- Subsection 9.10, "Sensitive Investigative Matters (SIM) in a Full Positive Foreign Intelligence Investigation"
- Subsection 10.1, "Sensitive Investigative Matters (SIM)"
- Subsection 16.2.3.5, "Sensitive Undisclosed Participation"
- Subsection 18.5.6.4.8, "Members of the News Media"
- Subsection 18.6.4.3.4.3, "Members of the News Media"

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- Subsection 18.6.5.3.5.1, “Members of the News Media”
- Subsection 18.6.6.3.7.4, “Contact with Members of the News Media by a [REDACTED] [REDACTED]”
- Subsection 18.6.8.4.2, “Compelled Disclosure”
- Subsection 18.7.2.6, “Standards for Use and Approval Requirements for Sensitive Title IIIs”
- Subsection 19.10, “Arrest of News Media Members”
- Appendix G.7, “Sensitive Investigative Matters”
- Appendix G.12, “National Security Letters for Telephone Toll Records of Members of the News Media or News Organizations”

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**4.6.2. Financial Institution Investigations**

In financial institution investigations, MCs or any other FO personnel must not disclose the amount of money or property involved without prior concurrence from the Criminal Investigative Division (CID) and OPA.

**4.6.3. Special Agent-Involved Shootings**

MCs must not identify nor verify the names of SAs involved in shooting incidents in the performance of duty. If the names of SAs involved in shooting incidents have been made public through inclusion in public records or disclosures at public proceedings, SACs may verify the SAs’ identities in response to inquiries by members of the media.

**4.6.4. Threats Against Human Life**

In order to protect the safety of victims, MCs must not disclose any information regarding kidnap-for-ransom cases or other crimes that involve a threat against human life without the approval of the applicable investigative FBIHQ division and OPA.

**4.6.5. Overseas Incidents**

FOs must coordinate media responses with NPO if the victims, suspects, or other individuals thought to be related to an overseas incident are from the FO’s AOR.

**4.6.6. Hot Pursuit**

In hot pursuit fugitive cases, SACs have discretion to approve radio and television broadcasts without advance approval from OPA. As soon as possible, MCs must coordinate these cases with NPO.

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**5. Summary of Legal Authorities**

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- 28 CFR § 50.2, Release of information by personnel of the Department of Justice relating to criminal and civil proceedings
- *United States Attorneys' Manual*, Title 1-7.000, "Media Relations."
- *The Attorney General Guidelines for Victim and Witness Assistance*, Article II(C), pp. 3-4, "Privacy and Confidentiality Considerations for Victims and Witnesses"
- *The Attorney General Guidelines for Victim and Witness Assistance*, Article V(J), pp. 47-48, "Right to Fairness and Respect for Dignity and Privacy"
- 18 U.S.C. § 5038(e), The Federal Juvenile Delinquency Act
- Privacy Act of 1974 (5 U.S.C. § 552(a))
- 18 U.S.C. § 3052, Powers of Federal Bureau of Investigation
- 18 U.S.C. § 3107, Service of warrants and seizures by Federal Bureau of Investigation
- 28 CFR § 0.85, General functions [of the FBI Director]

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**6. Recordkeeping Requirements**

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The Privacy Act also requires agencies to maintain an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person and the agency to whom the disclosure was made and to retain this accounting for five years or the life of the record, whichever is longer. All disclosures of PII must be documented. When PII is disclosed for the purposes as stated in the paragraph above, the information is documented in 80-HQ-C1144322, Investigative Publicity Matters. The disclosure may also be referenced in 80-HQ-C1702378, NA - Ten Most Wanted Fugitive Matters, or 80-HQ-C1353047, Most Wanted Terrorists Program – Most Wanted Terrorists Program.

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**Appendix A: Final Approvals**

|  |  |
|--|--|
| <b>POLICY TITLE:</b> <i>Media Relations at FBIHQ and in Field Offices Policy Guide</i>                               |  |
| <b>Primary Strategic Objective</b>   | P10-Enhance trust and confidence in the FBI.                               |
| <b>Publish Date</b>  | 2015-10-13   |
| <b>Effective Date</b>  | 2015-10-13   |
| <b>Review Date</b>   | 2018-10-13   |
| <b>REFERENCES</b>  |  |
| <i>PD 0664D, Office of Public Affairs Statement of Authorities and Responsibilities</i>                              |  |
| <i>Social Media and Other Electronic Information Sharing Technologies Policy Directive and Policy Guide, 0579DPG</i> |  |
| <i>PD 0672D, Creating and Maintaining FBI Public Websites and FBI Web Presences on the Internet</i>                  |  |
| <b>APPROVALS</b>   |  |
| <b>Sponsoring Executive Approval</b>   | <b>Michael P. Kortan</b><br>Assistant Director<br>Office of Public Affairs |
| <b>Final Approval</b>  | <b>Mark F. Giuliano</b><br>Deputy Director<br>Director's Office            |

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**Appendix B: Additional Information for Media Ride-Alongs**

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This appendix contains a sample MOU and a sample liability agreement to be used for the recording of live-action FBI operations.

