

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 15

[Docket No. FR-5015-P-01]

RIN 2501-AD18

**Public Access to HUD Records Under
the Freedom of Information Act (FOIA)
and Production of Material or
Provision of Testimony by HUD
Employees**

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule is intended to clarify and explain the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by the Department's document production and testimony approval regulations. This proposed rule describes the procedures to be followed by a party in making a demand for HUD documents and HUD testimony. The proposed rule also explains the standards that are to be followed by HUD in determining whether production of documents or testimony should be permitted and, if so, any conditions or restrictions imposed.

DATES: Comment Due Date: October 16, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0001. Communications should refer to the above docket number and title and should contain the information specified in the "Request for Comments" section.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title.

Public Inspection of Public Comments. All comments and communications submitted to HUD will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Nancy Christopher, Associate General Counsel for Litigation, Office of Litigation, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10258, Washington, DC 20410-5000; telephone (202) 708-0300 (this is not a toll-free telephone number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

HUD's regulations at 24 CFR part 15 describe the policies and procedures governing public access to HUD records under the Freedom of Information Act (FOIA) (5 U.S.C. 552), and the policies and procedures governing the production of material or provision of testimony by HUD employees, which § 15.2 defines to include all current or former employees who are not employees of the Office of the Inspector General. On January 22, 2001, the Department published a final rule (66 FR 6973) that amended the Department's FOIA regulations and redesignated former subparts H and I of part 15 that deal with the production of documents and provision of testimony by HUD employees, as subparts C and D, respectively. Aside from the designations and conforming amendments to reflect these new designations, no revisions were made to those subparts at that time.

HUD's regulations at 24 CFR part 15 were amended again on October 23, 2002 (67 FR 65276). That amendment delegated authority to the General Counsel to authorize an employee, upon a show of good cause, to testify as an expert or opinion witness in matters in

which the United States is a party, as well as in matters exclusively among non-federal litigants. Prior to this amendment, only the Secretary was authorized to permit expert or opinion testimony.

This proposed rule would revise and amend subparts C and D in order to clarify the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by the regulations in 24 CFR part 15. The proposed rule also describes the procedures to be followed by a party in making a demand to HUD for documents or testimony. The proposed rule also explains the standards that are to be followed by HUD in determining whether production or testimony should be permitted and, if so, any conditions or restrictions imposed. In addition to these changes, the proposed rule would make certain technical corrections in both subparts C and D.

As proposed to be amended by this rule, the organization of part 15 would no longer be based on a distinction between production of material and provision of testimony, but rather would be based on the parties involved in the legal proceeding. Subpart C would govern litigation between private parties, while subpart D would govern litigation where one of the parties is the federal government. In order to improve clarity and highlight the processes to be followed, subparts C and D would be revised in their entirety.

The following sections of this preamble provide a summary of the existing subparts and a discussion of the proposed changes to 24 CFR part 15, subparts C and D.

II. Proposed Changes to 24 CFR Part 15, Subpart C

Subpart C of 24 CFR part 15, currently titled "Production in Response to Subpoenas or Demands of Courts or Other Authorities," was designed to contain HUD's procedures to be followed when a subpoena, order, or other demand of a court or other authority is issued to HUD for the production of material, or the disclosure of information in its possession or the disclosure of information acquired by an employee or former employee as a part of the performance of the employee's official duties or because of his or her official status. The current subpart C prohibits production of material without the prior approval of the Secretary or General Counsel (24 CFR 15.202).

Though not expressly referred to in the title of the subpart, subpart C was also intended to address the provision of testimony by HUD employees, and

not just the production of material. In addition to the need to clarify the inclusion of demands for testimony, subpart C requires clarification. This clarification is needed because subpart C does not explicitly contain the standards that must be followed in determining: (1) Whether production of material or provision of testimony should be permitted and (2) if it is permitted, whether the production or testimony should or will be subject to conditions or restrictions. Furthermore, the current subpart C regulations cross-reference to 24 CFR part 15, subpart I, for the standards to be followed in deciding whether to approve such demands. Under this proposed rule, these standards would instead be found in subpart D.

