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Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault  
in Confinement Facilities; Final Rule

**DEPARTMENT OF HOMELAND SECURITY****6 CFR Part 115**

[ICEB–2012–0003]

RIN 1653–AA65

**Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities****AGENCY:** Department of Homeland Security.**ACTION:** Final rule.**SUMMARY:** The Department of Homeland Security (DHS) is issuing regulations setting standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities.**DATES:** This rule is effective May 6, 2014.**FOR FURTHER INFORMATION CONTACT:** Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 (not a toll-free number).**SUPPLEMENTARY INFORMATION:****I. Abbreviations**

ANPRM Advance Notice of Proposed Rulemaking  
 ASR Administrative Stay of Removal  
 BJS Bureau of Justice Statistics  
 BOP Bureau of Prisons  
 CBP U.S. Customs and Border Protection  
 CDF Contract Detention Facility  
 CFR Code of Federal Regulations  
 CMD Custody Management Division  
 CRCL DHS Office for Civil Rights and Civil Liberties  
 DHS Department of Homeland Security  
 DOJ Department of Justice  
 DSM Detention Service Manager  
 ERO ICE Enforcement and Removal Operations  
 FOD ICE Field Office Director  
 FR Federal Register  
 FOJC ICE Field Office Juvenile Coordinator  
 FSA *Flores v. Reno* Settlement Agreement  
 HHS Department of Health and Human Services  
 HSI ICE Homeland Security Investigations  
 ICE U.S. Immigration and Customs Enforcement  
 IGA Intergovernmental Agreement  
 IGSA Intergovernmental Service Agreement  
 INA Immigration and Nationality Act  
 IRFA Initial Regulatory Flexibility Analysis  
 IRIA Initial Regulatory Impact Analysis  
 JIC Joint Intake Center  
 LEP Limited English Proficient/Proficiency  
 LGBTI Lesbian, Gay, Bisexual, Transgender, Intersex  
 LGBTIGNC Lesbian, Gay, Bisexual, Transgender, Intersex, Gender Non-conforming  
 MOU Memorandum of Understanding

NAIGS North American Industry Classification System  
 NDS National Detention Standards  
 NPREC National Prison Rape Elimination Commission  
 NPRM Notice of Proposed Rulemaking  
 ODO ICE Office of Detention Oversight  
 OIG DHS Office of the Inspector General  
 OMB Office of Management and Budget  
 OPR ICE Office of Professional Responsibility  
 ORR HHS Office of Refugee Resettlement  
 PBNDS Performance Based National Detention Standards  
 PRA Paperwork Reduction Act of 1995  
 PREA Prison Rape Elimination Act of 2003  
 PSA Prevention of Sexual Assault  
 QAT Quality Assurance Team  
 RCA Risk Classification Assessment  
 RFA Regulatory Flexibility Act  
 RIA Regulatory Impact Analysis  
 SAAPID Sexual Abuse and Assault Prevention and Intervention Directive  
 SAFE Sexual Assault Forensic Examiner  
 SANE Sexual Assault Nurse Examiner  
 SBA Small Business Administration  
 SIJ Special Immigrant Juvenile  
 SPC Service Processing Center  
 TVPRA Trafficking Victims Protection Reauthorization Act  
 UMRA Unfunded Mandate Reform Act of 1995  
 U.S.C. United States Code  
 USCIS U.S. Citizenship and Immigration Services  
 USMS U.S. Marshals Service  
 VAWA Reauthorization Violence Against Women Reauthorization Act of 2013

**II. Executive Summary***A. Purpose of the Regulatory Action*

The purpose of this regulatory action is to set standards to prevent, detect, and respond to sexual abuse in Department of Homeland Security (DHS) confinement facilities.<sup>1</sup> Sexual violence, against any victim, is an assault on human dignity and an affront to American values. Many victims report persistent, even lifelong mental and physical suffering. As the National Prison Rape Elimination Commission (NPREC) explained in its 2009 report:

Until recently . . . the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff. Tolerance of sexual abuse of prisoners in the government's custody is totally incompatible with American values.<sup>2</sup>

<sup>1</sup> As discussed in greater detail below, in this final rule, "sexual abuse" includes sexual abuse and assault of a detainee by another detainee, as well as sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

<sup>2</sup> National Prison Rape Elimination Commission Report 1 (2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

DHS is committed to preventing, detecting, and responding to sexual abuse in facilities used to detain individuals for civil immigration purposes. Sexual abuse is not an inevitable feature of detention, and with DHS's strong commitment, DHS immigration detention and holding facilities have a culture that promotes safety and refuses to tolerate abuse. DHS is fully committed to its zero-tolerance policy against sexual abuse in its confinement facilities, and these standards will strengthen that policy across DHS confinement facilities. DHS is also fully committed to the full implementation of the standards in DHS confinement facilities, and to robust oversight of these facilities to ensure this implementation.

The standards build on current U.S. Immigration and Customs Enforcement (ICE) Performance Based National Detention Standards (PBNDS) and other DHS detention policies. The standards also respond to the President's May 17, 2012 Memorandum, "Implementing the Prison Rape Elimination Act," which directs all agencies with Federal confinement facilities to work with the Attorney General to create rules or procedures setting standards to prevent, detect, and respond to sexual abuse in confinement facilities, and to the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), which directs DHS to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in facilities that maintain custody of aliens detained for a violation of U.S. immigration laws. See Public Law 113–4 (Mar. 7, 2013).

*B. Summary of the Provisions of the Regulatory Action*

The DHS provisions span eleven categories that were originally used by the NPREC to discuss and evaluate prison rape elimination standards: Prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee<sup>3</sup> report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. Each provision under these categories reflects the context of DHS confinement of individuals and draws upon the particular experiences

<sup>3</sup> For simplicity, all persons confined in DHS immigration detention facilities and holding facilities are referred to as "detainees" in this rulemaking.

and requirements DHS faces in fulfilling its missions.

For example, DHS has broken down the standards to cover two distinct types of facilities: (1) Immigration detention facilities, which are overseen by ICE and used for longer-term detention of aliens in immigration proceedings or awaiting removal from the United States; and (2) holding facilities, which are used by ICE and U.S. Customs and Border Protection (CBP) for temporary administrative detention of individuals pending release from custody or transfer to a court, jail, prison, other agency or other unit of the facility or agency.

In addition, the standards reflect the characteristics of the population encountered by DHS in carrying out its border security and immigration enforcement missions by providing, for example, language assistance services for limited English proficient (LEP) detainees, safe detention of family units, and other provisions specific to DHS's needs. A more detailed discussion of all of the provisions in the rulemaking is included below in Section V of this preamble, "Discussion of PREA Standards," including a section-by-section analysis of the DHS rule.

In this final rule, DHS has modified the proposed regulatory text in multiple areas, including the following:

- In addition to implementing these standards at both DHS facilities and at non-DHS facilities whenever there is a new contract or contract renewal, DHS will also implement the standards at non-DHS facilities whenever there is a substantive contract modification.

- In addition to requiring that assessments for risk of victimization or abusiveness include an evaluation of whether the detainee has been incarcerated previously, DHS is now also requiring consideration of whether the detainee has been detained previously.

- DHS now requires immigration detention facilities to notify a regional ICE supervisor no later than 72 hours after the initial placement into segregation whenever a detainee has been held in administrative segregation on the basis of a vulnerability to sexual abuse or assault. Upon receipt of such notification, the official must conduct a review of the placement to consider whether continued segregation is warranted, whether any less restrictive housing or custodial alternatives may exist (such as placing the detainee in a less restrictive housing option at another facility or other appropriate custodial options), and whether the placement is only as a last resort and when no other viable housing options exist.

- DHS now requires immigration detention facilities to notify a regional ICE supervisor whenever a detainee victim has been held in administrative segregation for longer than 72 hours. Upon receipt of such notification, the official must conduct a review of the placement to consider whether placement is only as a last resort and when no other viable housing options exist, and, in cases where the detainee victim has been held in segregation for longer than five days, whether the placement is justified by extraordinary circumstances or is at the request of the detainee.

- DHS is now requiring immigration detention facilities to complete sexual abuse incident reviews within 30 days of the completion of the investigation, and is requiring that the review include consideration of whether the incident or allegation was motivated by, among other things, sexual orientation or gender identity.

- DHS is now requiring explicitly that facilities keep data collected on sexual abuse and assault incidents in a secure location.

- DHS is now requiring that the agency maintain sexual abuse data for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

DHS has also modified the regulatory text and clarified its interpretation of the rule in a number of ways, as explained more fully below.

### *C. Costs and Benefits*

The anticipated costs of full nationwide compliance with the rule as well as the benefits of reducing the prevalence of sexual abuse in DHS immigration detention facilities and holding facilities, are discussed at length in section VI, entitled "Statutory and Regulatory Requirements—Executive Orders 12866 and 13563" and in the accompanying Regulatory Impact Analysis (RIA), which is found in the docket for this rulemaking.

As shown in the Summary Table below, DHS estimates that the full cost of compliance with these standards at all covered DHS confinement facilities would be approximately \$57.4 million over the period 2013–2022, discounted at 7 percent, or \$8.2 million per year when annualized at a 7 percent discount rate. This is the estimated cost of compliance if all facilities adopt and implement the standards within the first year after the rule is finalized. This is an accurate reflection of implementation of these standards in holding facilities, which are fully owned and operated by DHS agencies. However, the annual cost for implementation at immigration

detention facilities, most of which are governed by a contract with another entity, will likely be less, because it depends on the pace of contract renewals and substantive modifications which are unlikely to be universally completed in the first year after the rule is finalized. DHS has not endeavored in the RIA to project the actual pace of implementation.

With respect to benefits, DHS conducts what is known as a "break even analysis," by first estimating the monetary value of preventing various types of sexual abuse (incidents involving violence, inappropriate touching, or a range of other behaviors) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. This analysis begins by estimating the recent levels of sexual abuse in covered facilities using data from 2010, 2011, and 2012. In 2010, ICE had four substantiated sexual abuse allegations in immigration detention facilities, two in 2011, and one in 2012. There were no substantiated allegations by individuals detained in a DHS holding facility. (This does not include allegations involved in still-open investigations or allegations outside the scope of these regulations.) In the RIA, DHS extrapolates the number of substantiated and unsubstantiated allegations at immigration detention facilities based on the premise that there may be additional detainees who may have experienced sexual abuse, but did not report it.

Next, DHS estimates how much monetary benefit (to the victim and to society) accrues from reducing the annual number of victims of sexual abuse. This is, of course, an imperfect endeavor, given the inherent difficulty in assigning a dollar figure to the cost of such an event. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify, and directs agencies to use the best available techniques to quantify benefits and costs. Executive Order 13563 also states that agencies "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." Each of these values is relevant here, including human dignity, which is offended by acts of sexual abuse.

DHS uses the Department of Justice (DOJ) estimates of unit avoidance values for sexual abuse, which DOJ extrapolated from the existing economic and criminological literature regarding

rape in the community.<sup>4</sup> The RIA concludes that when all facilities and costs are phased into the rulemaking, the breakeven point would be reached if the standards reduced the annual number of incidents of sexual abuse by 122 from the estimated benchmark levels, which is 147 percent of the total number of assumed incidents in ICE confinement facilities, including an estimated number of those who may not have reported an incident.<sup>5</sup>

There are additional benefits of the rule that DHS is unable to monetize or quantify. Not only will victims benefit

from a potential reduction in sexual abuse in facilities, so too will DHS agencies and staff, other detainees, and society as a whole. As noted by Congress, sexual abuse increases the levels of violence within facilities. Both staff and other detainees will benefit from a potential reduction in levels of violence and other negative factors. 42 U.S.C. 15601(14). This will improve the safety of the environment for other detainees and workplace for facility staff. In addition, long-term trauma from sexual abuse in confinement may diminish a victim’s ability to reenter

society resulting in unstable employment. Preventing these incidents will decrease the cost of health care, spread of disease, and the amount of public assistance benefits required for victims upon reentry into society, whether such reentry is in the United States or a detainee’s home country.

