

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 271**

[EPA-R07-RCRA-2008-0830; FRL-8758-4]

**Nebraska: Final Authorization of State Hazardous Waste Management Program Revisions****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** Nebraska has applied to EPA for final authorization for the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant final authorization to Nebraska.

**DATES:** Comments on this proposed action must be received in writing by January 29, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-RCRA-2008-0830 by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail: haugen.lisa@epa.gov*.

3. *Mail or hand delivery:* Lisa Haugen, Environmental Protection Agency, RCRA Enforcement and State Programs Branch, 901 North 5th Street, Kansas City, Kansas 66101. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30, excluding legal holidays.

Please see the immediate final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Lisa Haugen at (913) 551-7877, or by e-mail at *haugen.lisa@epa.gov*.

**SUPPLEMENTARY INFORMATION:** In the final rules section of the **Federal Register**, EPA is authorizing the changes by an immediate final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no relevant adverse comments to this action. A detailed rationale for the approval is set forth in the immediate final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant adverse comments, the immediate final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. EPA will not institute

a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment. For additional information, see the immediate final rule which is located in the rules section of this **Federal Register**.

Dated: December 19, 2008.

**John B. Askew,***Regional Administrator, Region 7.*

[FR Doc. E8-30977 Filed 12-29-08; 8:45 am]

**BILLING CODE 6560-50-P****NATIONAL SCIENCE FOUNDATION****45 CFR Part 681****RIN 3145-AA50****Program Fraud Civil Remedies Act****AGENCY:** National Science Foundation.**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The National Science Foundation (NSF) is proposing to issue regulations to implement the Program Fraud Civil Remedies Act of 1986 (PFCRA). PFCRA authorizes certain Federal agencies, including NSF, to impose, through administrative adjudication, civil penalties and assessments against any person who makes, submits, or presents, or causes to be made, submitted, or presented, a false, fictitious, or fraudulent claim or written statement to the agency. The proposed regulations establish the procedures that NSF will follow in implementing PFCRA, and specify the hearing and appeal rights of persons subject to penalties and assessments under PFCRA.

**DATES:** Comments must be submitted by January 29, 2009.

**ADDRESSES:** Send written comments to the Office of the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. You also may send comments by facsimile transmission to (703) 292-9041, or send them electronically through the Federal Government's one-stop rulemaking Web site at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Eric S. Gold, Assistant General Counsel, Office of the General Counsel, National Science Foundation, telephone (703) 292-8060 and e-mail *egold@nsf.gov*.

**SUPPLEMENTARY INFORMATION:****Background**

In October 1986, Congress enacted the Program Fraud Civil Remedies Act, Public Law 99-509 (codified at 31 U.S.C. 3801-3812) to establish an administrative remedy against any person who makes, or causes to be made, a false claim or written statement to any of certain Federal agencies. When PFCRA was enacted, its coverage did not extend to NSF. However, pursuant to section 7017 of the America COMPETES Act (Pub. L. No. 110-69), the scope of PFCRA's coverage has been expanded to include NSF. Following PFCRA's enactment, at the request of the President's Council on Integrity and Efficiency (PCIE), an inter-agency task force was established under the leadership of the Department of Health and Human Services to develop model regulations for implementation of the Act by all affected agencies. This action was in keeping with the stated desire of the Senate Governmental Affairs Committee that "the regulations would be substantially similar throughout the government." (S. Rep. No. 99-212, 99th Cong., 1st Sess. 12 (1985)). The PCIE recommended adoption of the model rules by all affected agencies.

NSF proposes the following regulations, which are patterned after the aforementioned model regulations, to establish procedures enabling NSF to recover penalties (up to \$5,000 per claim) and assessments (up to double the amount falsely claimed) against persons who file, or cause to have filed, false claims or statements with NSF for which the liability is \$150,000 or less.

**Executive Order 12866**

OMB has determined this proposed rule to be nonsignificant.

**Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))**

This proposed regulatory action will not have a significant adverse impact on a substantial number of small entities.

**Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104-4)**

This proposed regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

**Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)**

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

**Federalism (Executive Order 13132)**

This proposed regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It 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.

**List of Subjects***45 CFR Part 681*

Claims, Fraud, Penalties.

For the reasons stated in the preamble, NSF proposes to add a new Part 681 to Chapter VI of Title 45 of the Code of Federal Regulations to read as follows:

**PART 681—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS****Purpose, Definitions, and Basis for Liability**  
Sec.

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**Purpose, Definitions, and Basis for Liability****§ 681.1 Purpose.**

This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 (“PFCRA”). PFCRA provides NSF, and other Federal agencies, with an administrative remedy to impose 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 NSF. PFCRA also provides due process protections to all persons who are subject to administrative proceedings under this part.

**§ 681.2 Definitions.**

For the purposes of this part—  
*ALJ* means an Administrative Law Judge in the authority appointed pursuant to section 3105 of title 5 or detailed to the authority pursuant to section 3344 of title 5.

*Authority* means the National Science Foundation.

*Authority head* means the Director of the National Science Foundation or the Director’s designee.

*Benefit* is intended to cover anything of value, including but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

*Claim* is defined in section 3801(a)(3) of title 31 of the United States Code.

*Complaint* means the administrative complaint served by the reviewing official on the defendant under § 681.8.

*Defendant* means any person alleged in a complaint under § 681.7 to be liable for a civil penalty or assessment pursuant to PFCRA.

*Government* means the United States Government.

*Individual* means a natural person.

*Initial decision* means the written decision of the ALJ required by § 681.33, and includes a revised initial decision issued following a remand or a motion for reconsideration.

*Investigating official* means the NSF Inspector General or an employee of the Office of Inspector General designated by the Inspector General.

*Knows or has reason to know* is defined in section 3801(a)(5) of title 31 of the United States Code.

*Makes* shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, making or made shall likewise include the corresponding forms of such terms.

*Person* means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

*Representative* means an attorney who is in good standing of the bar of any State, Territory, or possession of the United States, or of the District of Columbia, or the Commonwealth of Puerto Rico, or any other individual designated in writing by the defendant.

*Reviewing official* means the General Counsel of NSF or the General Counsel’s designee.

*Statement* is defined in section 3801(a)(9) of title 5 of the United States Code.

**§ 681.3 What is the basis for the imposition of civil penalties and assessments?**

(a) *Claims.* (1) Any person shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,000 for each claim if that person makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which 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 which 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 shall be considered made to the authority, recipient, or party when such a claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of NSF.

(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 on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section may 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 shall be in lieu of damages sustained by the Government because of such a claim.

(b) *Statements.* (1) Any person shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,000 for each statement if that person makes a written statement that the person knows or has reason to know—

(i) Asserts a material fact which is false, fictitious, or fraudulent; or

(ii) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such a statement; and

(iii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of this statement.

(2) A person will only be subject to a civil penalty under 681.3(b)(1) if the written statement made by the person contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of this statement.

(3) Each written representation, certification, or affirmation constitutes a separate statement.

(4) A statement shall be considered made to NSF when it is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of NSF.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a false, fictitious, or fraudulent claim or statement under this section, each such person may be held liable for a civil penalty and assessment, where appropriate, under this section.

(e) 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, an assessment may be imposed against any such person or jointly and severally against any combination of persons.

#### **Procedures Leading to Issuance of a Complaint**

##### **§ 681.4 Who investigates program fraud?**

The Inspector General, or his or her designee, is the investigating official responsible for investigating allegations that a false claim or statement has been made. In this regard, the Inspector General has authority under PFCRA and the Inspector General Act of 1978 (5 U.S.C. App. 3), as amended, to issue administrative subpoenas for the production of records and documents.

