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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 13

[DHS–2005–0059]

RIN 1601–AA11

Program Fraud Civil Remedies

AGENCY: Office of the Secretary, Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule establishes uniform administrative procedures for the Department of Homeland Security (DHS) to implement the Program Fraud Civil Remedies Act of 1986 (the Act). The interim rule will provide a uniform, department-wide, administrative process for assessing penalties and recovering funds procured by fraud under departmental programs. It replaces the existing program fraud civil remedies rules of entities transferred from eight departments and the General Services Administration into DHS and establishes for the first time civil administrative procedures to deal with fraud under Federal Emergency Management Agency (FEMA) programs.

DATES: *Effective Date:* This interim rule is effective October 12, 2005.

Comments: Written comments may be submitted to the Department of Homeland Security on or before November 14, 2005.

ADDRESSES: You may submit comments, identified by Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, by *one* of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *FEMA-rules@dhs.gov*. Include Docket DHS–2005–0059 or RIN 1601–AA11 Program Fraud Civil Remedies, in the subject line of the message.
- Facsimile: Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, (fax) 202–646–4536. Include Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, in the subject line of the message.
- Mail or Hand Delivery/Courier: For paper, disk, or CD–ROM submissions, Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street, SW., Washington, DC 20472. Include Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Michael Russell, Acting Deputy Associate General Counsel, Office of the General Counsel, Department of Homeland Security, Washington, DC 20528. Telephone: 202–205–4634 or facsimile: 202–772–9735, not toll free calls; or email: *michael.d.russell@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim rule. DHS also invites comments that relate to the economic, environmental, or federalism affects that might result from this interim rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

I. Background

This interim rule will implement the Program Fraud Civil Remedies Act of 1986 (the Act) which is codified at 31 U.S.C. 3801–3812. The Act establishes an administrative remedy against anyone who makes a false Claim or written Statement to any of certain Federal agencies, including the Department of Homeland Security (DHS or the Department). In brief, any person who submits a claim or written statement to an affected agency knowing or having reason to know that it is false, fictitious, or fraudulent, is liable for a penalty of up to $5,500 per false claim or statement and, in addition, with respect to claims, for an assessment of up to double the amount falsely claimed. The Act requires each affected Federal agency to publish rules and regulations necessary to implement the provisions of the Act (31 U.S.C. 3809).

Congress established DHS in large part by transferring entities from other Federal departments and agencies to DHS. Before their transfer most of these entities were part of departments or agencies that had published rules under the Act. Prior to publication of this rule, most of the transferred entities followed the rules from their legacy department. The following program fraud rules have been in force:

- The program fraud regulations for the Bureau of Customs and Border Patrol, the Federal Law Enforcement Training Center, and the United States Secret Service, which were part of the U.S. Department of the Treasury, are in 31 CFR part 16;
- The program fraud regulations for the United States Coast Guard and the Transportation Security Administration, which were part of the Department of Transportation, are in 49 CFR part 31;
- The program fraud regulations for U.S. Citizenship and Immigration Services, the Bureau of Immigration and Customs Enforcement, the National Infrastructure Protection Center, the Office of Domestic Preparedness, and the Domestic Emergency Support Teams, which were part of the Department of Justice, are in 28 CFR part 71;
- The program fraud regulations for the National Communications System and the National Bio-Weapons Defense Analysis Center, which were part of the Department of Defense, are in 32 CFR part 277;
- The program fraud regulations for functions relating to agriculture import and entry inspection that were formerly in the Department of Agriculture, are in 7 CFR part 1, subpart L;
- The program fraud regulations for the National Infrastructure Simulation and Analysis Center (and energy security and assurances programs), programs and activities of the Department of Energy relating to the strategic nuclear defense posture of the United States, the Environmental Measurements Laboratory and, in some cases, the Nuclear Incident Response

Team, which were part of the Department of Energy are in 10 CFR part 1013;

• The program fraud regulations for the Critical Infrastructure Assurance Office and the Integrated Hazard Information System, which were part of the Department of Commerce, are in 15 CFR part 25;

• The program fraud regulations for the Strategic National Stockpile, the Office of Emergency Preparedness, the National Disaster Medical System, and the Metropolitan Medical Response System, which were part of the Department of Health and Human Services, are in 45 CFR part 79; and

• The program fraud regulations for the Federal Protective Service and the Federal Computer Incident Response Center, which were part of the General Services Administration, are in 41 CFR part 105–70.

Although these entities transferred to DHS, their published rules and procedures for dealing with program fraud cases remained in full force and effect. The ''savings provision'' of the Homeland Security Act of 2002, section 1512, ''saves'' completed administrative actions, such as regulations, until such time as DHS amends, modifies, supersedes, terminates, sets aside, or revokes them in accordance with law. Pub. L. 107–296 (Nov. 25, 2002). Under the savings provision, the legacy program fraud regulations from eight departments and the General Services Administration remained in full force and effect for the relevant DHS components.