Chapter 3 of the RIA presents detailed descriptions of the monetized benefits and break-even results. The Summary Table, below, presents a summary of the benefits and costs of the final rule. The costs are discounted at seven percent.

SUMMARY TABLE—ESTIMATED COSTS AND BENEFITS OF FINAL RULE  
[\$Millions]

|                                                                            | Immigration detention facilities                                                                                                                                                                                              | Holding facilities | Total DHS PREA rulemaking |
|----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|---------------------------|
| 10-Year Cost Annualized at 7% Discount Rate .....                          | \$4.9                                                                                                                                                                                                                         | \$3.3              | \$8.2                     |
| % Reduction of Sexual Abuse Victims to Break Even With Monetized Costs ... | N/A                                                                                                                                                                                                                           | N/A                | *147%                     |
| Non-monetized Benefits .....                                               | An increase in the general wellbeing and morale of detainees and staff, the value of equity, human dignity, and fairness for detainees in DHS custody.                                                                        |                    |                           |
| Net Benefits .....                                                         | As explained above, we did not estimate the number of incidents or victims of sexual abuse this rule would prevent. Instead, we conducted a breakeven analysis. Therefore, we did not estimate the net benefits of this rule. |                    |                           |

\* For ICE confinement facilities.

III. Background

Rape is violent, destructive, and a crime, no matter where it takes place. In response to concerns related to incidents of rape of prisoners in Federal, State, and local prisons and jails, as well as the lack of data available about such incidents, the Prison Rape Elimination Act (PREA) was enacted in September 2003. See Public Law 108–79 (Sept. 4, 2003). Some of the key purposes of the statute were to “develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape,” and to “increase the available data and information on the incidence of prison rape.” 42 U.S.C. 15602(3), (4).

To accomplish these ends, PREA established the National Prison Rape Elimination Commission (NPREC) to conduct a “comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States,” and to recommend national standards for the reduction of prison rape. 42 U.S.C. 15606(d). PREA

charged the Attorney General, within one year of NPREC issuing its report, to “publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape . . . based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by [NPREC] . . . and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.” 42 U.S.C. 15607(a)(1)–(2).

The NPREC released its findings and recommended national standards in a report (the NPREC report) dated June 23, 2009. The report is available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>. In that report, NPREC set forth four sets of recommended national standards for eliminating prison rape and other forms of sexual abuse. Each set was applicable to one of four confinement settings: (1) Adult prisons and jails; (2) lockups; (3) juvenile facilities; and (4) community corrections facilities. NPREC report at 215–235. The NPREC report

recommends supplemental standards for facilities with immigration detainees. *Id.* at 219–220. Specifically, and of particular interest to DHS, the NPREC made eleven recommendations for supplemental standards for facilities with immigration detainees and four recommendations for supplemental standards for family facilities. NPREC asserted that standards for facilities with immigrant detainees must be enforced in any facility that is run by ICE or through an ICE contract.

A. Department of Justice Rulemaking

In response to the NPREC report, a DOJ PREA Working Group reviewed the NPREC’s proposed standards to assist in the rulemaking process. DOJ published an advance notice of proposed rulemaking (ANPRM) on March 10, 2010 (75 FR 11077). Commenters on the ANPRM generally supported the broad goals of PREA and the overall intent of the NPREC’s recommendations, with some division over the merits of a number of the NPREC’s recommended national standards.

<sup>4</sup> Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, Final Regulatory Impact Analysis, Docket No.

DOJ–OAG–2011–0002, available at [www.regulations.gov](http://www.regulations.gov).

<sup>5</sup> As discussed in Chapter 1, and shown in Table 17 of the RIA, the benchmark level of sexual abuse

includes all types of sexual abuse, including offensive touching (for instance, during a pat-down search), voyeurism, harassment, and verbal abuse.

DOJ then issued a notice of proposed rulemaking (NPRM) on February 3, 2011, setting forth proposed national PREA standards. 76 FR 6248 (Feb. 3, 2011). In response to the NPRM, DOJ received over 1,300 comments that provided general assessments of DOJ's efforts as well as specific and detailed recommendations regarding each standard. Pertinent to DHS, there was specific concern expressed by the commenters with respect to NPREC's recommended supplemental standards for immigration detention number six, which proposed to mandate that immigration detainees be housed separately from criminal detainees. The DOJ NPRM noted that several comments to the DOJ ANPRM raised a concern that this requirement would impose a significant burden on jails and prisons, which often do not have the capacity to house immigration detainees and criminal detainees separately. *Id.* The DOJ NPRM also noted DOJ's concern about other proposed supplemental standards, such as imposing separate training requirements and requiring agencies to attempt to enter into separate memoranda of understanding with immigration-specific community service providers. *Id.* Furthermore, comments to the DOJ NPRM addressed whether the proposed standards should cover immigration detention facilities, prompting DOJ to examine the application of PREA to other Federal confinement facilities, which is discussed further below.

Following the public comment period for its NPRM, DOJ issued a final rule setting a national framework of standards to prevent, detect, and respond to prison rape at DOJ confinement facilities, as well as State prisons and local jails. 77 FR 37106 (June 20, 2012).

#### *B. Application of PREA Standards to Other Federal Confinement Facilities*

DOJ's NPRM interpreted PREA to bind only facilities operated by the Bureau of Prisons (BOP), and extended the standards to U.S. Marshals Service (USMS) facilities under other authorities of the Attorney General. 76 FR 6248, 6265. Numerous commenters criticized this interpretation of the statute. In light of those comments, DOJ re-examined whether PREA extends to Federal facilities beyond those operated by DOJ and concluded that PREA does, in fact, encompass any Federal confinement facility "whether administered by [the] government or by a private organization on behalf of such government." 42 U.S.C. 15609(7).

In its final rule, DOJ further concluded that, in general, each Federal

department is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. 77 FR 37106, 37113. In particular, DOJ noted that DHS possesses great knowledge and experience regarding the specific characteristics of its immigration facilities, which differ in certain respects from DOJ, State, and local facilities with regard to the manner in which they are operated and the composition of their populations. Thus, and given each department's various statutory authorities to regulate conditions of detention, DOJ stated that Federal departments with confinement facilities, like DHS, would work with the Attorney General to issue rules or procedures consistent with PREA.

#### *C. The Presidential Memorandum on Implementing the Prison Rape Elimination Act and the Violence Against Women Reauthorization Act of 2013*

On May 17, 2012, the same day DOJ released its final rule, President Obama issued a Presidential Memorandum reiterating the goals of PREA and directing Federal agencies with confinement facilities that are not already subject to the DOJ final rule to propose rules or procedures necessary to satisfy the requirements of PREA within 120 days of the Memorandum. In the Memorandum, the President firmly establishes that sexual violence, against any victim, is an assault on human dignity and an affront to American values, and that PREA established a "zero-tolerance standard" for rape in prisons in the United States. The Memorandum further expresses the Administration's conclusion that PREA encompasses all Federal confinement facilities, including those operated by executive departments and agencies other than DOJ, whether administered by the Federal Government or by an organization on behalf of the Federal Government, and that each agency is responsible for, and must be accountable for, the operations of its own confinement facilities. The President charged each agency, within the agency's own expertise, to determine how to implement the Federal laws and rules that govern its own operations, but to ensure that all agencies that operate confinement facilities adopt high standards to prevent, detect, and respond to sexual abuse. The President directed all

agencies with Federal confinement facilities that are not already subject to the DOJ final rule, such as DHS, to work with the Attorney General to propose rules or procedures that will satisfy the requirements of PREA.

Additionally, on March 7, 2013, the VAWA Reauthorization was enacted, which included a section addressing sexual abuse in custodial settings. *See* Public Law 113-4 (Mar. 7, 2013). Among requirements addressing certain Federal agencies, the law directs DHS to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in facilities that maintain custody of aliens detained for a violation of U.S. immigration laws. *Id.* The standards are to apply to DHS-operated detention facilities and to detention facilities operated under contract with DHS, including contract detention facilities (CDFs) and detention facilities operated through an intergovernmental service agreement (IGSA) with DHS. *Id.* The statute requires that the DHS standards give due consideration to the recommended national standards provided by NPREC. *Id.*

Sexual abuse in custodial environments is a serious concern with dire consequences for victims. DHS is firmly committed to protecting detainees from all forms of sexual abuse. By this regulation, DHS responds to and fulfills the President's directive and the requirements of the VAWA Reauthorization by creating comprehensive, national regulations for the detection, prevention, and reduction of sexual abuse at DHS immigration detention facilities and at DHS holding facilities that maintain custody of aliens detained for violating U.S. immigration laws.

#### *D. DHS Proposed Rule and Public Comments*

On December 19, 2012, DHS published an NPRM entitled *Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; Proposed Rule*. 77 FR 75300. On January 2, 2013 DHS published an Initial Regulatory Impact Analysis (IRIA), which presented a comprehensive assessment of the benefits and costs of DHS's proposed standards in both quantitative and qualitative terms. The IRIA was summarized in the proposed rule and was published in full in the docket (ICEB-2012-003) on the regulations.gov Web site. The public comment period on the NPRM originally was scheduled to end on February 19, 2013. Due to scheduled maintenance to the Federal

eRulemaking Portal, DHS extended the comment period by one week until February 26, 2013. 78 FR 8987. DHS received a total of 1,724 comments on the proposed rule. No public meeting was requested, and none was held.

Commenters included private citizens, professional organizations, social service providers, and advocacy organizations concerned with issues involving detainee safety and rights, sexual violence, discrimination, and the mental health of both the detainees and the facility employees. In general, commenters supported the goals of PREA and DHS's proposed rule. However, some commenters, particularly advocacy groups concerned with protecting the health and safety of the detainees, expressed concern that the proposed rule did not go far enough towards achieving the goals that PREA set forth. Some comments were outside the scope of the proposed rule, and therefore have not been included in the DHS responses and changes in the final rule below. DHS thanks the public for its interest and participation.

Members of Congress and others have also expressed interest in this rulemaking. In describing the potential positive impacts of the VAWA Reauthorization, Senator Richard Durbin—both a PREA and VAWA Reauthorization legislative co-sponsor—referred to the importance of the bill's provision regarding implementation of PREA standards by DHS. Specifically, Senator Durbin applauded DHS's efforts, through its proposed rule, to implement rules consistent with PREA's goals. 159 Cong. Rec. S503 (daily ed. Feb. 7, 2013) (statement of Sen. Durbin). Senator Durbin noted that, "It was critical . . . to have a provision in this VAWA Reauthorization that clarifies that standards to prevent custodial rape must apply to immigration detainees—all immigration detainees—a provision that codifies the good work DHS is now doing and ensures strong regulations pertaining to immigration will remain in place in the future." *Id.* DHS appreciates this strong statement of confidence in DHS's proposed rule, by a legislator who advocated for the original PREA legislation.

When the public comment period closed, DHS carefully reviewed each comment and deliberated internally on the revisions that the commenters proposed.

#### *E. Types of DHS Confinement Facilities*

This rule applies to just two types of confinement facilities: (1) Immigration detention facilities and (2) holding facilities.