##### **§ 681.5 What happens if program fraud is suspected?**

(a) If the investigating official concludes that an action under this part is warranted, the investigating official submits a report containing the findings and conclusions of the investigation to the reviewing official. If the reviewing official determines that the report provides adequate evidence that a person made a false, fictitious or fraudulent claim or statement, the reviewing official shall transmit to the Attorney General written notice of an intention to refer the matter for adjudication, with a request for approval of such referral. This notice will include the reviewing official's statements concerning:

(1) The reasons for the referral;

(2) The claims or statements upon which liability would be based;

(3) The evidence that supports liability;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in the false claim or statement;

(5) 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.

(b) If, at any time, the Attorney General or his or her designee requests in writing that this administrative process be stayed, the authority head, as identified in § 681.2(c) of this part, must stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

##### **§ 681.6 When may NSF issue a complaint?**

NSF may issue a complaint:

(a) If the Attorney General (or designee) approves the referral of the allegations for adjudication; and

(b) In a case of submission of false claims, if the amount of money or the value of property or services demanded or requested in a false claim, or a group of related claims submitted at the same time, does not exceed \$150,000.

##### **§ 681.7 What is contained in a complaint?**

(a) A complaint is a written statement giving notice to the person alleged to be liable under 31 U.S.C. 3802 of the specific allegations being referred for adjudication and of the person's right to request a hearing with respect to those allegations.

(b) The complaint will state that NSF seeks to impose civil penalties, assessments, or both, against the defendant and will include:

(1) The allegations of liability against the defendant, including the statutory basis for liability, identification of the claims or statements involved, and the reasons 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) A statement that the defendant may request a hearing by filing an answer and may be represented by a representative;

(4) Instructions for filing such an answer; and

(5) A warning that failure to file an answer within 30 days of service of the complaint will result in imposition of the maximum amount of penalties and assessments.

(c) The reviewing official must serve any complaint on the defendant and, if a hearing is requested by the defendant, provide a copy to the ALJ assigned to the case.

##### **§ 681.8 How will the complaint be served?**

(a) The complaint must be served on individual defendants directly, a partnership through a general partner, and on corporations or an unincorporated associations through an executive officer or a director, except that service also may be made on any

person authorized by appointment or by law to receive process for the defendant.

(b) The complaint may be served either by:

- (1) Registered or certified mail; or
- (2) Personal delivery by anyone 18 years of age or older.

(c) The date of service is the date of personal delivery or, in the case of service by registered or certified mail, the date of postmark.

(d) When served with the complaint, the defendant should also be served with a copy of this part 681 and 31 U.S.C. 3801–3812.

### Procedures Following Service of a Complaint

#### § 681.9 How does a defendant respond to the complaint?

(a) A defendant may file an answer with the reviewing official within 30 days of service of the complaint. An answer will be considered a request for an oral hearing.

(b) In the answer, a defendant—

- (1) Must admit or deny each of the allegations of liability contained in the complaint (a failure to deny an allegation is considered an admission);
- (2) Must state any defense on which the defendant intends to rely;
- (3) May state any reasons why he or she believes the penalties, assessments, or both should be less than the statutory maximum; and

(4) Must state the name, address, and telephone number of the person authorized by the defendant to act as the defendant's representative, if any.

(c) If the defendant is unable to file a timely answer which meets the requirements set forth in paragraph (b) of this section, the defendant may file with the reviewing official a general answer denying liability, requesting a hearing, and requesting an extension of time in which to file a complete answer. A general answer must be filed within 30 days of service of the complaint.

(d) If the defendant initially files a general answer requesting an extension of time, the reviewing official must promptly file with the ALJ the complaint, the general answer, and the request for an extension of time.

(e) For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section. Such answer must be filed with the ALJ and a copy must be served on the reviewing official.

#### § 681.10 What happens if a defendant fails to file an answer?

(a) If a defendant does not file any answer within 30 days after service of

the complaint, the reviewing official may refer the complaint to the ALJ.