The only major DHS function not previously covered by regulations providing for an administrative resolution of suspected program fraud cases was the Federal Emergency Management Agency (FEMA). FEMA's cases of suspected fraud have required direct referral to the Department of Justice. The Department of Justice made a determination on the merits of a case and decided whether to proceed on either a criminal or civil basis against a Defendant. This interim rule will provide an administrative process, including hearings and appeals for the Defendant, to resolve program fraud cases for all DHS components, including FEMA. As in the past, this interim rule contemplates a review by the Department of Justice before issuance of a complaint against a person suspected of program fraud.

DHS is therefore publishing this interim rule to ensure that all of its components are covered by rules under the Act. Furthermore, we have compared this interim rule with the rules that currently apply to DHS components and believe that this interim rule is, in material parts, identical to, or indistinguishable from, the existing rules. For example, the interim rule will mirror the complaint processing, hearing, and appeal rights that now exist.

As applied to defendants in actions brought by FEMA, the regulations will prove less burdensome both to FEMA and to defendants. FEMA will have the same administrative procedures and administrative adjudication that are available to the rest of DHS, and, we estimate, a greater likelihood that legal action would be taken on cases that the Department of Justice might not otherwise prosecute. This interim rule will provide the additional benefit of reducing the caseloads in Federal courts by diverting actions to civil administrative proceedings at DHS. Defendants will have the advantage of a less formal, perhaps less expensive, adjudication and swifter resolution of complaints brought by DHS.

II. The Interim Rule

This interim rule will implement the Program Fraud Civil Remedies Act of 1986, which imposes, through administrative adjudication and procedures, civil penalties and assessments against certain persons making false claims or statements against or to the Federal Government. The rule contains procedures governing the imposition of civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to DHS or any of its components.

III. Procedural Requirements

Administrative Procedure Act

Implementation of this rule as an interim rule with a request for public comment after the effective date of the rule is based upon the ''good cause'' exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(B). DHS has determined that delaying implementation of this rule to await public notice and comment is unnecessary, impracticable, and contrary to the public interest.

The rule provides procedures governing the imposition of civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Department or any of its components.

Congress established DHS in large part by transferring entities from other federal departments and agencies to DHS. Before their transfer most of these entities were part of departments or agencies that had published rules under the Act. Although the entities transferred to DHS, their published rules and procedures for dealing with program fraud cases remained in full force and effect. The ''savings provision'' of the Homeland Security Act of 2002, section 1512, ''saves'' completed administrative actions, such as regulations, until such time as DHS amends, modifies, supersedes, terminates, sets-aside or revokes them in accordance with law. Under the savings provision program fraud regulations that the nine entities had in place when they transferred to the Department of Homeland Security remain in full force and effect until DHS amends or otherwise changes them. See section 19.1(d).

DHS is therefore publishing this interim rule to ensure that all of its components are covered by rules under the Act. Furthermore, we have compared this rule against the rules that formerly applied to DHS components and believe that this rule is, in material parts, identical to, or indistinguishable from, the former rules. For example, the rule mirrors the complaint processing, hearing, and appeal rights of the other agencies. Since this rule borrows from existing rules that have already been subject to APA notice and comment procedures, and applies very similar rules to FEMA, we believe that publishing this rule with the usual notice and comment procedures is unnecessary.

As applied to defendants in actions brought by FEMA, the regulations will prove less burdensome both to FEMA and to defendants. FEMA will have the same administrative procedures and administrative adjudication available to the rest of DHS, and, we estimate, a greater likelihood that legal action may be taken on cases that the Department of Justice might not otherwise undertake to prosecute. It could have the further benefit of reducing the caseloads in federal courts, diverting actions to civil administrative proceedings. Defendants will have the advantage of a less formal, perhaps less expensive administrative and swifter process to resolve complaints bought by the Department.

The Department has a great number of grant and other financial assistance programs that benefit the public. We, therefore, believe it is in the public interest to implement this rule as soon as possible to afford DHS consolidated, uniform remedies under the Act against those who attempt to defraud the taxpayers.

Moreover, the historic assistance and relief efforts following Hurricane Katrina will make more urgent the need for efficient administrative procedures for processing cases of fraud. The department is responsible to the public for stewardship of public funds. The increase in the expenditure of program funds in response to Hurricane Katrina necessitates these immediate measures to ensure that resources appropriated for relief efforts reach their intended recipients.

DHS also finds good cause, under 5 U.S.C. 553(d)(3), for this interim rule to take effect immediately. DHS finds that, for the reasons previously discussed, it would be impracticable and contrary to the public interest to subject this interim rule to prior notice and public comment, or to delay its taking effect.

Although we have good cause to publish this rule without prior notice and comment, we value public comments. The Department does not anticipate a significant number of comments, but will consider any such comments in the process of amending or revising the rule in the future.