Section 115.5 defines an immigration detention facility as a "confinement facility operated by or pursuant to contract with [ICE] that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an Intergovernmental Service Agreement." These facilities are designed for long-term detention (more than 24 hours) and house the largest number of DHS detainees. ICE is the only DHS component agency with immigration detention facilities, and it has several types of such facilities: Service processing center (SPC) facilities are ICE-owned facilities staffed by a combination of Federal employees and contract staff; CDFs are owned by private companies and contracted directly with ICE; and detention services at IGSA facilities are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity.<sup>6</sup> There are two types of IGSA facilities: Dedicated IGSA facilities, which house detained aliens only, and non-dedicated (i.e., shared) IGSA facilities, which may house a variety of detainees and inmates.

The standards set forth in Subpart A of these proposed regulations are meant ultimately to apply to all of these various types of immigration detention facilities—but not, notably, to facilities authorized for use by ICE pursuant to agreements with BOP or pursuant to agreements between DOJ and state or local governments or private entities (e.g., USMS IGA facilities). Those facilities and their immigration detainees are covered by the DOJ PREA standards and not the provisions within Subpart A of these proposed rules.

These regulations do not apply to CDF and IGSA facilities directly; rather, standards for these facilities will be phased in through new contracts, contract renewals, or substantive contract modifications. Specifically, the regulations require that when contracting for the confinement of

detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, DHS component agencies include in any new contracts, contract renewals, or substantive contract modifications the obligation to adopt and comply with these standards. (Covered substantive contract modifications would include, for example, changes to the bed/day rate or the implementation of stricter standards, but not the designation of a new Contracting Officer.) In other words, DHS intends to enforce the standards though terms in its contracts with facilities.

Section 115.5 defines a holding facility similarly to DOJ's definition of "lockup." A "holding facility" is a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) Under the control of the agency; and (2) primarily used for the short-term confinement of individuals who have recently been detained pending release or transfer to or from a court, jail, prison, or other agency. These facilities, which are operated by ICE, CBP, or other DHS components, are designed for confinement that is short-term in nature, but are permanent structures intended primarily for the purpose of such confinement. Temporary-use hold rooms and other types of short-term confinement areas not primarily used for confinement are not amenable to compliance with these standards, but are covered by other DHS policies and procedures. We discuss the distinctions between these facilities in more detail later in this rule.

#### 1. ICE Detention Facilities

As stated above, the NPREC report contained eleven recommended standards for facilities with immigration detainees and four recommended standards specifically addressing family facilities. ICE oversees immigration detention facilities nationwide. The vast majority of facilities are operated through government contracts, State and local entities, private entities, or other Federal agencies. ICE Enforcement and Removal Operations (ERO) is the program within ICE that manages ICE operations related to the immigration detention system.

ERO is responsible for providing adequate and appropriate custody management to support the immigration removal process. This includes providing traditional and alternative custody arrangements for those in removal proceedings, providing aliens access to legal resources and representatives of advocacy groups, and facilitating the appearance of detained aliens at immigration court hearings.

<sup>6</sup> In the preamble of the proposed rule, DHS listed Intergovernmental Agreement (IGA) facilities among the types of immigration detention facilities. Upon further review, DHS has determined that ICE does not contract with state or local governments using IGAs, and therefore has no immigration detention facilities that qualify as IGAs (as opposed to IGSA). As discussed in greater detail below, although ICE is an authorized user of USMS IGA facilities, the facilities and their immigration detainees would be covered by the DOJ PREA standards and not the provisions within Subpart A of these proposed rules.

Through various immigration detention reform initiatives, ERO is committed to providing and maintaining appropriate conditions of confinement, providing required medical and mental healthcare, housing detainees in the least restrictive setting commensurate with their criminal background, ensuring appropriate conditions for all detainees, employing fiscal accountability, increasing transparency, and strengthening critical oversight, including efforts to ensure compliance with applicable detention standards through inspection programs.

The ERO Custody Management Division (CMD) provides policy and oversight for the administrative custody of immigration detainees, a highly transient population and one of the most diverse of any correctional or detention system in the world. CMD's mission is to manage ICE detention operations efficiently and effectively to provide for the safety, security and care of aliens in ERO custody.

As of spring 2012, ERO was responsible for providing custody management to approximately 158 authorized immigration detention facilities, consisting of 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities (of which 64 are covered by the DOJ PREA rule, not this rule, because they are USMS IGA facilities). ERO has 91 other authorized immigration detention facilities that typically hold detainees for more than 24 hours and less than 72 hours, including 55 USMS IGA facilities and 36 non-dedicated IGSA facilities. In addition, ICE has 149 holding facilities that hold detainees for less than 24 hours. These holding facilities are nationwide and are located within ICE ERO Field and Sub-Field Offices.<sup>7</sup>

## 2. ICE Sexual Abuse and Assault Policies

These regulations for immigration detention facilities and holding facilities support existing sexual abuse policies promulgated by ICE, including ICE's PBNDS 2011 and its 2012 Sexual Abuse and Assault Prevention and Intervention Directive (SAAPID),<sup>8</sup> which provide

<sup>7</sup> Facilities ICE used as of spring 2012, and the sexual abuse and assault standards to which facilities were held accountable or planned to be held accountable at that time, serve as the baseline for the cost estimates for this rulemaking.

<sup>8</sup> ICE, *Performance-Based National Detention Standards* (2011), <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>; ICE, *Directive No. 11062.1: Sexual Abuse and Assault Prevention and Intervention* (2012), [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/sexual-abuse-assault-prevention-intervention-policy.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/sexual-abuse-assault-prevention-intervention-policy.pdf). These documents are available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES**.

strong safeguards against all sexual abuse of individuals within its custody, consistent with the goals of PREA.

ICE's PBNDS 2011 standard on "Sexual Abuse and Assault Prevention and Intervention" was developed in order to enhance protections for immigration detainees as well as ensure a swift and effective response to allegations of sexual abuse. This standard derived in significant part from earlier policies contained in ICE's PBNDS 2008, promulgated in response to the passage of PREA, and took into consideration the subsequently released recommendations of the NPREC (including those for facilities housing immigration detainees) in June 2009 and ensuing draft standards later issued by DOJ in its ANPRM in March 2010. In drafting the PBNDS 2011, ICE also incorporated the input of the DHS Office for Civil Rights and Civil Liberties (CRCL), local and national advocacy organizations, and representatives of DOJ (including correctional experts from BOP) on methods for accomplishing the objectives of PREA in ICE's operational context, and closely consulted information and best practices reflected in policies of international corrections systems, statistical data on sexual violence collected by the DOJ Bureau of Justice Statistics (BJS), and reports published by the United Nations High Commissioner for Refugees and the Inter-American Commission on Human Rights of the Organization of American States regarding sexual abuse and other issues affecting vulnerable populations in U.S. correctional systems. The PBNDS 2011 establish responsibilities of all immigration detention facility staff with respect to preventative measures such as screening, staff training, and detainee education, as well as effective response to all incidents of sexual abuse, including timely reporting and notification, protection of victims, provision of medical and mental health care, investigation, and monitoring of incident data.

The PBNDS 2008 standard on Sexual Abuse and Assault Prevention and Intervention and the Family Residential Standards also contain robust safeguards against sexual abuse of ICE detainees, establishing similar requirements with respect to each of the issues covered by the PBNDS 2011 Sexual Abuse standard. In addition, ICE has made great strides in incorporating standards specific to sexual abuse and assault in NDS facilities. In fact, since the publication of the NPRM a substantial number of NDS facilities with which ICE maintains IGSA's have agreed to implement the PBNDS 2011's

Sexual Abuse and Assault Prevention and Intervention standard. Excluding those detainees who are held in DOJ-contracted facilities (and are therefore covered by the DOJ rule), as of July 2013 approximately 94% of ICE detainees, on average, are housed in facilities that have adopted a sexual abuse and assault standard under PBNDS 2011, PBNDS 2008, or Family Residential Standards.<sup>9</sup>

The 2012 ICE SAAPID complements the requirements established by the detention standards by delineating ICE-wide policy and procedures and corresponding duties of employees for reporting, responding to, investigating, and monitoring incidents of sexual abuse. Regardless of the standards applicable to a particular facility, ICE personnel are required under this Directive to ensure that the substantive response requirements of PBNDS 2011 are met, and that incidents receive timely and coordinated agency follow-up. In conjunction with the PBNDS, the SAAPID ensures an integrated and comprehensive system of preventing and responding to all incidents or allegations of sexual abuse of individuals in ICE custody.

On September 4, 2013, ICE issued a directive entitled "Review of the Use of Segregation for ICE Detainees." The directive establishes policy and procedures for ICE review of detainees placed into segregated housing. It is intended to complement the requirements of the 2011 PBNDS, the 2008 PBNDS, NDS and other applicable policies. The directive states that placement in segregation should occur only when necessary and in compliance with applicable detention standards, and includes a notification requirement whenever a detainee has been held continuously in segregation for 14 days out of any 21 day period and a 72-hour notification requirement for detainees placed in segregation due to a special vulnerability, including for detainees susceptible to harm due to sexual orientation or gender identity, and detainees who have been victims—in or

<sup>9</sup> Less than one-third of ICE's average detainee population is currently housed in facilities governed by the agency's 2000 National Detention Standards (NDS), which does not contain a standard specific to sexual abuse prevention and intervention—and nearly half of those detainees are in USMS IGA facilities. A substantial number of NDS facilities with which ICE maintains an IGSA have agreed to implement the PBNDS 2011's Sexual Abuse and Assault Prevention and Intervention standard. Again excluding detainees who are held in DOJ-contracted facilities (and are therefore covered by the DOJ PREA rule), as of July 2013, nearly three quarters of ICE detainees housed in NDS IGSA facilities are covered by the PBNDS 2011 sexual abuse and assault standard. For more information on the standards applicable to DOJ facilities, see the discussion *infra*.

out of ICE custody—of sexual assault, torture, trafficking, or abuse.

ICE's combined policies prescribe a comprehensive range of protections against sexual abuse, addressing prevention planning, reporting, response and intervention, investigation, and oversight, including: Articulation of facility zero-tolerance policies; designation of facility and component sexual assault coordinators; screening and classification of detainees; staff training; detainee education; detainee reporting methods; staff reporting and notification; first responder duties following incidents or allegations of sexual abuse (including to protect victims and preserve evidence); emergency and ongoing medical and mental health services; investigation procedures and coordination; discipline of assailants; and sexual abuse incident data collection and review.

These policies are tailored to the particular operational and logistical circumstances encountered in the DHS confinement system in order to maximize the effective achievement of the goals of PREA within the immigration detention context. To further improve transparency and enforcement, DHS has decided to issue this regulation and adopt the overall structure of the DOJ standards, as well as the wholesale text of various individual DOJ standards where DHS has deemed them appropriate and efficacious, to meet the President's goal of setting high standards, government-wide, consistent with the goals of PREA and Congress's expressed intent that DHS adopt national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in immigration confinement settings. Where appropriate, DHS also has used the results of DOJ research and considered public comments submitted in response to the DOJ ANPRM and NPRM in formulating the DHS standards.

### 3. U.S. Customs and Border Protection Holding Facilities

CBP has a priority mission of keeping terrorists and their weapons out of the United States. CBP also is responsible for securing and facilitating trade and travel while enforcing hundreds of U.S. statutes and regulations, including immigration and drug laws. All persons, baggage, and other merchandise arriving in or leaving the United States are subject to inspection and search by CBP officials for a number of reasons relating to its immigration, customs, and other law enforcement activities.

CBP detains individuals in a wide range of facilities. CBP detains some

individuals in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. CBP uses "hold rooms" in its facilities for case processing and to search, detain, or interview persons who are being processed. CBP does not currently contract for law enforcement staff within its holding facilities; CBP employees oversee detainees directly.