(b) Once the complaint is referred, the ALJ will promptly serve on the defendant a notice that an initial decision will be issued.

(c) The ALJ will assume the facts alleged in the complaint to be true and, if such facts establish liability under the statute, the ALJ will issue an initial decision imposing the maximum amount of penalties and assessments allowed under PFCRA.

(d) Except as otherwise provided in this section, when a defendant fails to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed in the initial decision.

(e) The initial decision becomes final 30 days after it is issued.

(f) At any time before an initial decision becomes final, a defendant may file a motion with the ALJ asking that the case be reopened. An ALJ may only reopen a case if, in this motion, he or she determines that the defendant set forth extraordinary circumstances that prevented the defendant from filing a timely answer. The initial decision will be stayed until the ALJ makes a decision on the motion. The reviewing official may respond to the motion.

(g) If the ALJ determines that a defendant has demonstrated extraordinary circumstances excusing his failure to file a timely answer, the ALJ will withdraw the initial decision, and grant the defendant an opportunity to answer the complaint.

(h) A decision by the ALJ to deny a defendant's motion to reopen a case is not subject to reconsideration under § 681.35.

(i) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(j) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(k) The authority head shall decide expeditiously, based solely on the record before the ALJ, whether extraordinary circumstances excuse the defendant's failure to file a timely answer.

(l) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(m) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such a decision.

#### § 681.11 What happens once an answer is filed?

(a) When the reviewing official receives an answer, he or she must file concurrently, the complaint and the answer with the ALJ, along with a designation of NSF's representative.

(b) When the ALJ receives the complaint and the answer, the ALJ will promptly serve a notice of hearing upon the defendant and the NSF representative, in the same manner as the complaint, which is described in § 681.8. The notice of oral hearing must be served within six years of the date on which the claim or statement is made.

(c) The notice must include:

- (1) The tentative date, time, and place of the hearing;
- (2) The legal authority and jurisdiction under which the hearing is being 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 defendant's representative and the representative for NSF; and
- (6) Such other matters as the ALJ deems appropriate.

### Hearing Procedures

#### § 681.12 What kind of hearing is contemplated?

The hearing is a formal proceeding conducted by the ALJ during which a defendant will have the opportunity to cross-examine witnesses, present testimony, and dispute liability.

#### § 681.13 At the hearing, what rights do the parties have?

Each party has the right to:

- (a) Be represented by a representative;
- (b) Request a pre-hearing conference and participate in any conference held by the ALJ;
- (c) Conduct discovery;
- (d) Agree to stipulations of fact or law which will be made a part of the record;
- (e) Present evidence relevant to the issues at the hearing;
- (f) Present and cross-examine witnesses;
- (g) Present 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, as permitted by the ALJ.

**§ 681.14 What is the role of the ALJ?**

An ALJ retained by NSF serves as the presiding officer at all hearings.

(a) The ALJ shall 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 find Federal statutes or regulations invalid.

**§ 681.15 How are the functions of the ALJ separated from those of the investigating official and the reviewing official?**

(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 review of the initial decision by the authority head; or

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

(b) The ALJ shall not be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

**§ 681.16 Can the reviewing official or ALJ be disqualified?**

(a) A reviewing official or an ALJ may disqualify himself or herself at any time.

(b) Upon motion of any party, the reviewing official or ALJ may be disqualified as follows:

(1) The motion must be supported by an affidavit containing specific facts establishing that personal bias or other reason for disqualification exists, including the time and circumstances of the discovery of such facts;

(2) The motion must be filed promptly after discovery of the grounds for disqualification or the objection will be deemed waived; and

(3) The party, or representative of record, must certify in writing that the motion is made in good faith.

(c) Once a motion has been filed to disqualify the reviewing official, the ALJ will halt the proceedings until resolving the matter of disqualification. If the ALJ determines that the reviewing official is disqualified, the ALJ will dismiss the complaint without prejudice. If the ALJ disqualifies himself or herself, the case will be promptly reassigned to another ALJ.