Executive Order 12866

This interim rule is considered by the Department of Homeland Security to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. 58 FR 51735, October 4, 1993 (Executive Order). Under Executive Order 12866 a significant regulatory action is subject to an Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Due to the ''savings clause'' discussed above, the only additional programmatic impact of this interim rule relates to fraud cases resulting from FEMA programs—major disasters, emergencies, and other financial assistance programs. FEMA's cases of suspected fraud currently require direct referral to the Department of Justice. The Department of Justice makes a determination on the merits of a case and decides whether to proceed on either a criminal or civil basis in the federal courts against a defendant. This interim rule will provide an administrative process, including hearings for the defendant, to resolve program fraud cases for all components in DHS, including FEMA. It is difficult to predict the precise number of additional program fraud cases. Exogenous variables that could affect the number of FEMA program fraud cases include the number and severity of major disasters and emergencies in a given year. FEMA expects that these administrative procedures will be less costly to defendants than cases referred to the Department of Justice and litigated in the Federal court system.

The interim rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, the legal sector, the insurance sector, State, local or tribal governments or communities, competition, or other sectors of the economy. As most other Departments and agencies have nearly identical rules in place, it will create no serious inconsistency or otherwise interfere with an action taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, although it will alter the procedures to be followed when an entity is alleged to have engaged in a fraudulent act, involving no more than $150,000, in a program operated by the Department.

Because this rule announces procedures for a unique and relatively new cabinet-level department, and because DHS engages in uncommon relief and assistance efforts such as those following Hurricane Katrina, this rule may raise novel policy issues. Accordingly, this rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is ''required by section 553 * * *, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for interpretative rule involving the internal revenue laws of the United States * * *.'' 5 U.S.C. 603(a). RFA analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). DHS has determined that good cause exists under 5 U.S.C. 553(b)(B) to exempt this rule from the notice and comment requirements of 5 U.S.C. 553(b). Therefore no RFA analysis under 5 U.S.C. 603 is required for this rule.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. The Act does not require an assessment in the case of an interim rule issued without prior notice and public comment. Nevertheless, DHS does not expect this rule to result in such an expenditure. We discuss this rule's effects elsewhere in this preamble.

Executive Order 13132, Federalism

This interim rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It will not preempt any state laws. In accordance with section 6 of Executive Order 13132, we determine that this rule will not have federalism implications sufficient to warrant the preparation of a federalism impact statement.

Executive Order 12988, Civil Justice Reform

This interim rule meets the applicable standards in section 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

This interim rule will not require or invite any additional record or information maintenance, submission, or collection for the DHS programs. Therefore, this interim rule will not invoke the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 6 CFR Part 13

Administrative practice and procedure, Claims, Fraud, Penalties.

Authority and Issuance

■ This interim rule is issued under the authority of 31 U.S.C. 3809. Accordingly, chapter I of 6 CFR is amended by adding part 13 to read as follows:

PART 13—PROGRAM FRAUD CIVIL REMEDIES

Sec.

Authority: Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C., Ch. 1, sections 101 et seq.); 5 U.S.C. 301; 31 U.S.C. 3801–3812.

§ 13.1 Basis, purpose, scope and effect.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812. Section 3809 of title 31, United States Code, requires each authority to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against Persons who Make, submit, or present, or cause to be Made, submitted, or presented, false, fictitious, or fraudulent Claims or written Statements to the Authority or to certain others; and

(2) Specifies the hearing and appeal rights of Persons subject to allegations of liability for such penalties and assessments.

(c) *Scope.* This part applies to all components of the Department of Homeland Security.

(d) *Effect.* (1) This part applies to program fraud cases initiated by any component of the Department of Homeland Security on or after October 12, 2005.

(2) Program fraud cases initiated by any component of the Department of Homeland Security before October 12, 2005, but not completed before October 12, 2005, will continue to completion under the rules and procedures in effect before this part.

§ 13.2 Definitions.

The following definitions have general applicability throughout this part:

(a) *ALJ* means an Administrative Law Judge in the Authority appointed pursuant to 5 U.S.C. 3105 or detailed to the Authority pursuant to 5 U.S.C. 3344. An ALJ will preside at any hearing convened under the regulations in this part.

(b) *Authority* means the Department of Homeland Security.

(c) *Authority Head* means the Deputy Secretary, Department of Homeland Security, or another officer designated by the Deputy Secretary.

(d) *Benefit* means, in the context of a Statement, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(e) *Claim* means any request, demand, or submission:

(1) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or Benefits);

(2) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority:

(i) For property or services if the United States:

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or Benefits) if the United States:

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

(f) *Complaint* means the administrative Complaint served by the Reviewing Official on the Defendant under § 13.7.

(g) *Defendant* means any Person alleged in a Complaint under § 13.7 to be liable for a civil penalty or assessment under § 13.3.

(h) *Government* means the Government of the United States.

(i) *Individual* means a natural Person.

(j) *Initial Decision* means the written decision of the ALJ required by § 13.10 or § 13.37, and includes a revised Initial Decision issued following a remand or a motion for reconsideration.

(k) *Investigating Official* means the Inspector General of the Department of Homeland Security or an officer or employee of the Office of the Inspector General designated by the Inspector General and eligible under 31 U.S.C. 3801(a)(4)(B).

(l) *Knows or Has Reason to Know,* means that a Person, with respect to a Claim or Statement:

(1) Has actual knowledge that the Claim or Statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the Claim or Statement; or

(3) Acts in reckless disregard of the truth or falsity of the Claim or Statement.