CBP generally detains individuals for only the short time necessary for inspection and processing, including pending release or transfer of custody to appropriate agencies. Some examples of situations in which CBP detains individuals prior to transferring them to other agencies are: (1) Persons processed for administrative immigration violations may, for example, be repatriated to a contiguous territory or transferred to ICE pending removal from the United States or removal proceedings with the Executive Office of Immigration Review; (2) unaccompanied alien children placed in removal proceedings under § 240 of the Immigration and Nationality Act (INA), 8 U.S.C. 1229a, are transferred, in coordination with ICE, to the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR); and (3) persons detained for criminal prosecution are temporarily held pending case processing and transfer to other Federal, State, local or tribal law enforcement agencies. CBP policies and directives currently cover these and other detention scenarios.

### 4. CBP Detention Directives and Guidance

The various CBP policies and directives containing guidance on the topics addressed in these regulations include, but are not limited to: *Personal Search Handbook*, Office of Field Operations, CIS HB 3300-04B, July 2004—describes in detail the procedures for personal searches. The handbook further explains the procedures for transportation and detention of, and reporting procedures for, persons detained for prolonged medical examinations as well as detentions lasting more than two hours.

CBP Directive No. 3340-030B, *Secure Detention, Transport and Escort Procedures at Ports of Entry*—establishes CBP's policy for the temporary detention, transport, and escort of persons by the Office of Field Operations. The policy also provides guidance on issues regarding the detention of juveniles, medical situations, meals, water, restrooms, phone notifications, sanitation of the

hold room, restraining procedures, classification of detainees, transportation, emergency procedures, escort procedures, transfer procedures, and property disposition.

U.S. Border Patrol Policy No. 08-11267, *Hold Rooms and Short-Term Custody*—establishes national policy describing the responsibilities and procedures for the short-term custody of persons in Border Patrol hold rooms pending case disposition. The policy also contains requirements regarding the handling of juveniles in Border Patrol custody.

DHS referenced all of these policies in its consideration of DHS-wide standards to prevent, detect, and respond to sexual abuse in DHS confinement facilities. The policies are available, redacted as appropriate, in the docket for this rule at [www.regulations.gov](http://www.regulations.gov).

## IV. Discussion of PREA Standards

### A. DHS's PREA Standards

With this final rule, DHS reiterates that sexual violence against any victim is an assault on human dignity. Such acts are particularly damaging in the detention environment, where the power dynamic is heavily skewed against victims and recourse is often limited. Until recently, however, this has been viewed by some as an inevitable aspect of detention within the United States. This view is not only incorrect but incompatible with American values.

As noted in the NPRM, DHS keeps records of any known or alleged sexual abuse incidents in its facilities. DHS reiterates that the allegations that have been tracked are unacceptable, both to DHS and the Administration, which has articulated a "zero-tolerance" standard for sexual abuse in confinement facilities. Accordingly, DHS continues to work to achieve its mandate to eliminate all such incidents.

With respect to this rule, DHS did not begin its work from a blank slate. Many correctional administrators have developed and implemented policies and practices to more effectively prevent and respond to sexual abuse in confinement facilities, including DHS confinement facilities. DHS applauds these efforts, and views them as an excellent first step. However, as noted in the NPRM, DHS has decided to promulgate regulations to meet PREA's goals and comply with the President's directive that can be applied effectively to all covered facilities in light of their particular physical characteristics, the nature of their diverse populations, and resource constraints.



DHS appreciates the considerable work DOJ has done in this area, and also recognizes that each DHS component has extensive expertise regarding its own facilities, particularly those housing unique populations, and that each DHS component is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. Thus DHS, because of its own unique circumstances, has adopted the overall structure of DOJ's regulations and has used its content to inform the provisions of the NPRM and this final rule, but has tailored individual provisions to maximize their efficacy in DHS confinement facilities.

DHS also reemphasizes that these standards are not intended to establish a safe harbor for otherwise constitutionally-deficient conditions regarding detainee sexual abuse. Likewise, while the DHS standards aim to include a variety of best practices due to the need to adopt standards applicable to a wide range of facilities while accounting for costs of implementation, the standards do not incorporate every promising avenue of combating sexual abuse. The standards represent policies and practices that are attainable by DHS components and their contractors, while recognizing that other DHS policies and procedures can, and in some cases currently do, exceed these standards in a variety of ways. DHS applauds such efforts, and encourages its components and contractors to further support the identification and adoption of additional innovative methods to protect detainees from sexual abuse.

#### *B. Section by Section Analysis*

The DHS rule follows the DOJ rule in devising separate sets of standards tailored to different types of confinement facilities utilized by DHS: Immigration detention facilities and holding facilities. Each set of standards consists of the same eleven categories used by the DOJ rule: Prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. As in the DOJ rule, a General Definitions section applicable to both sets of standards is provided.

#### **General Definitions (§ 115.5)**

Sections 115.5 and 115.6 provide definitions for key terms used in the standards, including definitions related

to sexual abuse. The definitions in this section largely mirror those used in the DOJ rule, with adjustments as necessary for DHS operational contexts. DHS has also largely relied on the NPREC's definitions in the Glossary sections that accompanied the NPREC's four sets of standards, but has made a variety of adjustments and has eliminated definitions for various terms that either do not appear in the DHS standards or whose meaning is sufficiently clear so as not to need defining.

*Facility, holding facility—transportation.* Numerous commenters, including advocacy groups and former Commissioners of NPREC, questioned this definition of facility, noting that it did not extend to custodial transport, when detainees are in transit between facilities. An advocacy group stated that the transfer of detainees, either between facilities or to facilitate removal, is a common aspect of immigration detention, necessitating clear inclusion of PREA protections during these situations. Another advocacy group stated that detainees are vulnerable when being transported and that, unlike within the DOJ system, facility staff regularly transport immigration detainees. One organization stated that definitions for both facility and holding facility should explicitly include transportation settings to provide for zero tolerance of abuse in such situations, with some groups stating that such definitions should include the language in PBNDS § 1.3 that addresses transportation.

DHS has considered these comments and decided to adopt the scope of the proposed rule—immigration detention facilities and holding facilities. DHS notes that some standards indirectly cover custodial transport. For example, the DHS standards cover all staff conduct, including staff and employee conduct while transporting detainees.

In addition, DHS has addressed custodial transport in numerous other contexts. The written zero tolerance policy applies to all forms of sexual abuse and assault by agency employees and contractors. This policy applies to transport of detainees in DHS custody to and from holding facilities and immigration detention facilities, between a holding facility and a detention facility, and to custodial transport for the purposes of removal. Moreover, the ICE SAAPID provides protection for all detainees when they are in ICE custody, including custodial transport. And whenever DHS is alerted to an alleged incident of sexual abuse and assault during DHS transport to or from a holding facility or immigration detention facility or during DHS

custodial transport for the purposes of removal, such allegations are required to be documented and promptly reported to the Joint Intake Center (JIC) and the PSA Coordinator, and will promptly receive appropriate follow-up, including a sexual abuse incident review at the conclusion of the investigation by the appropriate investigative authorities. In situations involving transportation between a holding facility maintained by one DHS component and an immigration detention facility maintained by another component, the Prevention of Sexual Assault (PSA) Coordinators at each component will be responsible for addressing the allegation in their respective annual reports.

By including explicit references to such custodial transportation in its policies, DHS reaffirms its commitment to preventing, detecting, and responding to sexual abuse and assault against individuals detained in DHS custody. Consistent with DOJ's approach, however, DHS declines to include additional separate standards on transportation.

One advocacy group, basing its comment on ICE standards under PBNDS, suggested a separate section in the final rule addressing transportation that would require that two transportation staff members be assigned to transport a single detainee, including at least one staff member of the same gender as the detainee, except in exigent circumstances. The suggested standards would specify similar requirements for multiple-detainee transit, provide detailed timekeeping accountability guidelines for exigent circumstances situations, provide documentation requirements when aberrations from the above suggestions occur, and provide separate rules for conduct and documentation requirements of pat-downs during transportation. The group also suggested the standards require minors to be separated from unrelated adults at all times during transport, seated in an area of the vehicle near officers, and remain under their close supervision. Additionally, the commenter suggested detainees of different genders be transported separately—or, if in one vehicle, in separately partitioned areas—with transgender detainees being transported in a manner corresponding to their gender identity.

As noted above, DHS recognizes the importance of protecting detainees in all custodial settings, including during transport. For this reason, and as noted by the commenters, ICE has promulgated, and is currently in the process of implementing, 2011 PBNDS, which provides greater protection for

detainees being transported while in ICE custody. These detention standards include a number of the protections recommended by the commenter, as do—to a lesser extent—the PBNDS 2008 and NDS. As noted above, detainees in ICE custody are also protected by DHS's zero-tolerance policy, ICE's zero-tolerance policy and ICE's SAAPID which prohibits sexual abuse and assault by any ICE employee in any custodial setting. CBP detainees are protected under DHS's zero-tolerance policy and other policies, including CBP Directive No. 3340-030B, Secure Detention, Transport and Escort Procedures at Ports of Entry.

Following careful review, DHS determined that the combination of generally applicable provisions of this final rule and other existing policies address the commenters' concerns in an effective and operationally practicable way. Therefore, DHS has decided not to add specific transportation standards to the regulation and instead, relies on existing policies and guidelines which provide for detainee protection.

*Facility, holding facility—temporary-use holding rooms.* Former Commissioners of NPREC and some advocacy groups recommended that DHS extend the definition of holding facility to include temporary-use holding rooms not in immigration detention facilities or holding facilities, but in locations sporadically used to detain for short periods of time during other DHS operations, such as U.S. Coast Guard vessels, conference rooms, and hotel rooms. Groups urged DHS to include additional regulatory protections for this temporary type of confinement. Although such temporary-use facilities are covered by existing policy, the former Commissioners recommended that DHS memorialize such guidance in binding Federal standards.

DHS reiterates that its zero-tolerance policy applies to all of its detention settings, and additional existing policies also cover temporary-use holding rooms. Moreover, any allegation of sexual abuse and assault will be reported to the JIC promptly and will promptly receive appropriate follow-up, regardless of the particular setting within DHS control in which the allegation arises. As DHS noted in the proposed rule, this rulemaking defines facility and holding facility broadly, including a number of settings that, while built for the purpose of detaining individuals, are used infrequently. DHS declines to further extend the requirements of the rule to settings that are not built for the purposes of detaining individuals, as many of the

provisions, including those pertaining to supervision and monitoring and upgrades to facilities and technologies, would be impracticable, inefficient, and at times impossible to apply outside of the contexts contemplated in the rule as drafted.

Former NPREC Commissioners commented that based on the proposed rule's definition of facility, it is unclear whether external audit standards apply to contract facilities. To clarify, DHS notes that the external audit standards do apply to all facilities, including contract facilities, in which the standards have been adopted.

*Exigent circumstances.* Multiple commenters objected to the definition of "exigent circumstances" as too broad. The rule allows detainee pat-down and strip search searches to be conducted by staff of the opposite sex in exigent circumstances. The former NPREC Commissioners commented that the definition might weaken the effect of the proposed standards by too readily allowing cross-gender searches. The Commissioners recommended that DHS replace "exigent circumstances" with a more restrictive exception, such as "in case of emergency circumstances." Another group stated that many standards would not apply because exigent circumstances exceptions could be continuously invoked and swallow the rule, suggesting instead that the definition specify that a threat must be of serious nature. One organization suggested replacing the word "unforeseen" in the definition with "unforeseeable."

After considering these comments, DHS has determined to retain the definition in the final rule. The definition in § 115.5 is properly tailored to ensure that standards are followed except in "temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person." It is necessary for operational purposes to carve out a limited exception to certain standards. For example, threats to the safety of a detainee or officer must be considered. In addition, a facility might have to adjust to the unforeseen absence of a staff member whose presence is typically necessary to carry out a specific standard.

