

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 295

RIN 3206-AL22

#### Testimony by OPM Employees Relating to Official Information and Production of Official Records in Legal Proceedings

**AGENCY:** U.S. Office of Personnel Management (OPM).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is adopting as final a proposed rule, with certain minor changes, that sets forth procedures that requesters have to follow when making demands on or requests to an OPM employee to produce official records and information, and provide testimony relating to official information, in connection with a legal proceeding in which OPM is not a party. This final rule establishes procedures to respond to such demands and requests in an orderly and consistent manner. The rule, among other benefits, will promote uniformity in decisions, protect confidential information, provide guidance to requesters, and reduce the potential for both inappropriate disclosures of official information and wasteful allocation of agency resources.

**DATE:** Effective October 6, 2008.

**FOR FURTHER INFORMATION CONTACT:** R. Alan Miller, Associate General Counsel, U.S. Office of Personnel Management, Room 7353, 1900 E Street, NW., Washington, DC 20415 or by electronic mail at [Richard.Miller@opm.gov](mailto:Richard.Miller@opm.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The U.S. Office of Personnel Management (OPM) occasionally receives subpoenas and requests for OPM employees to provide evidence in

litigation in which OPM is not a party. Often these subpoenas and requests are for OPM records that are not available to the public under the Freedom of Information Act. Also, OPM sometimes receives subpoenas and requests for OPM employees to appear as witnesses in litigation in conjunction with a request for nonpublic records. Requesters have sought information, for example, on retirement records, pay issues, and other program matters, under OPM jurisdiction. Responding to such demands and requests can result in a significant disruption to OPM employees' work schedules. The result is that employees may be diverted from performing their official duties in order to respond to requests from parties in litigation. In order to address this problem, many agencies over the years have issued regulations that are similar to this proposed regulation, governing the circumstances and manner in which an employee may respond to demands for testimony or for the production of documents. Such a regulation was sustained by the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

In *Touhy*, the Supreme Court held that a U.S. Department of Justice (DOJ) official, acting on order of the Attorney General, could not be held in contempt for declining to produce records in response to a subpoena. The employee's refusal was based upon a DOJ regulation that prohibited disclosure of agency files, documents, records, or information without the express approval of the Attorney General. The Court sustained the validity of the DOJ regulations, reasoning that it was appropriate for the Attorney General to prescribe regulations not inconsistent with law for the custody, use and preservation of records, papers, and property pertaining to the Department of Justice.

On June 23, 2008, OPM published in the **Federal Register** its own proposed *Touhy* regulation, for codification in a new part 295 of 5 CFR (See 73 FR 35354) which provided for a 60-day public comment period. OPM received suggestions on the rule as proposed from one commenter, whose comments were directed to the penalties section [295.401] and to OPM's authority to regulate the conduct of former employees. As noted below in the summary of this final rule, we are not

adopting changes in this final rule from the rule as proposed based upon those comments because employees and former employees are already on notice of and subject to penalties for violating the precepts established herein. However, in order to clarify the application of this rule, OPM has decided to revise the proposed part heading to make express that it applies to testimony by OPM employees "relating to official information" (as opposed to private matters), as well as to the production of official records in legal proceedings. In addition, OPM has determined to add a reference to 31 U.S.C. 9701 to the new part 295 authority citation. This statute authorizes agencies to issue regulations providing for fair and cost-based fees and charges.

Briefly summarized, this final rule prohibits disclosure of nonpublic official records or testimony by OPM employees unless there is compliance with the rule (295.201 and 295.203). The rule identifies the factors that OPM will consider in making determinations in response to such requests and what information requesters must provide (295.202 and 295.203). On its own initiative, OPM has added "otherwise protected information" to the types of sensitive information enumerated in paragraph (i) of 295.202. The rule also specifies when the request should be submitted (295.203), the time period for review (295.205), potential fees (295.301), and, if a request is granted, any restrictions that may be placed on the disclosure of records or the appearance of an OPM employee as a witness (295.207 and 295.208). OPM is also adopting in this final rule two other changes on its own initiative. First, OPM is adding the phrase "when necessary" to the procedure provided in 295.209 for informing the court or other competent authority and seeking a stay when a decision is not made prior to the time a response is required. This modification from the section as proposed recognizes that at times there can be informal resolution of such matters short of seeking a stay. The second change is that OPM is adding the phrase "unless otherwise advised by the General Counsel" to the procedure provided in 295.210 for personal appearance of an OPM employee when a stay of a demand (or, as now added by OPM, a request) is denied. This

change likewise recognizes that such denials can sometimes be resolved instead by written response (see the section's last sentence) or otherwise.

The commenter generally objected to penalizing employees who fail to comply with this rule (295.401), upon the grounds that the language of subsection 401 would appear to penalize an employee, even if OPM did not have an opportunity to appear and be heard by the court in question. Additionally, the commenter questions penalizing employees who are trying to be helpful and provide responses to informal inquiries from outside parties that seek clarification. OPM is not changing the penalty section based upon these comments. First, the penalties section (295.401) does not impose penalties *a priori*. Rather, as with any potential disciplinary matter, it provides that employees may be subject to discipline for violation of the rule. Moreover, employees and former employees are already subject to the provisions of the statutes cited in the subsection. Additionally, the rule does not apply to mere informal requests for clarification. Instead, as set out in subsections 101 and 102, it applies to demands or requests for official records or information in a legal proceeding in which OPM is not a party, while recognizing that requests may be received informally. Moreover, as set out in subsections 209 and 210, an employee is given guidance as to how to respond if OPM has not had the opportunity to be heard by the court.