(m) *Makes* includes presents, submits, and causes to be made, presented, or submitted. As the context requires, Making or Made will likewise include the corresponding forms of such terms.

(n) *Person* means any Individual, partnership, corporation, association, or private organization, and includes the plural of that term.

(o) *Representative* means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. This definition is not intended to foreclose *pro se* appearances. That is, an Individual may appear for himself or herself, and a corporation or other entity may appear by an owner, officer, or employee of the corporation or entity.

(p) *Reviewing Official* means the General Counsel of the Department of

Homeland Security, or other officer or employee of the Department who is designated by the General Counsel and eligible under 31 U.S.C. 3801(a)(8).

(q) *Statement* means any representation, certification, affirmation, Document, record, or accounting or bookkeeping entry Made:

(1) With respect to a Claim or to obtain the approval or payment of a Claim (including relating to eligibility to Make a Claim); or

(2) With respect to (including relating to eligibility for):

(i) A contract with, or bid or proposal for a contract with the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit; or

(ii) A grant, loan, or Benefit from, the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit.

§ 13.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each Claim (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a Claim that such Person Knows or Has Reason to Know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written Statement that asserts a material fact that is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written Statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a Statement in which the Person Making such Statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services that the Person has not provided as claimed.

(2) Each voucher, invoice, Claim form, or other Individual request or demand for property, services, or money constitutes a separate Claim.

(3) A Claim will be considered Made to the Authority, recipient, or party when such Claim is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority, recipient, or party.

(4) Each Claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has Made any payment (including transferred property or provided services) on a Claim, a Person subject to a civil penalty under paragraph (a)(1) of this section will also be subject to an assessment of not more than twice the amount of such Claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment will be in lieu of damages sustained by the Government because of such Claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a written Statement that:

(i) The Person Knows or Has Reason to Know:

(A) Asserts a material fact that is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the Person Making the Statement has a duty to include in such Statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the Statement.

(2) Each written representation, certification, or affirmation constitutes a separate Statement.

(3) A Statement will be considered Made to the Authority when such Statement is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority.

(c) *Specific intent not required.* No proof of specific intent to defraud is required to establish liability under this section.

(d) *More than one Person liable.* (1) In any case in which it is determined that more than one Person is liable for Making a Claim or Statement under this section, each such Person may be held liable for a civil penalty under this section.

(2) In any case in which it is determined that more than one Person is liable for Making a Claim under this section on which the Government has Made payment (including transferred property or provided services), an assessment may be imposed against any such Person or jointly and severally against any combination of such Persons.

§ 13.4 Investigation.

(a) If an Investigating Official concludes that a subpoena pursuant to the Authority conferred by 31 U.S.C. 3804(a) is warranted:

(1) The subpoena so issued will notify the Person to whom it is addressed of the Authority under which the subpoena is issued and will identify the records or Documents sought;

(2) The Investigating Official may designate a Person to act on his or her behalf to receive the Documents sought; and

(3) The Person receiving such subpoena will be required to tender to the Investigating Official or the Person designated to receive the Documents a certification that the Documents sought have been produced, or that such Documents are not available and the reasons therefore, or that such Documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the Investigating Official concludes that an action under the Act may be warranted, the Investigating Official will submit a report containing the findings and conclusions of such investigation to the Reviewing Official.

(c) Nothing in this section will preclude or limit an Investigating Official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the Reviewing Official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an Investigating Official to report violations of criminal law to the Attorney General.

§ 13.5 Review by the Reviewing Official.

(a) If, based on the report of the Investigating Official under § 13.4(b), the Reviewing Official determines that there is adequate evidence to believe that a Person is liable under § 13.3, the Reviewing Official will transmit to the Attorney General a written notice of the

Reviewing Official's intention to issue a Complaint under § 13.7.

(b) Such notice will include:

(1) A Statement of the Reviewing Official's reasons for issuing a Complaint;

(2) A Statement specifying the evidence that supports the allegations of liability;

(3) A description of the Claims or Statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other Benefits requested or demanded in violation of § 13.3;

(5) A Statement of any exculpatory or mitigating circumstances that may relate to the Claims or Statements known by the Reviewing Official or the Investigating Official; and

(6) A Statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 13.6 Prerequisites for issuing a Complaint.

(a) The Reviewing Official may issue a Complaint under § 13.7 only if:

(1) The Department of Justice approves the issuance of a Complaint in a written Statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 13.3(a) with respect to a Claim, the Reviewing Official determines that, with respect to such Claim or a group of related Claims submitted at the same time such Claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 13.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of Claims submitted at the same time will include only those Claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section will be construed to limit the Reviewing Official's authority to join in a single Complaint against a Person's Claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 13.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a Complaint in accordance with 31 U.S.C. 3803(b)(1), the Reviewing Official may serve a Complaint on the Defendant, as provided in § 13.8.

(b) The Complaint will state:

(1) The allegations of liability against the Defendant, including the statutory basis for liability, an identification of the Claims or Statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such Claims or Statements;

(2) The maximum amount of penalties and assessments for which the Defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific Statement of the Defendant's right to request a hearing by filing an answer and to be represented by a Representative; and

(4) That failure to file an answer within 30 days of service of the Complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 13.10.