*Contractor.* Multiple commenters suggested that DHS clarify the definition of contractor to include all employees and subcontractors of the person or entity referred to in the relevant provision. In response to these comments, DHS notes that it considers all facility employees and sub-

contractors to be covered under the final rule's definition of staff in § 115.5, which "means employees or contractors of the agency or facility, including any entity that operates within the facility."

*Family unit.* Multiple commenters recommended changing the requirement in the proposed rule that provided that to qualify as a family unit under Subpart A, none of the juvenile(s) or his/her/their parent(s) or legal guardian(s) may have a known history of criminal or delinquent activity. The commenters expressed concern that this could lead to the separation of a detained family where a member had a non-violent adjudication or committed a non-violent offense years ago, where a member committed an immigration-related crime, or where a juvenile was engaged in a delinquent activity. Some groups suggested that the qualifier "violent" be used to describe disqualifying criminal or delinquent activity and that only "violent criminal or delinquent activity, or . . . sexual abuse, violence or substance abuse that could reasonably put the safety or well-being of other family members at risk" should prevent an otherwise qualifying group from falling into the family unit definition. One group recommended that protection of the family unit be paramount, with exceptions being narrower than in the proposed rule. The former Commissioners also seemed to assert that the definition could exclude situations where juveniles are accompanied by non-parental family members or family friends, and further expressed concern that the definition was too narrow and could jeopardize keeping family units intact. Advocacy groups stated the definition should better reflect "the child's lived reality" and more closely comply with existing Federal standards.

While DHS must take steps to ensure the safety of minors in its custody, the agency also recognizes the important goal of keeping families intact. DHS has revised the "family unit" definition in the final rule to provide a more straightforward regulatory description in a manner that accords with current ICE policy and that recognizes the need for flexibility due to the operational realities of ensuring a safe detention environment. DHS's revised definition states that family unit means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), whom the agency will evaluate for safety purposes to protect juveniles from sexual abuse and violence. This modified definition ensures the necessary language to qualify as a "family unit" under the

Family Detention and Intake Guidance remains in the regulatory text. The revised definition also permits the agency to maintain needed flexibility to ensure the safety of juveniles in DHS custody.

Revising the “family unit” definition as applied in Subpart A to allow all individuals with a non-violent criminal history to stay with minors, and to expand the definition of family to include non-parental family members or family friends, as recommended by commenters, potentially could conflict with the intent behind ICE’s Family Detention and Intake Guidance, which seeks to protect children from abuse and human trafficking. DHS therefore declines to incorporate that specific recommendation into the revised definition.

One commenter suggested revising the definition of family unit to include not only non-U.S. citizen juvenile(s) accompanied by their parents or legal guardians, but also non-U.S. citizen juveniles accompanied by “a sponsor approved by” HHS/ORR. The commenter stated that “[i]n the context of apprehension and enforcement, a family unit should be broadened to include ORR-approved sponsors because they have the authority to release unaccompanied children to a ‘suitable family member’ per 8 U.S.C. 1232(c).”

The definition of “family unit” relates to placement in the ICE Family Residential Program. An unaccompanied alien child without a parent or legal guardian would not meet the criteria set forth in the definition of a “family unit” for these purposes. An unaccompanied alien child would not be accompanied by a sponsor approved by HHS/ORR until after they are transferred from DHS to HHS/ORR. Once an unaccompanied alien child is transferred to HHS/ORR, they are no longer within DHS’s jurisdiction. Furthermore, because the purpose of this final rule is to prevent, detect, and respond to sexual abuse and assault in confinement facilities, addressing the treatment of a family unit during apprehension and enforcement is outside the scope of this rule.

*Gay, lesbian, bisexual.* One immigration advocacy group requested that the final rule define these terms, in addition to already included definitions of transgender, intersex, and gender nonconforming. The group suggested first looking to the U.S. Citizenship and Immigration Services (USCIS) Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI) Asylum Module’s definitions regarding sexual orientation, gay,

lesbian, heterosexual/straight, and bisexual.

After considering the comment to include these terms in the final rule, DHS decided not to add them to the definitions section for several reasons. First, DHS used the DOJ PREA final rule—which does not define gay, lesbian, and bisexual—as a general guide when determining which definitions should be included. Second, as a general matter, the regulation currently relies on self-identification for classification and protective purposes.

*Security staff, law enforcement staff.* A collection of advocacy groups suggested that the proposed definitions’ distinction between security staff who operate at immigration detention facilities, and law enforcement staff who operate in a holding facility, should be eliminated and consolidated under one “security staff” definition so that security personnel at each type of facility are labeled in the same way. The groups contended that DHS does not need to differentiate like the DOJ standards, and suggests consolidating by adding “or holding facility” to the conclusion of the “security staff” definition.

DHS notes that under the final rule, there is a meaningful difference between security staff and law enforcement staff. Unlike holding facilities, which are staffed by law enforcement officers from either ICE or CBP, immigration detention facilities use a wide range of staffing, including personnel from private companies who are not law enforcement officers. The general definitions of “law enforcement staff” and “security staff” recognize this distinction and allow DHS to tailor its rule to the specific contexts at issue.

#### **Definitions Related to Sexual Abuse and Assault (§ 115.6)**

*Sexual abuse.* One commenter stated that the current definition should include language from the definition implemented by DOJ, including unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures or actions of a derogatory or offensive sexual nature. The commenter encouraged DHS to add this language because the actions that are described in DOJ’s definition seem more likely to occur than the proposed rule’s description of sexual abuse. A number of advocacy groups commented that the part of the proposed sexual abuse definition addressing threats, intimidation, harassment, profane or abusive language, or other actions or communications coercing or pressuring into a sexual act, should include “requests” and should also encompass

“encouraging” detainees to engage in such an act.

It appears that the commenters are comparing the DHS definition of sexual abuse to the definition of sexual harassment in DOJ’s standards. DHS has not added this language because the DHS standards already include a similar definition of sexual harassment within the current DHS definition of sexual abuse. Specifically, the DHS definition of sexual abuse in § 115.6 forbids “threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.” DHS believes that this coverage under the definition of sexual abuse is sufficient and accomplishes the objective sought by the commenter. DHS also notes that the standards include sexual harassment in the definition of staff on detainee sexual abuse.

Regarding the proposed rule’s provision on inappropriate visual surveillance, certain advocacy groups requested that the standards specifically include within the definition of sexual abuse acts of voyeurism by staff members, contractors, or volunteers. The commenters suggested that explicitly incorporating voyeurism into the definition was necessary in order to capture the complete scope of prohibited behavior. The suggested more expansive definition would include unnecessary or inappropriate visual surveillance of a detainee, including requiring a detainee to expose his or her buttocks, genitals, or breasts, or unnecessarily viewing or taking images of all or part of a detainee’s naked body or of a detainee performing bodily functions.

DHS has considered this suggested addition to the standards and the DHS final rule now expressly includes voyeurism by a staff member, contractor, or volunteer as a type of sexual abuse. Voyeurism is defined as “inappropriate visual surveillance of a detainee for reasons unrelated to official duties. Where not conducted for reasons relating to official duties, the following are examples of voyeurism: Staring at a detainee who is using a toilet in his or her cell to perform bodily functions; requiring an inmate detainee to expose his or her buttocks, genitals, or breasts; or taking images of all or part of a detainee’s naked body or of a detainee performing bodily functions.”

One commenter suggested that the sexual abuse definition account for a detained child’s legal inability to consent to sex with an adult. DHS recognizes the extreme importance of protecting minors while in custody and remains fully committed to that end.

DHS notes that existing Federal and State laws legally preclude the possibility of consent by a detainee to sexual relations with a staff member while in custody, and moreover provide that any such sexual acts be criminalized, regardless of the age of the detainee. DHS considers the existence of these legal prohibitions outside the context of the regulation to authoritatively establish the legal inability of a child to consent to sex with an adult while in detention. For this reason, DHS declines to incorporate additional language to the regulation in response to the comment.

**Coverage of DHS Immigration Detention Facilities (§ 115.10); Coverage of DHS Holding Facilities (§ 115.110)**

*Summary of Proposed Rule*

The standards contained in the proposed rule clarified that ICE immigration detention facilities are governed by Subpart A of the rule. DHS holding facilities are governed by Subpart B. DHS recognizes that to effectively prevent, detect, and respond to sexual abuse in its facilities, DHS must have strong standards appropriate to each unique context. Immigration detention facilities and holding facilities are different by nature and need to have a respectively different set of standards tailored to each of them for an effective outcome.

*Changes in Final Rule*

DHS is adopting the regulation as proposed.

*Comments and Responses*

*Comment.* Regarding coverage, one organization expressed concern that agency policies should include zero tolerance of sexual abuse during transportation of detainees in DHS custody, as well as in detention facilities. The group suggested stating in Subpart B's coverage standard that the standard covers transportation to or from DHS holding facilities in addition to holding facilities themselves.

*Response.* Please see DHS's response in the discussion of § 115.5 above.

**Zero Tolerance; PSA Coordinator (§§ 115.11, 15.111)**

*Summary of Proposed Rule*

The standards in the proposed rule required that each covered agency have a written zero-tolerance policy toward sexual abuse, outlining the agency's approach to preventing, detecting, and responding to such conduct. DHS also proposed that each covered agency appoint an upper-level, agency-wide PSA Coordinator to oversee agency

efforts to comply with the DHS standards and that each immigration detention facility covered by Subpart A have its own written zero-tolerance policy and appoint a Prevention of Sexual Assault (PSA) Compliance Manager to oversee facility efforts in this regard.

*Changes in Final Rule*

DHS is adopting the regulation as proposed, with one technical revision to the PSA Coordinator's title.

*Comments and Responses*

*Comment.* The organization that suggested changes regarding covering transportation in § 115.110 also recommended revising paragraph (b) to include in the PSA Coordinator's responsibilities for protecting detainees in the agency's custody, including detainees being transported to or from its holding facilities while in DHS custody, in addition to those held in all of its holding facilities.

*Response.* As previously stated, DHS has zero tolerance for all forms of sexual abuse and assault of individuals in custody. This applies to DHS custodial transport to and from holding facilities and immigration detention facilities, between a holding facility and a detention facility, and for the purposes of removal. The PSA Coordinators will oversee all component efforts to comply with the standards, including zero tolerance. It is not necessary to revise the rule to include a reference to transportation.

*Comment.* Former NPREC Commissioners noted that under the proposed standards, facilities have considerable discretion to determine their sexual abuse policies; therefore, prior to permitting detainees to be confined in a facility, DHS should ensure its policies are consistent with PREA standards.

*Response.* DHS concurs that it is important to ensure that facility policies are consistent with PREA standards. Section 115.11(c) already requires DHS to review each facility's sexual abuse and assault policy, as required by subsection (c). Therefore, no additional changes are required.

*Comment.* An advocacy group commented generally that DHS should allocate sufficient staff and provide them with the authority and time to continually monitor the policies enacted by the facilities to reflect the zero-tolerance goal.

*Response.* DHS recognizes the importance of dedicating personnel to implement, monitor, and oversee these efforts and has employed a full-time PSA Coordinator. Section 115.11(b)

already provides that the PSA Coordinator shall have sufficient time and authority to monitor implementation.

**Contracting With Non-DHS Entities for Confinement of Detainees (§§ 115.12, 115.112)**

*Summary of Proposed Rule*

The standards contained in the proposed rule required that covered agencies that contract for the confinement of detainees include in new contracts or contract renewals the other party's obligation to comply with the DHS sexual abuse standards.