**Sample Agreement With a Media Production Company**

Note: Any substantial deviation from the language provided below must be fully justified. Before execution, the agreement must be reviewed by the CDC (if applicable), OGC, and FBI's OPA. It may only be signed for the FBI by the responsible FBIHQ division head (i.e., AD) or FO head (i.e., ADIC or SAC) after receiving the approval of the FBI's OPA and OGC.

CONTAINS ATTORNEY PRIVILEGED /  
PRE-DECISIONAL INFORMATION

**AGREEMENT  
BETWEEN  
THE FEDERAL BUREAU OF INVESTIGATION  
AND  
[PRODUCTION COMPANY]  
AND  
[NETWORK]**

[Production Company] ("PRODUCTION COMPANY") has asked the Federal Bureau of Investigation ("FBI") for approval to accompany personnel from the FBI's [DIVISION] on a variety of law enforcement activities and to film all or a portion of such activities for use as part of a documentary program regarding [identify topic, crime type, etc.] ("DOCUMENTARY") for broadcast by [Network] ("NETWORK"). As used herein, "film" includes any recording whatsoever, whether of audio or video.

[Identify and briefly describe Production Company and Network – e.g. official corporate name, state of incorporation, nature of business etc. as applicable]

The FBI enters into this agreement pursuant to its authorities in 28 U.S.C. Section 533 and 28 CFR Section 0.85 [Insert other authorities if appropriate]. The parties understand that the FBI is bound by 28 CFR Section 50.2, and will not provide information or filming assistance that violates this regulation. The FBI agrees to support this project in an effort to increase public awareness and understanding of the issues and FBI missions related to [describe crime problem and any other FBI objectives in the project (e.g. a recent uptick in violent crime in a particular geographic region, a specific type of cyber crime, etc.)].

In recognition of PRODUCTION COMPANY's request and the applicable law, regulations, and rules pertaining to Department of Justice assistance to the media, the parties to this agreement understand that the following parameters will guide the filming and production of the DOCUMENTARY:

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1. The parties understand that the Assistant Director, Office of Public Affairs has final authority for the FBI to grant or deny requests from PRODUCTION COMPANY to film specific law enforcement activities. Such requests will be coordinated with the Division signing this agreement, as well as the FBI General Counsel, other affected divisions at FBI Headquarters, and the Department of Justice.
2. The responsible United States Attorney's Office(s) must provide prior written approval for any case(s) selected for filming. If a case selected for filming involves the participation of state and/or local law enforcement authorities, their prior approval must also be obtained.
3. PRODUCTION COMPANY may not film an area in which an individual may have a reasonable expectation of privacy, such as in the interior of a residence or an enclosed yard. All filming must be of activity occurring in a place open to the public or plainly in public view. PRODUCTION COMPANY will not enter, or allow any member of the film/production crew to enter any individual's home or other non-public areas that law enforcement personnel may enter to accomplish an arrest, search, interview, or any other case-related activity.
4. During any filming of FBI activities pursuant to this agreement, PRODUCTION COMPANY will immediately comply with requests or direction from FBI officials, such as to cease filming or to depart from an area.
5. The DOCUMENTARY shall not reveal the name of any suspect, defendant, witness or bystander, nor display their faces. Digital or other means should be used to hide faces as well as to conceal license plates in any televised or otherwise publicly screened, broadcast, or exhibited version of the DOCUMENTARY.
6. FBI personnel will not re-enact any law enforcement activity. FBI personnel will not conduct any type of "perp walk" for the purpose of filming. This means that FBI personnel may not intentionally create, for the benefit of PRODUCTION COMPANY, an opportunity to film the defendant(s) after arrest.
7. [Choose one of the following provisions to address filming of victims. The preference of the local USAO must be considered in making this determination. However, even where the USAO does not insist on an absolute prohibition against filming victims, the agreement proponent should still consider other relevant factors such as the type of crime issues involved, age of victims, any particularly sensitive privacy issues, etc. in evaluating whether any contact between PRODUCTION COMPANY and victims is appropriate.]
  - a. PRODUCTION COMPANY shall not film any crime victim without the individual's express written consent, and advance authorization from the FBI.
  - b. PRODUCTION COMPANY shall not film any crime victim.
8. PRODUCTION COMPANY, NETWORK, and any other party in interest shall provide, without the necessity of a subpoena or other order, a copy of the entire

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unedited film to the Department of Justice or the FBI, the prosecution, defense counsel, or court upon request made by the Department of Justice or the FBI.

9. Notwithstanding any of the foregoing provisions, both the PRODUCTION COMPANY and the FBI/USAO must obtain an original release from an arrested individual before footage pertaining to the individual may be televised or otherwise publicly screened, broadcast, or exhibited. Each original release must contain the following language:

"I understand that my agreement to be included in the [Production Company] documentary about the Federal Bureau of Investigation is completely voluntary. I have not received, and was not promised, any right or benefit, substantive or procedural, by any officer, employee, agent, or other associated personnel of the United States Government in return for my agreement to be included in the documentary."