(5) That the Defendant may obtain copies of relevant material and exculpatory information pursuant to the process outlined in § 13.20.

(c) At the same time the Reviewing Official serves the Complaint, he or she will serve the Defendant with a copy of the regulations in this part.

§ 13.8 Service of Complaint.

(a) Service of a Complaint must be Made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service of a Complaint is complete upon receipt.

(b) Proof of service, stating the name and address of the Person on whom the Complaint was served, and the manner and date of service, may be Made by:

(1) Affidavit of the Individual serving the Complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the Defendant or his or her Representative; or

(4) In case of service abroad, authentication in accordance with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Commercial and Civil Matters.

§ 13.9 Answer.

(a) The Defendant may request a hearing by serving an answer on the Reviewing Official within 30 days of service of the Complaint. Service of an answer will be Made by delivering a copy to the Reviewing Official or by placing a copy in the United States mail, postage prepaid and addressed to the Reviewing Official. Service of an answer is complete upon such delivery or mailing. An answer will be deemed to be a request for hearing.

(b) In the answer, the Defendant:

(1) Will admit or deny each of the allegations of liability Made in the Complaint;

(2) Will state any defense on which the Defendant intends to rely;

(3) May state any reasons why the Defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Will state the name, address, and telephone number of the Person authorized by the Defendant to act as Defendant's Representative, if any.

(c) If the Defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the Defendant may, before the expiration of 30 days from service of the Complaint, serve on the Reviewing Official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to serve an answer meeting the requirements of paragraph (b) of this section. The Reviewing Official will file promptly the Complaint, the general answer denying liability, and the request for an extension of time as provided in § 13.11. For good cause shown, the ALJ may grant the Defendant up to 30 additional days from the original due date within which to serve an answer meeting the requirements of paragraph (b) of this section.

§ 13.10 Default upon failure to answer.

(a) If the Defendant does not answer within the time prescribed in § 13.9(a), the Reviewing Official may refer the Complaint to an ALJ by filing the Complaint and a Statement that Defendant has failed to answer on time.

(b) Upon the referral of the Complaint, the ALJ will promptly serve on Defendant in the manner prescribed in § 13.8, a notice that an Initial Decision will be issued under this section.

(c) In addition, the ALJ will assume the facts alleged in the Complaint to be true, and, if such facts establish liability under § 13.3, the ALJ will issue an Initial Decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to answer on time, the Defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the Initial Decision will become final and binding upon the parties 30 days after it is issued.

(e) If, before such an Initial Decision becomes final, the Defendant files a motion seeking to reopen on the grounds that extraordinary circumstances prevented the Defendant from answering, the Initial Decision will be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the Defendant can demonstrate extraordinary circumstances excusing the failure to answer on time, the ALJ will withdraw the Initial Decision in paragraph (c) of this section, if such a decision has been issued, and will grant the Defendant an opportunity to answer the Complaint.

(g) A decision of the ALJ denying a Defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 13.38.

(h) The Defendant may appeal to the Authority Head the decision denying a motion to reopen by filing a notice of appeal in accordance with § 13.26 within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal will stay the Initial Decision until the Authority Head decides the issue.

(i) If the Defendant files a timely notice of appeal with the Authority Head, the ALJ will forward the record of the proceeding to the Authority Head.

(j) The Authority Head will decide expeditiously whether extraordinary circumstances excuse the Defendant's failure to answer on time based solely on the record before the ALJ.

(k) If the Authority Head decides that extraordinary circumstances excused the Defendant's failure to answer on time, the Authority Head will remand the case to the ALJ with instructions to grant the Defendant an opportunity to answer.

(l) If the Authority Head decides that the Defendant's failure to answer on time is not excused, the Authority Head will reinstate the Initial Decision of the ALJ, which will become final and binding upon the parties 30 days after the Authority Head issues such decision.

§ 13.11 Referral of Complaint and answer to the ALJ.

Upon receipt of an answer, the Reviewing Official will refer the matter to an ALJ by filing the Complaint and answer in accordance with § 13.26.

§ 13.12 Notice of hearing.

(a) When the ALJ receives the Complaint and answer, the ALJ will promptly serve a notice of hearing upon the Defendant in the manner prescribed by § 13.8.

(b) Such notice will include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the Representative of the Government and of the Defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 13.13 Parties to the hearing.

(a) The parties to the hearing will be the Defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 13.14 Separation of functions.

(a) The Investigating Official, the Reviewing Official, and any employee or agent of the Authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the Initial Decision or the review of the Initial Decision by the Authority Head, except as a witness or a Representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ will not be responsible to, or subject to the supervision or direction of, the Investigating Official or the Reviewing Official.

(c) Except as provided in paragraph (a) of this section, the Representative for the Government may be employed anywhere in the Authority, including in the offices of either the Investigating Official or the Reviewing Official.

§ 13.15 *Ex parte* contacts.

No party or Person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a Person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 13.16 Disqualification of Reviewing Official or ALJ.