*Changes in Final Rule*

DHS revised §§ 115.12 and 115.112 to require the agency to include the entity's obligation to adopt and comply with these standards in all substantive contract modifications.

*Comments and Responses*

*Comment.* Multiple commenters suggested that contract facilities or IGSA facilities housing detainees should be required to adopt DHS sexual abuse standards within a specified timeframe, with some urging no delay in application and others urging compliance within 90 days or a year after the standards' effective date. The commenters believe that without a specific timeframe, or compliance schedule similar to that applicable to DHS's own facilities, contract facilities could delay implementing these standards. Commenters expressed concern over the potential lag between the standards' effective date and their implementation at non-DHS facilities.

Among the commenters that recommended requiring adoption of the standards during any contract modification, some commenters suggested a set timeline of 90 days after the standards' effective date for DHS to proactively initiate contract modification or modification-related negotiations with any existing non-DHS facility. One such commenter suggested eliminating "contract renewals" as a scenario for when compliance with the standards would be triggered. The commenters also proposed that any such negotiations conclude within 270 days of the standards' effective date. Additionally the commenters, in paragraph (b), would also include "contract modifications" in the monitoring process, to allow DHS to monitor compliance for modified contracts. Commenters also recommended that DHS create a new requirement that any failure to adopt the changes via contract in the specified

timeframe would disqualify the facility from continuing to detain individuals until remedied. One group suggested that compliance with the proposed 90-day timeline be verified by an independent auditing process.

*Response.* Based on ICE's past experience with the contract negotiation process, it can take one year or more to complete a contract renegotiation for a single detention facility. ICE cannot reasonably conduct such large numbers of contract negotiations simultaneously in such a short period of time. Given that there are 132 covered immigration detention facilities that would need to adopt the standards, without some additional appropriation to address these staffing and logistical challenges, bringing contract negotiations to conclusion within one year is not operationally feasible.

DHS remains committed to protecting its immigration detainees from incidents of sexual abuse and assault. With that goal in mind, DHS, through ICE, will endeavor to ensure that SPCs, CDFs, and dedicated IGSAs adopt the standards set forth in this regulation within 18 months of the effective date. These facilities currently hold more than half of the immigration detainees in ICE custody and therefore should be DHS's highest priority.

DHS, through ICE, will also make serious efforts to initiate the renegotiation process with the remaining covered facilities as quickly as operational and budgetary constraints will allow. As a matter of policy, DHS will seek to prioritize implementation to reduce the most risk as early as possible, taking into consideration all relevant factors, including the resources necessary to reopen and negotiate contracts, the size and composition of each facility's detainee population, the marginal cost of implementing the standards of each facility, the detention standards currently in effect at each facility, the prevalence of substantiated incidents of sexual abuse at each facility, and other available information related to the adequacy of each facility's existing safeguards against sexual abuse and assault.

In further recognition of DHS's pledge to abide by the principles set forth in this regulation, DHS has revised §§ 115.12 and 115.112 to require components to include these standards in contracts for facilities that undergo any substantive contract modification after the effective date. Under this provision, DHS would include the PREA standards in any contract modification that affects the substantive responsibilities of either party. (Covered substantive contract modifications

would include, for example, changes to the bed/day rate or the implementation of stricter standards, but not the designation of a new Contracting Officer.) This change endeavors to ensure that facilities come into compliance with the regulation at a faster rate, but not in a manner that is operationally impossible for DHS.

*Comment.* Former Commissioners of NPREC raised an issue regarding applicability of DOJ and DHS standards. The former Commissioners recommended that DHS clarify which of the two sets of standards applies to immigration detainees held in state prisons or jails, lock-ups, or community residential settings. According to the comment, DOJ's standards are "facility driven" as opposed to driven by sub-population of inmates. "If a facility meets one of the definitions for covered facility types under DOJ's Standards, then the Standards apply to the entire facility." The former Commissioners therefore urged that DHS clarify the application of DHS standards in facilities also covered by the DOJ standards.

The former Commissioners also recommended that DHS ensure that its detainees benefit from the most protective standards possible, regardless of whether their detainees happened to be placed in a DOJ-covered facility. To that end, the former Commissioners recommended that DHS avoid comingling DHS detainees with other populations. This would ease application of immigration standards to immigration detainees and provide them the special protections they need, so—for facilities housing inmates and detainees—housing detainees separately throughout their time in custody is necessary.

*Response.* As noted above, DHS, through ICE, will endeavor to ensure that SPCs, CDFs, and dedicated IGSAs adopt the standards set forth in this regulation within 18 months of the effective date. These facilities currently hold more than half of the immigration detainees in ICE custody and therefore are appropriately DHS's highest priority. When DHS and a facility agree to incorporate these standards into a contract, such standards are binding on the facility with respect to DHS detainees, notwithstanding any separate obligations the facility might have under the DOJ rule. DHS's standards, though not identical with DOJ's standards, are not inconsistent with them either.

While some immigration detention facilities only house immigration detainees, for operational and financial reasons, ICE cannot rely solely on such facilities to meet the agency's detention

needs. As a result, some detainees are held in non-dedicated IGSAs and a significant number (approximately 20 percent of the average daily population of ICE detainees) are also held in BOP facilities or state, local, and private facilities operated under agreement between the servicing facility and a component of DOJ. Such agreements are often negotiated and executed by USMS. DHS components can benefit from such agreements as authorized users and via other indirect arrangements, which often do not afford DHS an opportunity to negotiate specific terms and conditions at length. For these facilities, DHS relies on DOJ's national standards to provide a baseline of PREA protections.

In part because DHS does not currently maintain privity of contract with these facilities, however, DHS does not consider them to fall within the ambit of §§ 115.12 and 115.112. The standards set forth in Subpart A do not apply to facilities used by ICE pursuant to an agreement with a DOJ entity (e.g., BOP facilities) or between a DOJ entity (e.g., USMS) and a state or local government or private entity. These facilities are not immigration detention facilities as the term is defined in the regulation because they are not "operated by or pursuant to contract with U.S. Immigration and Customs Enforcement." Instead, the servicing facility, including its immigration detainees, is covered by the DOJ PREA standards.

Similarly, holding facilities that are authorized for use by ICE and CBP pursuant to an agreement between a DOJ entity and a state or local government or a private entity are not included in the definition of holding facility in § 115.5 or the scope provision in § 115.112 because DHS is not a party to the agreement with the servicing facility and these facilities are not under the control of the agency.

DHS recognizes that facilities might find it easier to comply with a single set of standards, rather than multiple standards simultaneously. DHS has attempted to strike a balance that covers as many detainees as possible, without imposing unnecessary burdens on facilities. DHS's approach in this area is consistent with the Presidential Memorandum, which specifically directed Federal agencies with confinement facilities that are not already subject to the DOJ final rule to establish standards necessary to satisfy the requirements of PREA. The Memorandum stated clearly that each agency is responsible for, and must be accountable for, the operations of its own confinement facilities. VAWA 2013

confirmed this view, by requiring that DHS finalize standards for “detention facilities operated by the Department of Homeland Security and . . . detention facilities operated under contract with the Department.” The latter category “includes, but is not limited to contract detention facilities and detention facilities operated through an intergovernmental service agreement with the Department of Homeland Security.” 42 U.S.C. 15607.

In short, DHS believes that facilities will know which standards to apply based on their relationship with DHS and the agreements they have executed. DHS and DOJ are committed to ensuring smooth implementation of their respective standards. If implementation reveals that facilities would benefit from further guidance regarding the applicability of each agency’s standards, DHS and DOJ will work to provide such guidance. DHS makes no changes to the regulatory text as a result of this comment.

*Comment.* One commenter suggested that DHS further clarify more directly how the standards apply to private parties contracting with the government, noting concern about a possibility that contractual remedies will serve as insufficient deterrents against such private contractors who may potentially violate the standards.

*Response.* DHS recognizes the concern of commenters that private entities running detention facilities adequately comply with these standards. DHS currently enforces detention standards through contracts with facilities and believes that PREA will be effectively implemented through new contracts, contract renewals, and substantive contract modifications. DHS, through ICE, can transfer detainees from facilities that do not uphold PREA standards after adoption and it can terminate a facility’s contract, which ICE has done in the past and will continue to do if a facility is unable to provide adequate care for detainees.

*Comment.* A range of advocacy groups suggested adding a paragraph to § 115.12 that would mirror the provision in Subpart B’s similar proposed standard at § 115.112. The change would require all standards in Subpart A that apply to the government also apply to the contractor and all rules that apply to staff or employees also apply to contractor staff; the groups expressed concern that without this language, poorly performing contractors could attempt to excuse themselves when failing to fully comply with the standards.

*Response.* DHS declines to add paragraph (c) from § 115.112 to § 115.12

based on the inherent differences between the facilities covered by Subpart A and Subpart B, respectively. To the extent appropriate, Subpart A applies to DHS employees and contractors alike; as § 115.5 states, the term “staff” includes “employees or contractors of the agency or facility, including any entity that operates within the facility.”

DHS included § 115.112(c) in Subpart B because DHS rarely uses contractors to run holding facilities and would only need to use contractors on a short-term basis. In rare instances where DHS contracts for holding facility space, paragraph (c) provides an additional layer of protection; despite the short-term nature of the detention, contractors must be fully aware of the obligation to abide by the standards set forth in this rule.

*Comment.* Former NPREC Commissioners suggested that the standard include a requirement that all contracts entered into between DHS and contracting facilities directly, through IGSA’s, or through other arrangements include contract language requiring that the facilities abide by the applicable PREA standards. Some commenters suggested provisions regarding consequences for failure of contract facilities to comply with PREA, including taking away funding from noncompliant facilities, removing detainees, and closer monitoring or even criminal or civil sanctions for facilities that fail to comply repeatedly. Relatedly, some members of Congress have suggested strict and tangible sanctions for noncompliance, include termination of contracts, to ensure that individuals will not be housed in facilities that cannot protect them.

*Response.* As noted above, the final rule requires that the DHS include in new contracts, contract renewals, and substantive contract modifications the entity’s obligation to adopt and comply with the standards set forth in this regulation. DHS disagrees about the need to articulate punitive measures for noncompliant facilities in the regulation. DHS, through ICE, has longstanding and well-established procedures for sanctioning underperforming facilities that violate its detention standards, including by putting any detainee in danger. For example, if ICE determines that a facility is not compliant with relevant detention standards, it can reduce the number of detainees held by the facility or impose a corrective action plan on the facility. If ICE determines that detainees remain at risk, ICE will terminate the facility’s contract and remove all detainees from the facility.

*Comment.* One advocacy group suggested requiring robust oversight of the standards’ implementation in contract facilities, including descriptions of the manner in which contract monitoring will be conducted, the frequency of monitoring, and the party or parties responsible for monitoring.

*Response.* Once the standards set forth in this regulation are adopted by a facility, the facility will be expected to comply with them and will be subjected to DHS and ICE’s multi-layered inspection and oversight process which will include an evaluation of compliance with these standards.

Currently at ICE, ERO contracts for independent inspectors to review conditions of confinement at ICE facilities on an annual or biennial basis, with follow-up inspections scheduled as required. All ICE facilities with an average daily population of 50 or more detainees are inspected on an annual basis. In addition, ERO employs 40 on-site Federal Detention Service Managers (DSMs) at key ICE detention facilities to monitor and inspect components of facility operations for compliance with ICE detention standards. Currently, DSMs are assigned to 52 detention facilities, covering approximately 83 percent of ICE’s detained population. ERO also contracts for a Quality Assurance Team (QAT) comprised of three subject matter experts in the fields of corrections and detention. The QAT performs quality assurance reviews at the facilities that have assigned DSMs. The purpose of the QAT reviews is to ensure that DSMs are effectively monitoring the operations of the facility and addressing concerns.