**§ 681.17 What rights are there to review documents?**

(a) Once the ALJ issues a hearing notice pursuant to § 681.11(b), and upon written request to the reviewing official, the defendant may:

(1) Review 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 are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents; and

(2) 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.

(b) The notice sent to the Attorney General from the reviewing official as described in § 681.5(a) is not discoverable under any circumstances.

(c) If the reviewing official does not respond to the defendant's request

within 20 days, the defendant may file a motion to compel disclosure of the documents with the ALJ subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 681.9.

**§ 681.18 What type of discovery is authorized and how it is conducted?**

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

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

(d) Motions for Discovery. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, 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 and/or a motion for protective order as provided in § 681.22.

(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 § 681.22.

(e) Depositions. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed by § 681.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

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

(f) Each party shall bear its own costs of discovery.

**§ 681.19 Are witness lists exchanged before the hearing?**

(a) As ordered by the ALJ, the parties must exchange witness lists and copies of proposed hearing exhibits, including copies of any written statements or transcripts of deposition testimony that each party intends to offer in lieu of live testimony.

(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 or any exhibit not provided to an opposing party in advance unless the ALJ finds good cause for the omission or concludes that there is no prejudice to the objecting party.

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

**§ 681.20 Can witnesses be subpoenaed?**

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(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 shall file a written request not less than 15 days before the date of the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall 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 shall serve it in the manner prescribed in § 681.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ 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.

**§ 681.21 Who pays the costs for a subpoena?**

The party requesting a subpoena shall 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 shall accompany the subpoena when served, except that when a subpoena is issued on behalf of NSF, a check of fees and mileage need not accompany the subpoena.

**§ 681.22 Are protective orders available?**

(a) A party or 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 which 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;

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

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

**§ 681.23 How are documents filed and served with the ALJ?**

(a) Documents filed with the ALJ must include an original and two copies. Every document filed in the proceeding must contain a title (e.g., motion to quash subpoena), a caption setting forth

the title of the action, and the case number assigned by the ALJ. Every document must be signed by the person on whose behalf the paper was filed, or his or her representative.

(b) Documents are considered filed when they are mailed. The 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.

(c) A party filing a document with the ALJ must, at the time of filing, serve a copy of such document on every other party. When a party is represented by a representative, the party's representative must be served in lieu of the party.

(d) A certificate of the individual serving the document constitutes proof of service. The certificate must set forth the manner in which the document was served.

**§ 681.24 How is time computed?**

(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 are excluded from the computation.

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

**§ 681.25 Where is the hearing held?**

The ALJ will hold the hearing in any judicial district of the United States:

(a) In which the defendant resides or transacts business; or

(b) In which the claim or statement on which liability is based was made to NSF; or

(c) As agreed upon by the defendant and the ALJ.

**§ 681.26 How will the hearing be conducted and who has the burden of proof?**

(a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the penalty and/or assessment. The hearing will be recorded and transcribed, and the transcript of testimony, exhibits admitted at the hearing, and all papers filed in the proceeding constitute the record for a decision by the ALJ.

(b) NSF must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

**§ 681.27 How is evidence presented at the hearing?**

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

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where he or she deems appropriate.

(c) The ALJ shall 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 shall be excluded if it is privileged under Federal law.

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

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

**§ 681.28 How is witness testimony presented?**

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall 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 statement must be provided to all other parties along with the last known address of such witness, in a manner which 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 shall be exchanged as provided in § 681.19.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

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

(e) Upon motion of any party, the ALJ shall order witnesses excluded from the hearing room 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 appearing for the entity pro se or 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.

**§ 681.29 Will the hearing proceedings be recorded?**

The hearing will be recorded and transcribed. 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.