This proposed rule would also make several amendments to subpart C, to clearly set forth the procedures to be followed and standards to be applied by HUD in processing demands for the production of material or provision of testimony in legal proceedings among private litigants. The purpose and scope of the subpart would largely be unchanged and prior approval by the Secretary or the General Counsel would still be required before the release of material or the provision of testimony by HUD employees.

This proposed rule would revise the title of subpart C to more clearly describe the scope of the regulations contained in the subpart (the proposed new title would be "Production of material or provision of testimony in response to demands in legal proceedings among private litigants"). The proposed rule would also revise § 15.203 to list, with specificity, the requirements that must be included in a demand to HUD for the production of material or the provision of testimony. Section 15.203 would also be revised to provide that the Associate General Counsel for Litigation or a designee shall be notified immediately of all demands, is to be provided with a copy of the demand, will maintain a record of all demands served upon the Department, and will refer the demand to the appropriate designee for processing and determination.

Further, the proposed rule would revise § 15.204 to explain how HUD will consider demands for material or testimony. The Secretary or the General Counsel would have to evaluate demands to determine what material will be produced or testimony provided. The revised regulation will make clear that material or testimony cannot be used for expert or opinion purposes unless authorized by the Secretary or General Counsel for good cause shown.

Once a determination is made, the requester will be notified, will be given the underlying reasoning for the decision, and will be apprised of any applicable conditions imposed on the material or testimony provided. The determination by the Secretary constitutes final agency action, meaning administrative appeals of the determination could not be made.

In the event that a response to a demand for material or the production of testimony is required before the Secretary renders a determination, the U.S. Attorney or such other attorney as may be designated for the purpose will furnish the court or other authority a copy of HUD's public access to records regulations and respectfully request that the demand be stayed until a prompt determination can be made. If the court or other authority requires compliance, regardless of the fact that the Secretary has not made a determination, or the fact that the Secretary decided either not to respond or decided to respond subject to conditions or restrictions, the employee must choose if so directed by an attorney representing the Department, to respectfully decline to comply with the demand.

III. Proposed Changes to 24 CFR Part 15, Subpart D

Subpart D of 24 CFR part 15, currently titled "Testimony of Employees in Legal Proceedings," addresses testimony of HUD employees, including expert or opinion testimony, with respect to material or information contained in the files of the Department, or information learned as part of the performance of their official duties or because of their official status in any legal proceeding. However, subpart D does not expressly list the standards that are followed in determining whether testimony or production should be permitted and subject to what conditions or restrictions, other than an express prohibition against any HUD employee being called to testify as an expert or opinion witness by any party other than the federal government, unless specifically authorized by the Secretary or the General Counsel for good cause shown. This proposed rule would amend Subpart D to set forth and clarify the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings in which the United States is a party.

This proposed rule would revise the title of subpart D to more clearly describe the scope of the regulations contained in the subpart (the proposed new title would be "Production of

material or provision of testimony in response to demands in legal proceedings in which the United States is a party").

The proposed rule would also revise § 15.302 to provide that demands for production of material or provision of testimony in any legal proceeding in which the United States is a party will be directed to the agency by the attorney representing the United States, after which the Associate General Counsel for Litigation or designee will be internally notified of the demand. Additionally, the blanket authorization of factual testimony would be removed and the determination of what testimony to approve would be made by HUD in consultation with the attorney representing the federal government. The content of § 15.304 has been removed from the regulations because, as a result of the other amendments now being proposed to this part, it would no longer be necessary. The procedures governing legal proceedings among private litigants are set forth in §§ 15.201 through 15.206.

IV. Other Proposed Regulatory Changes

This proposed rule would also make certain technical corrections to both subparts C and D of 24 CFR part 15. One such technical correction is that the rule would not apply to any legal proceeding in which an employee would testify, not on official time, as to opinions or facts that do not involve covered material or information (i.e., are in no way related to the duties the employee performs for, or to the functions of, the Department). Such legal proceedings are outside the scope of this proposed rule.