The ICE Office of Detention Oversight (ODO), within the Office of Professional Responsibility (OPR), conducts compliance inspections at selected detention facilities where detainees are housed for periods in excess of 72 hours. ODO selects facilities to inspect based on a variety of considerations, including significant compliance issues or deficiencies identified during ERO inspections, concerns identified or raised by the DSMs, detainee complaints, and allegations reported or referred by the DHS Office of Inspector General (OIG) or the ICE JIC. ODO provides its compliance inspection reports, recommendations and identified best practices to ERO and ICE leadership who ensure appropriate corrective action plans are developed and put in place at detention facilities.

At the Department level, CRCL reviews allegations related to civil rights and civil liberties issues in immigration detention facilities. The OIG also may

respond to certain complaints by conducting investigations. The OIG will refer certain complaints to ERO.

### **Detainee Supervision and Monitoring (§§ 115.13, 115.113)**

#### *Summary of Proposed Rule*

The standards contained in the proposed rule required the agency or the facility to make its own comprehensive assessment of adequate supervision levels, taking into account its use, if any, of video monitoring or other technology. The agency or facility must reassess such adequate supervision and monitoring at least annually and the assessment will include an examination of the adequacy of resources it has available to ensure adequate levels of detainee supervision and monitoring. Each immigration detention facility must also conduct frequent unannounced security inspections to identify and deter sexual abuse of detainees.

#### *Changes in Final Rule*

DHS added two factors for the facility to consider when determining adequate levels of detainee supervision and determining the need for video monitoring. These factors are (1) generally accepted detention and correctional practices and (2) any judicial findings of inadequacy.

DHS also made a minor change to § 115.13(d). Instead of prohibiting staff from alerting others that “supervisory rounds” are occurring, DHS prohibits staff from alerting others about the “security inspections.” The purpose of this change is to make the provision more consistent with the rest of the paragraph, which refers to such checks as security inspections rather than supervisory rounds.

#### *Comments and Responses*

*Comment.* A number of commenters requested generally that this section more closely resemble DOJ’s standards regarding supervision and monitoring. A human rights advocacy group requested that DOJ’s more specific list of factors in paragraph (a) be included. Under this approach, the rule would explicitly require facilities to consider, when determining adequate staffing levels, past findings of supervision inadequacies by courts or internal or external oversight bodies. These considerations would be in addition to the considerations set forth in the proposed section’s paragraph (c), which provides that “the facility shall take into consideration the physical layout of each facility, the composition of the detainee population, the prevalence of

substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.”

*Response.* DHS respectfully disagrees with the notion that its supervision and monitoring provision must include the same enumerated factors included in DOJ’s regulation regarding facilities. DOJ’s rule is intended to cover a broad range of Federal and State facilities managed and overseen by a variety of different government organizations. By contrast, ICE oversees detainee supervision and monitoring at all immigration detention facilities. ICE uses its well-established detention standards to ensure that facilities are properly and effectively supervising detainees. DHS agrees, however, that a number of factors from DOJ’s regulation have application in the DHS context. DHS has therefore incorporated into its regulation the following two additional factors: (1) Generally accepted detention and correctional practices and (2) any judicial findings of inadequacy.

*Comment.* A number of comments addressed the requirements for security inspections. Regarding the standard in § 115.113 for holding facilities specifically, one organization suggested that DHS add a requirement that such facilities conduct periodic unannounced security inspections just as in Subpart A, stating that video monitoring is not a substitute for adequate staffing and also suggesting that the clauses in both proposed sections allowing video monitoring where applicable be struck from paragraph (a) and instead included in paragraph (b) as a part of the requirement to develop and document supervision guidelines.

*Response.* DHS defines a holding facility similarly to DOJ’s definition of “lockup.” The DOJ rule requires unannounced security inspections of adult prisons and jails, but not of lockups. Similarly, DHS provides for such inspections in its immigration detention facilities, but not in its holding facilities. This is because holding facilities, like lockups, generally provide detention for much shorter periods of time.

*Comment.* Commenters suggested adding another requirement for intermediate-level or higher-level supervisors to conduct more inspections.

*Response.* DHS notes that by focusing on having only mid- to high-level supervisors conduct inspections, the facilities would not be effectively accomplishing the main purpose of the

provision, which is to deter sexual assault and abuse. DHS believes that facility staff are trained and qualified to conduct security inspections and that these inspections are an effective and efficient deterrent to sexual abuse and assault. Because deterrence is the primary purpose of this requirement, and because, in its experience, non-supervisory inspections are an effective deterrent, DHS declines to make the suggested revisions.

*Comment.* Another comment criticized § 115.13 generally for not articulating the frequency (e.g., regular inspections) or location of the inspections (e.g., throughout the facility). The commenter believed this would result in minimal deterrent effect and low likelihood of identifying misconduct as it occurs.

*Response.* DHS notes that paragraph (d) provides for unannounced security inspections, which may occur with varying frequency and in any part of a facility. These unannounced inspections are meant to act as a deterrent, and are not meant to catch detainees and/or staff in acts of sexual assault or abuse. Unannounced security inspections are an effective tool used by facilities to deter a wide range of detainee and employee misconduct.

*Comment.* Multiple commenters suggested additional requirements for the proposed standards on developing and documenting comprehensive detainee supervision guidelines. One comment recommended that DHS require facility-specific development and implementation of a concrete staffing and monitoring plan, with a specific provision for adequate numbers of supervisors. Another comment recommended that DHS adopt an analogue to paragraph (b) of the DOJ standard, which requires that “the facility shall document and justify all deviations from the [staffing] plan.” Comments also suggested that the agency also document any needed adjustments identified in the annual review, and that—when not in compliance with the staffing plan—a facility should be required to document and justify all deviations, for measuring and compliance during auditing and oversight.

*Response.* These standards require that each immigration detention facility develop and document comprehensive detainee supervision guidelines, to ensure that the facility maintains sufficient supervision of detainees to protect detainees against sexual abuse. As explained above, the sufficiency of supervision depends on a variety of factors, including, but not limited to, the physical layout of each facility, the



composition of the detainee population, and each facility's track record in detainee protection.

Currently, NDS relies on performance-based inspections to determine whether a facility has adequate supervision and monitoring. ICE's 2008 PBNDS and 2011 PBNDS require that facility administrators determine the security needs based on a comprehensive staffing analysis and staffing plan that is reviewed and updated at least annually. Section 115.13 enhances ICE's detention standards by requiring that facilities develop and document comprehensive detainee supervision guidelines which will be reviewed annually. Unlike the facilities that fall under DOJ's final rule, ICE has direct oversight over immigration detention facilities and can, through its well-established inspection process, effectively determine whether a facility's detainee supervision guidelines are inadequate and whether a facility is not providing adequate supervision and monitoring.

Furthermore, requiring every facility to adopt specific staffing ratios under this regulation could significantly increase contract costs without commensurate benefits. In short, DHS has determined that it can make more effective use of limited resources by mandating comprehensive guidelines that each facility will review annually and auditors will examine on a regular basis.

DHS declines to require facilities to document deviations from supervision guidelines because we do not believe this additional documentation would materially assist ICE monitoring of conditions generally and compliance with the supervision guidelines in particular. Through its comprehensive facility oversight and inspection programs, ICE has sufficient tools to ensure that facilities effectively supervise detainees and comply with these regulations. And if ICE determines after an inspection that a facility has failed to meet the standards set forth in § 115.13 or failed adequately justify deviations from supervision guidelines, ICE has direct authority to remove detainees from the facility. DHS has therefore elected to proceed with the proposed rule's approach.

*Comment.* One group suggested that, in regard to the standard on determining adequate levels of detainee supervision and video monitoring in paragraph (c), an annual review should assess effectiveness and identify changes that may be necessary to improve effectiveness and allow implementation.

*Response.* As discussed above, staffing levels, detainee supervision, and video monitoring are inspected on

a regular basis. Once a facility adopts these standards, it also will be subject to regular auditing by an outside entity pursuant to the audit requirement in this regulation. Under section 115.203, such audits must include an evaluation of (1) whether facility policies and procedures comply with relevant detainee supervision and monitoring standards and (2) whether the facility's implementation of such policies and procedures does not meet, meets, or exceeds the relevant standards. 6 CFR 115.203(b)–(c).

#### **Juvenile and Family Detainees (§§ 115.14, 115.114)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule required juveniles to be detained in the least restrictive setting appropriate to the juvenile. The Subpart A standard required immigration detention facilities to hold juveniles apart from adult detainees, minimizing sight, sound, and physical contact, unless the juvenile is in the presence of an adult member of the family unit, and provided there are no safety or security concerns with the arrangement. That standard further required that facilities provide priority attention to unaccompanied alien children, as defined by 6 U.S.C. 279, who would be transferred to an HHS/ORR facility.

##### *Changes in Final Rule*

DHS made minor changes to § 115.14(a), (d), and (e) of the final rule. The “in general” and “should” language that was suggested in the NPRM was removed in paragraph (a) to ensure a clear requirement that juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

DHS made a technical change to paragraph (d) to maintain consistency between this regulation and the statutory provision at 8 U.S.C. 1232(b)(3). DHS clarified that paragraph (e) does not apply if the juvenile described in the paragraph is not also an unaccompanied alien child.

Regarding the Subpart B standard at § 115.114, DHS added the same change in paragraph (a) as in § 115.14(a) for consistency. DHS also added more specific language in paragraph (b) to require that unaccompanied juveniles generally be held separately from adult detainees. The final standard also clarifies that a juvenile may temporarily remain with a non-parental adult family

member if the family relationship has been vetted to the extent feasible, and the agency determines that remaining with the non-parental adult family member is appropriate, under the totality of the circumstances.

##### *Comments and Responses*

*Comment.* Commenters expressed concern that the standards should not allow for housing of juveniles in adult facilities, particularly if not held with adult family members. One human rights advocacy group stated that as proposed, the standard on separating juveniles does not set forth specific steps to prevent unsupervised contact with adults.

*Response.* It is DHS policy to keep children separate from unrelated adults whenever possible. To take into account, in part, the resulting settlement agreement between the legacy INS and plaintiffs from class action litigation, known as the *Flores v. Reno* Settlement Agreement (FSA), INS—and subsequently DHS—have put in place policies covering detention, release, and treatment of minors in the immigration system nationwide. Both the FSA and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) inform DHS policies regarding juveniles. There are sometimes instances in which ICE personnel reasonably believe the juvenile to be an adult because the juvenile has falsely represented himself or herself as an adult and there is no available contrary information or reason to question the representation. Under existing policy, ICE officers must base age determinations upon all available evidence regarding an alien's age, including the statement of the alien.

In promulgating these PREA standards, DHS attempted to codify the fundamental features of its policy in regulation, while maintaining a certain amount of flexibility for situations such as brief confinement in temporary holding facilities. Additionally, DHS, through ICE, must and does enforce the Juvenile Justice and Delinquency Prevention Act, which requires that alien juveniles not charged with any offense not be placed in secure detention facilities or secure correctional facilities and not be detained or confined in any institution in which they have contact with adult inmates. *See* 42 U.S.C. 5633.

*Comment.* Former Commissioners of NPREC and other groups recommended that both the Subpart A and B standards require all sight and sound separation from non-familial adults, as DOJ's standard does. Some members of Congress commented generally that the



standards on housing of juveniles should be revisited to be in line with DOJ's standard. For the Subpart A standard, comments suggested more explicit language requiring facilities to separate juveniles by sight, sound, and physical contact to clarify the degree of separation required; they recommended that DHS eliminate the language of "minimizing" such situations.