(a) A Reviewing Official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file a motion for disqualification of a Reviewing Official or an ALJ. Such motion will be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit will be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections will be deemed waived.

(d) Such affidavit will state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It will be accompanied by a certificate of the Representative of record that it is Made in good faith.

(e)(1) If the ALJ determines that a Reviewing Official is disqualified, the ALJ will dismiss the Complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case will be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Authority Head may determine the matter only as part of his or her review of the Initial Decision upon appeal, if any.

§ 13.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a Representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which will be Made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 13.18 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is Made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of Documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of Representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in Person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to Make any determinations regarding the validity of treaties or other international agreements, Federal statutes or regulations, or Departmental Orders or Directives.

§ 13.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ will schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite Statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of Documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 13.20 Disclosure of Documents.

(a) Upon written request to the Reviewing Official, the Defendant may review, at a time and place convenient to the Authority, any relevant and material Documents, transcripts, records, and other materials that relate to the allegations set out in the Complaint and upon which the findings and conclusions of the Investigating Official under § 13.4(b) are based, unless such Documents are subject to a privilege under Federal law. Special arrangements as to confidentiality may be required by the Reviewing Official, who may also assert privilege or other related doctrines. Upon payment of fees for duplication, the Defendant may obtain copies of such Documents.

(b) Upon written request to the Reviewing Official, the Defendant also may obtain a copy of all exculpatory information in the possession of the Reviewing Official or Investigating Official relating to the allegations in the Complaint, even if it is contained in a Document that would otherwise be privileged. If the Document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the Reviewing Official as described in § 13.5 is not discoverable under any circumstances.

(d) The Defendant may file a motion to compel disclosure of the Documents subject to the provisions of this section. Such a motion may only be filed following the serving of an answer pursuant to § 13.9.

§ 13.21 Discovery.

(a) *In general.* (1) The following types of discovery are authorized:

(i) Requests for production of Documents for inspection and copying;

(ii) Requests for admissions of the authenticity of any relevant Document or of the truth of any relevant fact;

(iii) Written interrogatories; and

(iv) Depositions.

(2) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ will regulate the timing of discovery.

(b) *Documents defined.* (1) For the purpose of this section and §§ 13.22 and 13.23, the term *Documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence.

(2) Nothing in this part will be interpreted to require the creation of a Document.

(c) *Motions for discovery.* (1) A party seeking discovery may file a motion. Such a motion will be accompanied by a copy of the request for production of Documents, request for admissions, or interrogatories or, in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order as provided in § 13.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 13.24.

(d) *Depositions.* (1) If a motion for deposition is granted, the ALJ will issue a subpoena for the deponent, which may require the deponent to produce Documents. The subpoena will specify the time and place at which the deposition will be held. Deposition requests for senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent showing of compelling need that cannot be met by any other means.

(2) The party seeking to depose will serve the subpoena in the manner prescribed in § 13.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

(4) The party seeking to depose will provide for the taking of a verbatim transcript of the deposition, which it will Make available to all other parties for inspection and copying.

(e) Each party will bear its own costs of discovery.

§ 13.22 Exchange of witness lists, Statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties will exchange witness lists, copies of prior Statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written Statements that the party intends to offer in lieu of live testimony in accordance with § 13.33(b). At the time the above Documents are

exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, will provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list of any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, Documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

§ 13.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any Individual at the hearing may request that the ALJ issue a subpoena. Requests for witness testimony of senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent a showing of compelling need that cannot be met by any other means.

(b) A subpoena requiring the attendance and testimony of an Individual may also require the Individual to produce Documents at the hearing.

(c) A party seeking a subpoena will file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request will be accompanied by a proposed subpoena, which will specify and Documents to be produced and will designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena will specify the time and place at which the witness is to appear and any Documents the witness is to produce.

(e) The party seeking the subpoena will serve it in the manner prescribed in § 13.8. A subpoena on a party or upon an Individual under the control of party may be served by first class mail.

(f) A party or the Individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

§ 13.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may Make any order that justice requires to protect a party or Person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except Persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; and

(9) That the parties simultaneously submit to the ALJ specified Documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 13.25 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 13.26 Filing, form and service of papers.

(a) *Filing and form.* (1) Documents filed with the ALJ will include an original and two copies.

(2) Every pleading and paper filed in the proceeding will contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, Motion to Quash Subpoena).

(3) Every pleading and paper will be signed by, and will contain the address and telephone number of, the party or the Person on whose behalf the paper was filed, or his or her Representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its Representative or by proof that the Document was sent by certified or registered mail.

(b) *Service.* A party filing a Document will, at the time of filing, serve a copy of such Document on every other party. Service upon any party of any Document other than those required to be served as prescribed in § 13.8 will be Made by delivering a copy, or by placing a copy of the Document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a Representative, service will be Made upon such Representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the Individual serving the Document by Personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 13.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a Document has been served or issued by placing it in the United States mail, an additional five days will be added to the time permitted for any responses.

§ 13.28 Motions.