10. PRODUCTION COMPANY and NETWORK, and their respective employees, contractors, servants, and agents, must not disclose any law enforcement or case-related information provided by the FBI, or obtained as a result of FBI participation in the documentary, including any image or other information identifying any crime suspect, victim, or third party, unless expressly authorized by the FBI. Before filming begins, PRODUCTION COMPANY and NETWORK will require all employees, contractors, servants, and agents of PRODUCTION COMPANY and NETWORK who work on the DOCUMENTARY to sign a non-disclosure agreement provided by the FBI, and will provide copies of such agreements to the FBI upon request. As appropriate, the FBI will provide a separate written permission for PRODUCTION COMPANY or NETWORK to use footage of FBI law enforcement activities and interviews, as well as to use the FBI Seal or other insignia as set dressing.
11. Neither the finished DOCUMENTARY nor any portion thereof, including raw footage, may be televised or otherwise publicly exhibited until final review by the FBI in conjunction with the relevant United States Attorney's Office(s). PRODUCTION COMPANY and NETWORK shall not televise or otherwise publicly exhibit footage to which the FBI or relevant United States Attorney's Office(s) objects.
12. Further, neither the finished DOCUMENTARY nor any portion thereof, including raw footage, may be televised or otherwise publicly exhibited until the final disposition of the case approved for filming with respect to all potential defendants in the case, as determined by the FBI. For cases prosecuted in Federal Court, final disposition shall be determined by the prosecuting United States Attorney's Office.
13. PRODUCTION COMPANY and NETWORK agree that all employees, personnel, contractors, and agents of PRODUCTION COMPANY and NETWORK who participate in the filming and/or production of the DOCUMENTARY must sign a



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separate Release and Acknowledgement of Risk provided by the FBI, prior to such participation.

14. PRODUCTION COMPANY and NETWORK acknowledge that they and their employees are voluntarily participating in the filming of FBI law enforcement activities with full knowledge and awareness that there is inherent risk in such activities, including but not limited to risk inherent in the potential use of force and the potential pursuit and physical apprehension of a criminal subject. [Optional: add any other substantial known risk particular to investigation, if applicable.] With such knowledge and awareness, PRODUCTION COMPANY and NETWORK hereby assume such risk with respect to any personal injury or damage to personal property which may occur directly or indirectly as a result of the participation of their personnel, agents, contractors or employees in such filming.
15. To the extent permitted by law, PRODUCTION COMPANY and NETWORK, their respective employees, servants, and agents, and their heirs and assigns, hereby agree to hold harmless, release, discharge, and indemnify the United States, the FBI, and their personnel, agents and employees, from any and all claims, demands, causes of action, and damages should any be found, which may result or arise from the acts or omissions of PRODUCTION COMPANY and NETWORK, their employees, servants, or agents, while participating in the filming and/or production of a documentary program concerning FBI law enforcement operations. PRODUCTION COMPANY and NETWORK shall maintain sufficient insurance coverage for such liability or indemnification.
16. This agreement is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather, is a basic statement of the terms to which the parties mutually agree concerning the activities described herein. Unless otherwise agreed in writing, each party shall bear its own costs in relation to this agreement. Expenditures by each party will be subject to its own budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this agreement in no way implies that funds will be made available for such expenditures.
17. Any notice required to be given pursuant to this agreement shall be in writing and mailed by certified or registered mail, return receipt requested, or delivered by a national overnight express service, as follows:

|                                     |                          |
|-------------------------------------|--------------------------|
| To: Federal Bureau of Investigation | To: [PRODUCTION COMPANY] |
| Attn: [ADIC/SAC]                    | [ADDRESS]                |
| [ADDRESS]                           | [CITY/STATE]             |

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[CITY/STATE]

To: [NETWORK]  
[ADDRESS]  
[CITY/STATE]

18. This agreement constitutes the entire understanding of the parties and revokes and supersedes any prior agreements between the parties. It shall not be modified or amended except in writing signed by the parties hereto and specifically referring to this agreement.
19. This agreement is effective as of the date signed by the parties below, and will remain in effect until terminated. Any party may terminate this agreement at any time. Such termination must be in writing, and the terminating party will endeavor to provide 30 days notice of termination to the other parties. In the event of termination of this agreement, all responsibilities regarding any recorded material as outlined herein remain in effect.
20. The undersigned representatives of Production Company and Network warrant that they possess authority to bind Production Company and Network to their obligations in this agreement.

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[NAME]  
[TITLE]  
[PRODUCTION COMPANY]

---

[NAME]  
[TITLE]  
[NETWORK]

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[NAME]  
[AD, ADIC, or SAC]  
FBI, [DIVISION] Division

---

[NAME]  
Assistant Director  
FBI, Office of Public Affairs

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[NAME and TITLE]  
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