This proposed rule would also amend § 15.1, which describes the scope of each subpart in part 15, to conform the descriptions of subparts C and D to the proposed regulatory changes. In addition, the proposed rule would revise § 15.2, which contains the definitions for 24 CFR part 15, to set forth the defined terms applicable to revised subparts C and D.

V. Findings and Certifications

Paperwork Reduction Act

The proposed information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for this collection of information is estimated to include the time for reviewing the instructions, for gathering and preparing

the information required to be included in demands, and for completing and reviewing the information to be provided.

The following table provides information on the estimated public reporting burden:

Information collection	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hours
§ 15.301	106	1	106	1.5	159

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (e.g., permitting responses to be submitted electronically). Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Under the provisions of 5 CFR 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, any comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. However, this time frame does not affect the deadline for comments to the agency on the proposed rule. Comments must refer to the proposal by the proposal's name and docket number (FR-5015-P-01) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; and

Celestine R. Smith, Regulations and Directives Clearance Officer, Office of the General Counsel, Office of Legislation and Regulations, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-5000.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and subject to comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory amendments that would be made by this proposed rule are procedural. Accordingly, the rule would not have any impact on the substantive rights or duties of small entities requesting HUD records under the Freedom of Information Act. Furthermore, because the fees charged under this rule are limited by FOIA to direct costs of searching for, reviewing, and duplicating the records processed for requesters, the fees are not economically significant.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

Environmental Impact

This proposed rule does not direct, provide for assistance, or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism

implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C.1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, reporting and recordkeeping requirements.

Accordingly, for the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 15 to read as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

1. The authority citation for part 15 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

2. Revise § 15.1(b) and (c) to read as follows:

§ 15.1 What is the purpose of this part?

* * * * *

(b) *Subpart C of this part.* Subpart C of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of

testimony in legal proceedings among private litigants.

(c) *Subpart D of this part.* Subpart D of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings in which the United States is a party.

* * * * *

3. In § 15.2(b) add, in alphabetical order, definitions of the terms “*Demand*,” “*Good cause*,” “*Material*,” “*Production*,” “*Testimony*,” and “*United States*” to read as follows:

§ 15.2 Definitions.

* * * * *

Demand means a subpoena, order, or other demand of a court or other authority that is issued in a legal proceeding and any accompanying submissions.

* * * * *

Good cause means necessary to prevent a miscarriage of justice or to promote a significant interest of the Department.

* * * * *

Material means either documents or information contained in or relating to contents of the files of the Department or documents or information acquired by any person while such person was an employee of the Department as a part of the performance of his or her official duties or because of his or her official status.

* * * * *

Production refers to the provision of material by any means other than through the provision of oral testimony.

* * * * *

Testimony refers to any oral or written statements made in litigation under oath or penalty of perjury.

* * * * *

United States refers to the Federal Government of the United States (including the Department), the Secretary, and any employees of the Department in their official capacities.

4. Revise subpart C to read as follows:

Subpart C—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings Among Private Litigants

Sec.

15.201 Purpose and scope.

15.202 Production of material or provision of testimony prohibited unless approved by the Secretary or General Counsel.

15.203 Making a demand for production of material or provision of testimony.

15.204 Consideration of demands for production of material or provision of testimony.

15.205 Method of production of material or provision of testimony.

15.206 Procedure in the event of an adverse ruling regarding production of material or provision of testimony.

§ 15.201 Purpose and scope.

(a) This subpart contains the regulations of the Department concerning the procedures to be followed and standards to be applied when demand is issued in a legal proceeding among private litigants for the production or disclosure of any material, whether provided through production of material or provision of testimony.

(b) This subpart does not apply to demands, which are covered by part 2004 of this title, for production of material in the files of the Office of Inspector General or provision of testimony by employees within the Office of Inspector General.

§ 15.202 Production of material or provision of testimony prohibited unless approved by the Secretary or General Counsel.