(a) Any application to the ALJ for an order or ruling will be by motion. Motions will state the relief sought, the authority relied upon, and the facts alleged, and will be filed and served on all other parties.

(b) Except for motions Made during a prehearing conference or at the hearing, all motions will be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing response thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will Make a reasonable effort to dispose of all outstanding motions before the hearing begins.

(f) Except as provided by §§ 13.21(e)(3) and 13.23(f), which concern subpoenas, the filing or pendency of a motion will not automatically alter or extend a deadline or return date.

§ 13.29 Sanctions.

(a) The ALJ may sanction a Person, including any party or Representative, for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Sanctions include but are not limited to those specifically set forth in paragraphs (c), (d), and (e) of this section. Any such sanction will reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part begun by service of a notice of hearing, the ALJ may dismiss the action or may issue an Initial Decision imposition penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other Document that is not filed in a timely fashion.

§ 13.30 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the Defendant is liable for a civil penalty or assessment under § 13.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Authority will prove Defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The Defendant will prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 13.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Authority Head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Authority Head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false fictitious, of fraudulent Claims or Statements) charged in the Complaint:

(1) The number of false, fictitious, or fraudulent Claims or Statements;

(2) The time period over which such Claims or Statements were Made;

(3) The degree of the Defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or Benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the Defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the Defendant attempted to conceal the misconduct;

(10) The degree to which the Defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the Defendant, the extent to which the Defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the Defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the Defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the Defendant's sophistication with respect to it, including the extent of the Defendant's prior participation in the program or in similar transactions;

(15) Whether the Defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the Defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section will be construed to limit the ALJ or the Authority Head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 13.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the Defendant resides or transacts business;

(2) In any judicial district of the United States in which the Claim or Statement in issue was Made; or

(3) In such other place as may be agreed upon by the Defendant and the ALJ.

(b) Each party will have the opportunity to present written and oral argument with respect to the location of the hearing.

(c) The hearing will be held at the place and at the time ordered by the ALJ.

§ 13.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written Statement or deposition. Any such written Statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written Statements of witnesses proposed to testify at the hearing and deposition transcripts will be exchanged as provided in § 13.22(a).

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination will be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ will order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an Individual;

(2) In the case of a party that is not an Individual, an officer or employee of the party;

(i) Appearing for the entity pro se; or

(ii) Designated by the party's Representative; or

(3) An Individual whose presence is shown by a party to be essential to the presentation of its case, including an Individual employed by the Government engaged in assisting the Representative for the Government.

§ 13.34 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ will exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(h) All Documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Authority Head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 13.37 Initial Decision.

(a) The ALJ will issue an Initial Decision based only on the record, which will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact will include a finding on each of the following issues:

(1) Whether the Claims or Statements identified in the Complaint, or any portions thereof, violate § 13.3;

(2) If the Person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 13.31.

(c) The ALJ will promptly serve the Initial Decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ will at the same time serve all parties with a Statement describing the right of any Defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Authority Head. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless the Initial Decision of the ALJ is timely appealed to the Authority Head, or a motion for reconsideration of the Initial Decision is timely filed, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued by the ALJ.

§ 13.38 Reconsideration of Initial Decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the Initial Decision within 20 days of receipt of the Initial Decision. If service was Made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion will be accompanied by a supporting brief.

(c) Responses to such motions will be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an Initial Decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised Initial Decision.

(f) If the ALJ denies a motion for reconsideration, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after the ALJ denies the motion, unless the Initial Decision is timely appealed to the Authority Head in accordance with § 13.39.

(g) If the ALJ issues a revised Initial Decision, that decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Authority Head in accordance with § 13.39.

§ 13.39 Appeal to Authority Head.

(a) Any Defendant who has served a timely answer and who is determined in an Initial Decision to be liable for a civil penalty or assessment may appeal such decision to the Authority Head by filing a notice of appeal in accordance with this section and § 13.26.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an Initial Decision. However, if another party files a motion for reconsideration under § 13.38, consideration of the appeal will be stayed automatically pending resolution of the motion for reconsideration.

(2) If a Defendant files a timely motion for reconsideration, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised Initial Decision, whichever applies.

(3) The Authority Head may extend the initial 30-day period for an additional 30 days if the Defendant files with the Authority Head a request for an extension within the initial 30-day period and shows good cause.

(c) If the Defendant files a timely notice of appeal and the time for filing motions for reconsideration under § 13.38 has expired, the ALJ will forward two copies of the notice of appeal to the Authority Head, and will forward or Make available the record of the proceeding to the Authority Head.

(d) A notice of appeal will be accompanied by a written brief specifying exceptions to the Initial Decision and reasons supporting the exceptions.

(e) The Representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Authority Head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the Initial Decision, the Authority Head will not consider any objection that was not raised before the ALJ unless a demonstration is Made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Authority Head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Authority Head will remand the matter to the ALJ for consideration of such additional evidence.

(j) The Authority Head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any Initial Decision.