The charges for witnesses are the same as those provided by the Federal courts; and the fees related to production of records are the same as those charged under FOIA. The charges for time spent by an employee to prepare for testimony and for certification of records by OPM are authorized under 31 U.S.C. 9701, which permits an agency to charge for services or things of value that are provided by the agency.

This final rule applies to a broad range of matters in any legal proceeding in which OPM is not a named party. It also applies to former and current OPM employees (as well as OPM consultants and advisers). Former OPM employees are prohibited from testifying about specific matters for which they had responsibility during their active employment unless permitted to testify as provided in the rule. They would not be barred from appearing to testify about general matters unconnected with the specific matters for which they had responsibility.

This final regulation will ensure a more efficient use of OPM resources,

minimize the possibility of involving OPM in issues unrelated to its responsibilities, promote uniformity in responding to such requests and subpoenas, and maintain the impartiality of OPM in matters that are in dispute between other parties. It will also serve OPM's interest in protecting sensitive, confidential, and privileged information and records that are generated in response to the requirements in the ethics laws and regulations.

This final OPM rule is internal (not branch-wide), and is essentially procedural, not substantive. It does not create a right to obtain official records or the official testimony of an OPM employee and it does not create any additional right or privilege not already available to OPM to deny any demand or request therefor. However, any failure to comply with the procedures in this rule would be a basis for denying a demand or request submitted to OPM.

#### **Regulatory Flexibility Act**

For purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6), this final rule will not have a significant economic impact on a substantial number of small entities. The final rule addresses only the procedures to be followed in the production or disclosure of OPM materials and information in litigation where OPM is not a party. Accordingly, OPM has determined that a Regulatory Flexibility Analysis is not required.

#### **Unfunded Mandates Reform Act**

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), the final rule would not significantly or uniquely affect small governments and would not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation).

#### **Executive Order 12866**

In issuing this final regulation, OPM has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This final rule has not been reviewed by the Office of Management and Budget under that Executive Order since it is not a significant regulatory action with the meaning of the Executive Order.

#### **Executive Order 12988**

As Acting Director of OPM, I have reviewed this final regulation in light of section 3 of Executive Order 12988,

Civil Justice Reform, and certify that it meets the applicable standards provided therein.

#### **Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this final regulation does not contain information collection requirements that require approval by the Office of Management and Budget. OPM expects the collection of information that is called for by the final regulation would involve fewer than ten persons each year.

#### **List of Subjects in 5 CFR Part 295**

Administrative practice and procedures, Conflict of Interests, Courts, Government employees, Records, Subpoenas, Testimony.

U.S. Office of Personnel Management.

**Michael W. Hager,**

*Acting Director.*

■ Accordingly, for the reasons set forth in the preamble, the U.S. Office of Personnel Management hereby adds a new part 295 to 5 CFR to read as follows:

### **PART 295—TESTIMONY BY OPM EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS**

#### **Subpart A—General Provisions**

Sec.

295.101 Scope and purpose.

295.102 Applicability.

295.103 Definitions.

#### **Subpart B—Requests for Testimony and Production of Documents**

295.201 General prohibition

295.202 Factors OPM will consider.

295.203 Filing requirements for demands or requests for documents or testimony.

295.204 Service of subpoenas or requests.

295.205 Processing demands or requests.

295.206 Final determination.

295.207 Restrictions that apply to testimony.

295.208 Restrictions that apply to released records.

295.209 Procedure when a decision is not made prior to the time a response is required.

295.210 Procedure in the event of an adverse ruling.

#### **Subpart C—Schedule of Fees**

295.301 Fees.

#### **Subpart D—Penalties**

295.401 Penalties.

**Authority:** 5 U.S.C. App. (Sec. 1103, Civil Service Reform Act of 1978; 31 U.S.C. 9701).

**Subpart A—General Provisions****§ 295.101 Scope and purpose.**

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the U.S. Office of Personnel Management (OPM) to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) OPM intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving OPM in controversial issues not related to our functions;

(3) Prevent the misuse of OPM employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law;

(4) Maintain OPM's impartiality among private litigants where neither OPM nor any other Federal entity is a named party; and

(5) Protect sensitive, confidential information and the deliberative processes of OPM.

(c) In providing for these requirements, OPM does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OPM. It does not create any right or benefits, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

**§ 295.102 Applicability.**

This part applies to demands and requests to employees of OPM in legal proceedings in which OPM is not a named party, for factual or expert testimony relating to official information or for production of official records or information. However, it does not apply to:

(a) Demands upon or requests for a current OPM employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of OPM;

(b) Demands upon or requests for a former OPM employee to testify as to matters in which the former employee was not directly or materially involved while at OPM;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552(a); and

(d) Congressional or Government Accountability Office (GAO) demands and requests for testimony or records.