Neither the Department nor any employee of the Department shall comply with any demand for production of material or provision of testimony in a legal proceeding among private litigants, unless the prior approval of the Secretary or General Counsel has been obtained in accordance with this subpart. This rule does not apply to any legal proceeding in which an employee may be called to participate, either through the production of documents or the provision of testimony, not on official time, as to facts or opinions that are in no way related to material described in § 15.201.

§ 15.203 Making a demand for production of material or provision of testimony.

(a) Any demand made to the Department or an employee of the Department to produce any material or provide any testimony in a legal proceeding among private litigants, must:

(1) Be submitted in writing to the Department or employee of the Department, with a copy to the Associate General Counsel for Litigation, no later than 30 days before the date the material or testimony is required;

(2) State, with particularity, the material or testimony sought;

(3) State whether expert or opinion testimony will be sought from the employee;

(4) State whether the production of such material or provision of such testimony could reveal classified, confidential, or privileged material;

(5) Summarize the need for and relevance of the material or testimony sought in the legal proceeding;

(6) State whether the material or testimony is available from any other source and, if so, state all such other sources;

(7) State why no document[s], or declaration or affidavit, could be used in lieu of oral testimony that is being sought;

(8) Estimate the amount of time the employee will need in order to prepare for, travel to, and attend the legal proceeding, as appropriate;

(9) State why the production of the material or provision of the testimony is appropriate under the rules of procedure governing the legal proceeding for which it is sought (*e.g.*, not unduly burdensome or otherwise inappropriate under the relevant rules governing discovery); and

(10) Describe how producing such material or providing such testimony would affect the interests of the United States.

(b) Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the Associate General Counsel for Litigation or designee shall be notified immediately. The Associate General Counsel for Litigation or designee shall maintain a record of all demands served upon the Department and refer the demand to the appropriate designee for processing and determination.

§ 15.204 Consideration of demands for production of material or provision of testimony.

(a) The Secretary or General Counsel shall determine what material is to be produced or what testimony is to be provided, based upon the following standards:

(1) *Expert or opinion material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201 that is of an expert or opinion nature, unless specifically authorized by the Secretary or the General Counsel for good cause shown.

(2) *Factual material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201 unless specifically authorized by the Secretary or General Counsel. Such authorization may be granted if the Secretary or General Counsel determines that it is warranted based upon an assessment of whether:

(i) Producing such material or providing such testimony would violate a statute or regulation;

(ii) Producing such material or providing such testimony would reveal classified, confidential, or privileged material;

(iii) Such material or testimony is relevant to the legal proceeding;

(iv) Such material or testimony can be obtained from any other source;

(v) One or more documents, or a declaration or affidavit, could reasonably be provided in lieu of oral testimony;

(vi) The amount of employees' time necessary to comply with the demand is reasonable;

(vii) Production of the material or provision of the testimony is appropriate under the rules of procedure governing the legal proceeding for which it is sought (*e.g.*, unduly burdensome or otherwise inappropriate under the relevant rules governing discovery); and

(viii) Producing such material or providing such testimony would impede a significant interest of the United States.

(b) Once a determination has been made, the requester will be notified of the determination, the reasons for the grant or denial of the demand, and any conditions that have been imposed upon the production of the material or provision of the testimony demanded.

(c) The Secretary or General Counsel may impose conditions or restrictions on the production of any material or provision of any testimony. Such conditions or restrictions may include the following:

(1) A requirement that the parties to the legal proceeding obtain a protective order or execute a confidentiality agreement, the terms of which must be acceptable to the Secretary or General Counsel, to limit access to, and limit any further disclosure of, material or testimony;

(2) A requirement that the requester accept examination of documentary material on HUD premises in lieu of production of copies;

(3) A limitation on the subject areas of testimony permitted;

(4) A requirement that testimony of a HUD employee be provided by deposition at a location prescribed by HUD or by written declaration or affidavit;

(5) A requirement that the parties to the legal proceeding agree that a transcript of the permitted testimony be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was demanded;

(6) A requirement that the requester provide the Department with a copy of a transcript of the employee's testimony free of charge; or

(7) Any other condition or restriction deemed to be in the best interests of the United States.