(k) The Authority Head will promptly serve each party to the appeal with a copy of the decision of the Authority Head and with a Statement describing the right of any Person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a Defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Authority Head serves the Defendant with a copy of the Authority Head's decision, a determination that a Defendant is liable under § 13.3 is final and is not subject to judicial review.

§ 13.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Authority Head a written finding that continuation of the administrative process described in this part with respect to a Claim or Statement may adversely affect any pending or potential criminal or civil action related to such Claim or Statement, the Authority Head will stay the process immediately. The Authority Head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 13.41 Stay pending appeal.

(a) An Initial Decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Authority Head.

(b) No administrative stay is available following a final decision of the Authority Head.

§ 13.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Authority Head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 13.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 13.44 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under § 13.42 or § 13.43, or any amount agreed upon in a compromise or settlement under § 13.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be Made under that subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the Defendant.

§ 13.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part will be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 13.46 Compromise or settlement.

(a) Parties may Make offers of compromise or settlement at any time.

(b) The Reviewing Official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the Reviewing Official is permitted to issue a Complaint and before the date on which the ALJ issues an Initial Decision.

(c) The Authority Head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an Initial Decision, except during the pendency of any review under § 13.42 or during the pendency of any action to collect penalties and assessments under § 13.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 13.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The Investigating Official may recommend settlement terms to the Reviewing Official, the Authority Head, or the Attorney General, as appropriate. The Reviewing Official may recommend settlement terms to the Authority Head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing and signed by all parties and their Representatives.

§ 13.47 Limitations.

(a) The notice of hearing with respect to a Claim or Statement must be served in the manner specified in § 13.8 within 6 years after the date on which such Claim or Statement is Made.

(b) If the Defendant fails to serve a timely answer, service of a notice under § 13.10(b) will be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Dated: September 25, 2005.

Michael Chertoff,

Secretary.

[FR Doc. 05–20346 Filed 10–11–05; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005 and 1007

[Docket No. AO–388–A15 and AO–366–A44; DA–03–11]

Milk in the Appalachian and Southeast Marketing Areas; Order Amending the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This partial final rule amends the Appalachian and Southeast marketing orders. Specifically, the final rule expands the Appalachian milk marketing area, eliminates the ability to simultaneously pool the same milk on the Appalachian or Southeast order and on a State-operated milk order that has marketwide pooling, and amends the transportation credit provisions of the Southeast and Appalachian orders. The amendments are based on record evidence of a public hearing held February 2004. More than the required number of dairy farmers approved the issuance of the amended orders.

EFFECTIVE DATE: November 1, 2005.

FOR FURTHER INFORMATION CONTACT: Antoinette M. Carter, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–3465, e-mail address: *antoinette.carter@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601–674) provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During February 2004, the month in which the hearing was held, the milk of 7,311 dairy farmers was pooled on the Appalachian (Order 5) and Southeast (Order 7) milk orders (3,395 Order 5 dairy farmers and 3,916 Order 7 dairy farmers). Of the total, 3,252 dairy farmers (or 96 percent) and 3,764 dairy farmers (or 96 percent) were considered small businesses on the Appalachian and Southeast orders, respectively.

During February 2004, there were a total of 36 plants associated with the Appalachian order (25 fully regulated plants, 7 partially regulated plants, 1 producer-handler, and 3 exempt plants) and a total of 51 plants associated with the Southeast order (32 fully regulated plants, 6 partially regulated plants, and 13 exempt plants). The number of plants meeting the small business criteria under the Appalachian and Southeast orders were 13 (or 36 percent) and 13 (or 25 percent), respectively.

The final rule will expand the Appalachian milk marketing area to include 25 unregulated counties and 15 unregulated cities in the State of Virginia that currently are not in any Federal milk marketing area. Adopted amendments to the producer milk provisions of the Appalachian and Southeast milk orders will prevent producers who share in the proceeds of a state marketwide pool from simultaneously sharing in the proceeds of a Federal marketwide pool on the same milk. In addition, this final rule amends the transportation credit provisions of the Appalachian and Southeast orders.

The final rule amendments that will expand the Appalachian marketing area will likely continue to regulate under the Appalachian order two fluid milk distributing plants located in Roanoke, Virginia, and Lynchburg, Virginia, and shift the regulation of a distributing plant located in Mount Crawford, Virginia, from the Northeast order to the Appalachian order.

The amendments will allow the Kroger Company's (Kroger) Westover Dairy plant, located in Lynchburg, Virginia, that competes for a milk supply with other Appalachian order plants to continue to be regulated under the order if it meets the order's minimum performance standards. The plant has been regulated by the Appalachian order since January 2000. In addition, the adopted amendments will remove the disruption that occurs as a result of the Dean Foods Company's (Dean Foods) Morningstar Foods plant, located in Mount Crawford, Virginia, shifting its regulatory status under the Northeast order.

The Appalachian order currently contains a ''lock-in'' provision that provides that a plant located within the marketing area that meets the order's minimum performance standard will be regulated by the Appalachian order even if the majority of the plant's Class I route sales are in another marketing area. The expansion of the Appalachian marketing area along with the lock-in provision will regulate fluid milk distributing plants physically located in the marketing area that meet the order's minimum performance standard even if