**§ 295.103 Definitions.**

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of an OPM employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of OPM or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*OPM* means the U.S. Office of Personnel Management.

*OPM employee or employee* means:

(1) Any current or former officer or employee of OPM;

(2) Any other individual hired through contractual agreement by or on behalf of the OPM or who has performed or is performing services under such an agreement for OPM; and

(3) Any individual who served or is serving in any consulting or advisory capacity to OPM, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by OPM and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with OPM.

*Records or official records and information* mean:

(1) All documents and materials which are OPM agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in OPM files; and

(3) All other information or materials acquired by an OPM employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

**Subpart B—Requests for Testimony and Production of Documents****§ 295.201 General prohibition.**

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

**§ 295.202 Factors OPM will consider.**

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) OPM has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder OPM in performing its statutory duties or use OPM resources in a way that will interfere with the ability of OPM employees to do their regular work;

(e) Allowing such testimony or production of records would be in the best interest of OPM or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, Executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(k) Disclosure would result in OPM appearing to favor one private litigant over another private litigant;

(l) Disclosure relates to documents that were produced by another agency;

(m) A substantial Government interest is implicated;

(n) The demand or request is within the authority of the party making it;

(o) The demand improperly seeks to compel an OPM employee to serve as an expert witness for a private interest;

(p) The demand improperly seeks to compel an OPM employee to testify as to a matter of law;

(q) The demand or request is sufficiently specific to be answered.

**§ 295.203 Filing requirements for demands or requests for documents or testimony.**

You must comply with the following requirements whenever you issue demands or requests to an OPM employee for official records and information or testimony.

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on OPM or an OPM employee before submitting a written request and receiving a final determination, OPM will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved.

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on OPM to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OPM employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will

require with each OPM employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Office of Personnel Management reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

**§ 295.204 Service of subpoenas or request.**

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

**§ 295.205 Processing demands or requests.**

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) OPM will process requests in the order in which they are received. Absent exigent or unusual circumstances, OPM will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of OPM or the United States or for other good cause.

**§ 295.206 Final determination.**

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the

demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OPM employee.

**§ 295.207 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on the testimony of OPM employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) OPM may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to facts when the General Counsel determines such testimony would not be in the best interest of OPM or the United States; or

(3) For a current OPM employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OPM unless testimony is being given on behalf of the United States.

**§ 295.208 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, OPM may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original OPM records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official OPM records, and they are not to be

marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

**§ 295.209 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel can make the determination referred to in Sec. 295.206, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

**§ 295.210 Procedure in the event of an adverse ruling.**

If the court or other competent authority fails to stay the demand, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

**Subpart C—Schedule of Fees**

**§ 295.301 Fees.**

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to OPM.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by OPM in its Freedom of Information Act regulations at 5 CFR part 294.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the

location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Payment of fees.* You must pay witness fees for current OPM employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former OPM employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records.* The U.S. Office of Personnel Management may certify that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from OPM at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of \$15.00 for each document certified.

(f) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

**Subpart D—Penalties**

**§ 295.401 Penalties.**

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by OPM or as ordered by a Federal court after OPM has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OPM employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OPM employee who testifies or produces official records and information in violation of this part may be subject to disciplinary action.

[FR Doc. E8–23605 Filed 10–3–08; 8:45 am]

**BILLING CODE 6325–48–P**

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 100 and 212**

[USCBP–2007–0084; CBP Dec. 08–41]

RIN 1651–AA71

**Issuance of a Visa and Authorization for Temporary Admission Into the United States for Certain Nonimmigrant Aliens Infected With HIV**

**AGENCY:** Customs and Border Protection; DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations to provide, on a limited and categorical basis, a more streamlined process for nonimmigrant aliens infected with the human immunodeficiency virus (HIV) to enter the United States as visitors on temporary visas (for business or pleasure) for up to 30 days. Nonimmigrant aliens who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by this rule may elect to seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for aliens who are infected with HIV.

**DATES:** This rule is effective on October 6, 2008.

**FOR FURTHER INFORMATION CONTACT:** Michael D. Olszak, Customs and Border Protection, Office of Field Operations, (703) 261–8424.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background and Purpose
- II. The Final Rule
- III. Discussion of Comments
  - A. Objections to the Inadmissibility of HIV-Positive Aliens
  - B. Opposition to Admission of HIV-Positive Aliens
  - C. Asylees and the Required Waiver of Adjustment of Status
  - D. Privacy Rights/Annotation of Visas
  - E. Whether the Rule Is More Stringent Than the Existing Process
  - F. Sufficient Insurance and Medication
  - G. Human Rights Concerns
  - H. Public Health Reasons for the Rule
  - I. Disparate Treatment Applied to Contagious Diseases
  - J. The 30-Day Temporary Admission Limit
  - K. Extension of the Comment Period
  - L. Vagueness in Criteria and Medical Expertise of Consular Officers
  - M. Negative Impact on United States Citizens
  - N. Focus on Illegal Aliens
  - O. Aliens Who Are Unaware of Their HIV Status