**§ 681.30 Are ex parte communications between a party and the ALJ permitted?**

Ex parte communications between a party and the ALJ are not permitted unless the other party consents to such a communication taking place. This does not prohibit a party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

**§ 681.31 Are there sanctions for misconduct?**

(a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, or for engaging in other misconduct that interferes with the speedy, orderly, and fair conduct of a hearing.

(b) Any such sanction shall reasonably relate to the severity and nature of the 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 a request.

(d) The ALJ may refuse to consider any motion, request, response, brief or

other document which is not filed in a timely fashion.

(e) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

**§ 681.32 Are post-hearing briefs required?**

Post-hearing briefs are not required, but the ALJ may permit them at his or her discretion.

**Decisions and Appeals**

**§ 681.33 How is the case decided?**

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

(b) The ALJ will serve the initial decision on all parties within 90 days after the close of the hearing or, if the filing of post-hearing briefs were permitted, within 90 days after the final post-hearing brief was filed.

(c) The findings of fact must include a finding on each of the following issues:

(1) Whether any one or more of the claims or statements identified in the complaint violate this part; and

(2) If the defendant is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors.

(d) The initial decision will include a description of the right of a defendant found 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.

**§ 681.34 How are penalty and assessment amounts determined?**

(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. 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 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 cost of the 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 public confidence in the management of Government programs and operations;

(8) Whether the defendant has engaged in a pattern or 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 a state, directly or indirectly; and

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

(b) Nothing in this section shall 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.

**§ 681.35 Can a party request reconsideration of the initial decision?**

(a) Any party may file a motion for reconsideration of the initial decision with the ALJ within 20 days of receipt of the initial decision. If the initial decision was served by mail, there is a rebuttable presumption that the initial decision was received by the party 5 days from the date of mailing.

(b) A motion for reconsideration must be accompanied by a supporting brief

and must describe specifically each allegedly erroneous decision.

(c) Any response to a motion for reconsideration will only be allowed if it is requested by the ALJ.

(d) The ALJ will dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(e) If the ALJ issues a revised initial decision upon motion of a party, no further motions for reconsideration may be filed by any party.

**§ 681.36 When does the initial decision of the ALJ become final?**

(a) The initial decision of the ALJ becomes the final decision of NSF, and shall be binding on all parties 30 days after it is issued, unless any party timely files a motion for reconsideration or any defendant adjudged to have submitted a false, fictitious, or fraudulent claim or statement timely appeals to the authority head of NSF, as set forth in § 681.37.

(b) If the ALJ disposes of a motion for reconsideration by denying it or by issuing a revised initial decision, the ALJ's order on the motion for reconsideration becomes the final decision of NSF 30 days after the order is issued, unless a defendant adjudged to have submitted a false, fictitious, fraudulent claim or statement timely appeals to the authority head of NSF, as set forth in § 681.37.

**§ 681.37 What are the procedures for appealing the ALJ decision?**

(a) Any defendant who submits a timely answer and is found liable for a civil penalty or assessment in an initial decision may appeal the decision.

(b) The defendant may file a notice of appeal with the authority head within 30 days following issuance of the initial decision, serving a copy of the notice of appeal on all parties and the ALJ. The authority head may extend this deadline for up to an additional 30 days if an extension request is filed within the initial 30 day period and shows good cause.

(c) The defendant's appeal will not be considered until all timely motions for reconsideration have been resolved.

(d) If a timely motion for reconsideration is denied, a notice of appeal may be filed within 30 days following such denial or issuance of a revised initial decision, whichever applies.

(e) A notice of appeal must be supported by a written brief specifying why the initial decision should be reversed or modified.

(f) The NSF representative may file a brief in opposition to the notice of appeal within 30 days of receiving the defendant's appeal and supporting brief.

(g) If a defendant timely files a notice of appeal, and the time for filing reconsideration motions has expired, the ALJ will forward the record of the proceeding to the authority head.

**§ 681.38 What happens if an initial decision is appealed?**

(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.