(d) The determination made with respect to the production of material or provision of testimony is within the sole discretion of the Secretary or General Counsel and shall constitute final agency action from which no administrative appeal is available.

§ 15.205 Method of production of material or provision of testimony.

(a) Where the Secretary or General Counsel has authorized the production of material or provision of testimony, the Department shall produce such material or provide such testimony in accordance with this section and any conditions imposed upon production of material or provision of testimony pursuant to § 15.204.

(b) In any legal proceeding where the Secretary or General Counsel has authorized the production of documents, the Department shall respond by producing authenticated copies of the documents, to which the seal of the Department has been affixed, in accordance with its authentication procedures. That authentication shall be evidence that the documents are true copies of documents in the Department's files and be sufficient for the purposes of Rule 902 of the Federal Rules of Evidence.

(c) If response to the demand is required before the determination from the Secretary or General Counsel is received, the U.S. Attorney, or such other attorney as may be designated for the purpose, will appear or make such filings as are necessary to furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been, or is being, as the case may be, referred for prompt consideration. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested determination from the Secretary or General Counsel.

§ 15.206 Procedure in the event of an adverse ruling regarding production of material or provision of testimony.

If the court or other authority declines to stay the demand made in accordance with § 15.205 pending receipt of the determination from the Secretary or General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the determination by the Secretary or

General Counsel not to produce the material or provide the testimony demanded or to produce subject to conditions or restrictions, the employee upon whom the demand has been made shall, if so directed by an attorney representing the Department, respectfully decline to comply with the demand. (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

5. Revise subpart D to read as follows:

Subpart D—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings in Which the United States is a Party

Sec.

15.301 Purpose and scope.

15.302 Procedure for review of demands for production of material or provision of testimony in any legal proceeding in which the United States is a party.

15.303 Consideration of demands for production of material or provision of testimony.

15.304 Method of production of material or provision of testimony.

§ 15.301 Purpose and scope.

(a) This subpart contains the regulations of the Department concerning the procedures to be followed and standards to be applied when demand is issued in a legal proceeding in which the United States is a party for the production or disclosure of any material, whether provided through production of material or provision of testimony.

(b) This subpart does not apply to demands, which are covered by part 2004 of this title, for production of material in the files of the Office of Inspector General or provision of testimony by employees within the Office of Inspector General.

§ 15.302 Procedure for review of demands for production of material or provision of testimony in any legal proceeding in which the United States is a party.

All demands for production of material or provision of testimony in any legal proceeding in which the United States is a party shall be directed to the agency through the attorney representing the United States in the proceeding. Whenever the Department or an employee of the Department is notified by the attorney representing the United States of the demand for the production of material or provision of testimony in any legal proceeding in which the United States is a party, the Associate General Counsel for Litigation or designee shall be notified immediately.

§ 15.303 Consideration of demands for production of material or provision of testimony.

(a) The Secretary or General Counsel shall consult with the attorney representing the United States, as to the response to the demand for production of material, or to the provision of testimony.

(b) An employee of the Department may not testify as an expert or opinion witness unless specifically authorized by the Secretary or the General Counsel for good cause shown.

§ 15.304 Method of production of material or provision of testimony.

Where the Secretary or General Counsel has authorized the production of material or provision of testimony, the Associate General Counsel for Litigation or designee shall arrange for the production of any authorized material or provision of any authorized testimony through the attorney representing the United States. Where the Secretary or General Counsel has authorized the production of documents, the Department may respond by producing authenticated

copies of the documents, to which the seal of the Department has been affixed in accordance with its authentication procedures. That authentication shall be evidence that the documents are true copies of documents in the Department's files and be sufficient for the purposes of Rule 902 of the Federal Rules of Evidence.

Dated: July 12, 2006.

Roy A. Bernardi,
Deputy Secretary.

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