**§ 681.39 Are there any limitations on the right to appeal to the authority head?**

(a) A defendant has no right to appear personally, or through a representative, before the authority head.

(b) There is no right to appeal any interlocutory ruling.

(c) The authority head will not consider any objection or evidence that was not raised before the ALJ unless the defendant demonstrates that the failure to object was caused by extraordinary circumstances. If the defendant demonstrates to the satisfaction of the authority head that extraordinary circumstances prevented the presentation of evidence at the hearing, and that the additional evidence is material, the authority head may remand the matter to the ALJ for consideration of the additional evidence.

**§ 681.40 How does the authority head dispose of an appeal?**

(a) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment imposed by the ALJ in the initial decision or reconsideration decision.

(b) The authority head will promptly serve each party to the appeal and the ALJ with a copy of his or her decision. This decision must contain a statement describing the right of any person, against whom a penalty or assessment has been made, to seek judicial review.

**§ 681.41 What judicial review is available?**

31 U.S.C. 3805 authorizes judicial review by the appropriate United States District Court of any final NSF decision imposing penalties or assessments, and specifies the procedures for such review. To obtain judicial review, a defendant must file a petition with the appropriate court in a timely manner.

**§ 681.42 Can the administrative complaint be settled voluntarily?**

(a) Parties may make offers of compromise or settlement at any time. Any compromise or settlement must be in writing.



(b) The reviewing official has the exclusive authority to compromise or settle the case from the date on which the reviewing official is permitted to issue a complaint until the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle the case from the date of the ALJ's initial decision until initiation of any judicial review or any action to collect the penalties and assessments.

(d) The Attorney General has exclusive authority to compromise or settle the case while any judicial review or any action to recover penalties and assessments is pending.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate.

**§ 681.43 How are civil penalties and assessments collected?**

Section 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.

**§ 681.44 Is there a right to administrative offset?**

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

**§ 681.45 What happens to collections?**

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

**§ 681.46 What if the investigation indicates criminal misconduct?**

(a) Any investigating official may:

- (1) Refer allegations of criminal misconduct directly to the Department of Justice for prosecution or for suit under the False Claims Act or other civil proceeding;
- (2) Defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution; or
- (3) Issue subpoenas under any other statutory authority.

(b) Nothing in this part limits the requirement that NSF employees report suspected violations of criminal law to

the NSF Office of Inspector General or to the Attorney General.

Dated: December 5, 2008.

**Lawrence Rudolph,**

*General Counsel.*

[FR Doc. E8-29207 Filed 12-29-08; 8:45 am]

**BILLING CODE 7555-01-P**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

**[DA 08-2728; MB Docket No. 08-250; RM-11508]**

**Television Broadcasting Services; Santa Ana, CA**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a channel substitution proposed by Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network ("Trinity"), the licensee of KTVN-DT, post-transition DTV channel 23, Santa Ana, California. Trinity requests the substitution of DTV channel 33 for post-transition DTV channel 23 at Santa Ana.

**DATES:** Comments must be filed on or before January 14, 2009, and reply comments on or before January 26, 2009.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Colby M. May, Esq., 205 3rd Street, SE., Washington, DC 20003.

**FOR FURTHER INFORMATION CONTACT:**

Adrienne Y. Denysyk, [adrienne.denysyk@fcc.gov](mailto:adrienne.denysyk@fcc.gov), Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08-250, adopted December 17, 2008, and released December 18, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th

Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-478-3160 or via e-mail <http://www.BCPIWEB.com>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

**PART 73—RADIO BROADCAST SERVICES**

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

**§ 73.622 [Amended]**

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under California, is amended by adding DTV channel 33 and removing DTV channel 23 at Santa Ana.

Federal Communications Commission.

**Clay C. Pendarvis,**

*Associate Chief, Video Division, Media Bureau.*

[FR Doc. E8-31028 Filed 12-29-08; 8:45 am]

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