Regarding the Subpart B standard, a commenter suggested physical contact, sight, and sound restrictions be in place particularly for shared dayrooms, common spaces, shower areas, and sleeping quarters. Similarly, one group comment suggested adding language to define the meaning of "separately" in Subpart B's unaccompanied alien children provision to ensure placement outside of the sight and sound of, and to prevent physical contact with, adult detainees to the greatest degree possible.

*Response.* Regarding Subpart A, DHS does not believe the suggested changes are appropriate, as the DHS standard is tailored to the unique characteristics of immigration detention and the variances among confinement facilities for DHS detainees. With respect to the Subpart A standard for immigration detention facilities, juveniles are primarily held in such facilities under the family residential program. (Rarely, DHS must detain a minor who is not unaccompanied but who is, for example, a lawful permanent resident who has committed a serious crime. In this rare circumstance, DHS uses an appropriate juvenile detention facility which is subject to regular inspection by ICE.) Under the family residential program, juveniles are held with adult family members—not solely with other juveniles as would be the case in the context of DOJ's traditional juvenile settings. Juveniles in the family residential setting for immigration detention may have some contact with adults; however, an adult family member will be present. Given the unique nature of the family detention setting, maintaining the standard's language as proposed is the best and most straightforward way to meet PREA's goals.

The burden of inserting additional specific restrictions would be particularly high because unaccompanied alien children are generally transferred to an HHS/ORR facility within a short period of time—72 hours at most—after determining that he or she is an unaccompanied alien child, except in exceptional circumstances.<sup>10</sup> DHS does not believe

the best approach is to wholly transfer DOJ's standard, which fits the correctional system rather than immigration juvenile detention system, to the DHS context in the manner described by the commenters.

Regarding the Subpart B standard, DHS notes that its standard is consistent with, and in some ways more detailed than, the analogous DOJ standard. Finally, DHS intends that the word "separately" be understood according to the plain meaning of the word. To keep the standards straightforward and easily administrable, DHS declines to create a separate definition of the term for purposes of these standards.

*Comment.* One commenter suggested adding requirements for separation outside of housing units to mirror the DOJ standard's requirement of sight and sound separation. The commenter also recommended adding requirements for direct staff supervision when not separated.

*Response.* Consistent with the reasoning above, DHS does not believe changes to conform with the DOJ standard in this manner are appropriate, as the DHS standard is tailored to the unique characteristics of immigration detention and the variances among confinement facilities for DHS detainees.

*Comment.* An immigration advocacy group commented that it had received preliminary data as a result of a request under the Freedom of Information Act, and that data show thousands of children, including many under the age of 14, have been housed in adult facilities. The commenter wrote that such a practice would violate the terms and conditions of the FSA, which sets forth a policy for the detention, release, and treatment of minors in the custody of then-INS and requires that unaccompanied minors be generally separated from unrelated adults. The commenter also wrote that PREA regulations that discourage but do not prohibit this practice are insufficient to protect this exceptionally vulnerable population from potential sexual abuse.

*Response.* DHS has examined available data on this subject, and determined that the commenter's conclusions do not reflect ICE practices. DHS assures the commenter as follows:

- Any individual who claims to be a juvenile during processing or while in detention is immediately separated from the general adult population pending the results of an investigation into the claim;

- All unaccompanied alien children are required to be transferred to an HHS/ORR facility within 72 hours after determining that the child is an unaccompanied alien child, except in exceptional circumstances;

- As stated in § 115.14(b), juveniles will be held with adult members of the family unit only when there are no safety or security concerns with the arrangement; and

- As indicated in § 115.114, if juveniles are detained in holding facilities, they shall generally be held separately from adult detainees. Where, after vetting the familial relationship to the extent feasible, the agency determines it is appropriate, under the totality of the circumstances, the juvenile may temporarily remain with a non-parental family member.

*Comment.* Some commenters suggested that more explicit language be incorporated in the standards to prevent abusive use of restrictive confinement in all types of facilities. Multiple groups expressed concern that administrative segregation for juveniles must be limited. One group stated that any separation of juveniles from adult facilities, which it supported, should not subject them to harmful segregation or solitary confinement. Others suggested strict limits, including for all forms of protective custody, with a collection of groups suggesting an explicit prohibition on administrative segregation and solitary confinement if needed to comply with the juvenile and family detainee requirements. The groups suggested removing the phrase "[in] general" in paragraph (a) of the Subpart A and B standards regarding making juvenile detention as least restrictive as possible. One organization suggested requirements for when isolation is necessary to protect a juvenile, including documenting the reason therefor, reviewing the need daily, and ensuring daily monitoring by a medical or mental health professional.

*Response.* Upon reconsideration based upon these comments, DHS has concluded that in the interest of clarity removing the introductory words "[in] general" from paragraph (a) is appropriate. However, DHS does not see a need for an explicit regulatory prohibition on administrative segregation, solitary confinement, and the like in this context; concerns about overly restrictive confinement for juveniles should be alleviated by the strong standards in both subparts—further strengthened in this final rule—requiring juveniles to be detained in the least restrictive setting appropriate to the juvenile's age and special needs, taking into account safety concerns,

<sup>10</sup> ICE will occasionally and for short periods of time house unaccompanied alien children whose

transfer to HHS/ORR is pending in IGSA juvenile detention facilities. These facilities are subject to inspection and oversight by ICE.

laws, regulations, and legal requirements. Administrative segregation and solitary confinement clearly do not comply with the requirement that juveniles be detained in the “least restrictive setting appropriate.”

Additionally, the TVPRA mandates that, except in exceptional circumstances, DHS turn over any unaccompanied child to HHS/ORR within 72 hours of determining that the child is an unaccompanied alien child and that ORR promptly place the child in the least restrictive setting that is in the child’s best interest. *See* 8 U.S.C. 1232(b)(3), (c)(2)(A).<sup>11</sup> Therefore, the types of segregation described by the commenters are generally neither feasible nor permissible for such children.

These concerns appear even further diminished when taking into account that under ICE policy juveniles are to be supervised in an alternate setting which would generally not include administrative segregation. Because Subpart A of these standards implements safeguards that will allow a juvenile to be in the presence of an adult member of the family unit when no safety or security concerns exist, accompanied children remaining in immigration detention will not present situations of serious concern either. For these same reasons, DHS declines to adopt the additional suggested requirements regarding isolation.

*Comment.* Multiple commenters recommended that when possible and in the best interest of the juvenile, family units should remain intact during detention. Some commenters suggested that DHS include this principle in the regulation. Some commenters also recommended expanding the definition of family unit to account for more expansive understandings of parentage and guardianship in many countries of origin. They suggested that if there are concerns about a child’s safety with a family member, other than a parent or legal guardian, DHS assess the relationship and safety and make appropriate placements, including admitting such a family unit while

providing separate housing for the child in the same facility.

*Response.* For immigration detention facilities, DHS has set a regulatory “floor” in § 115.14 and in the regulatory definition of family unit. This suite of requirements provide that facilities do not hold juveniles apart from adults if the adult is a member of the family unit, provided there are no safety or security concerns with the arrangement. DHS holds immigration detention facilities and holding facilities accountable for complying with a range of policy, and now regulatory, requirements.

With respect to the suggestion that DHS add regulatory language addressing intact family unit detention, DHS declines to adopt such a standard. ICE has found that the PREA standards’ definition of family unit and current ICE policy, specifically ICE’s Family Detention and Intake Guidance, has worked well, and to the extent that deficiencies might exist, DHS does not believe that addressing them in regulation would be beneficial to the affected population.

With respect to expanding the regulation’s treatment of the family unit beyond the parent or legal guardian, DHS declines to expand the “family unit” definition, given the legal requirement for DHS to transfer unaccompanied alien children to HHS, generally within 72 hours of determining that the child is an unaccompanied alien child. *See* 8 U.S.C. 1232(b)(3). Under the Homeland Security Act of 2002, adopted by the TVPRA, an “unaccompanied alien child” is defined, in part, as a child for whom “there is no parent or legal guardian” either in the United States or available in the United States to provide care and custody. 6 U.S.C. 279(g)(2); *see also* 8 U.S.C. 1232(g). DHS’s definition of “family unit” takes these provisions on unaccompanied alien children into account.

However, for Subpart B, as indicated above, DHS has revised § 115.114 to provide that where the agency determines that it is appropriate, under the totality of the circumstances and after vetting the familial relationship to the extent feasible, the juvenile may temporarily remain with a non-parental adult family member.

*Comment.* One organization suggested a more bright line mandate regarding the proposed standard’s paragraph (d) by requiring the transfer of unaccompanied alien children to HHS/ORR within the timeframe proposed. Another advocacy group emphasized the importance of adequate training and procedures for meeting the timeframe for transfer.

*Response.* DHS has considered these comments; however, the standard as proposed, which mandates the transfer of unaccompanied alien children within the 72-hour timeframe except in exceptional circumstances, is consistent with the TVPRA requirements. DHS is confident that the transfer of unaccompanied alien children to ORR will continue to be carried forth expeditiously. DHS will strictly enforce this regulatory provision, as it will all PREA standards. With respect to the observation on the importance of adequate training and internal procedures to support timely transfer to ORR, DHS takes the comments under advisement for purposes of developing its training curriculum.

*Comment.* An advocacy group recommended ensuring adequate training regarding the enforcement of the standards in general and procedures to avoid sexual abuse or assault of minors in DHS custody. The group suggested that DHS regularly update and implement field guidance regarding age determinations and related custody decisions, consistent with HHS/ORR program instructions.

*Response.* DHS makes changes to existing guidance on issues such as age determinations and custody to reflect new laws, policies, or practices, or as otherwise needed.

*Comment.* A number of comments recommended additional protection for unaccompanied children and families in family facilities specifically. The former NPREC Commissioners recommended that DHS separate provisions dealing with unaccompanied minors from provisions dealing with families. Similarly, one advocacy group stated that, because in its view detaining juveniles in family facilities does not eliminate sexual assault risk and may create a greater risk, DHS should include additional standards specific to the family unit setting.

The former NPREC Commissioners specifically suggested DHS adopt additional standards that would apply to the family facility setting specifically. Proposed provisions included screening/vetting of immigration detainees in family facilities, reporting of sexual abuse in family facilities, investigations in family facilities, and access to medical and mental health care in family facilities. The former Commissioners believe that these additional measures would improve protections in family settings.

*Response.* DHS has considered these comments and declines to make the suggested changes to the proposed standard. DHS grouped the provisions specific to all juvenile detention and

<sup>11</sup> In addition, under 8 U.S.C. 1232(c)(2)(B), if an unaccompanied alien child reaches 18 years of age and is transferred to DHS custody, DHS must consider placement in the least restrictive setting available after taking into account the alien’s danger to self, danger to the community, and risk of flight. Such aliens are eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien’s need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

family detention in one section in order to account for current immigration detention and holding facility practice and policy. Under current practice and policy, a single facility might detain individuals as well as families. (In other words, families detained while travelling or living together may be detained together, even if the facility usually holds detainees as individuals only.) Given this context, DHS believes that streamlining juvenile-specific regulatory standards in a single location strengthens protections, as responsible officials are able to refer to a “one-stop shop” in §§ 115.14 and 115.114. DHS believes that its decision to streamline the standards will not decrease the level of protection to young detainees. DHS will carefully monitor policies and the implementation of this approach and make future policy or regulatory changes if necessary.

With respect to the former NPREC Commissioners’ specific proposals for family unit detention and/or family facilities, ICE already has strong policies in place regarding these matters. These standards and ICE policies include detailed provisions on screening/vetting of immigration detainees, reporting of sexual abuse, investigations, and access to medical and mental health care. Again, in addition to the PREA regulatory standards that address these topics generally for all detainees, the 2007 Residential Standard addressing Sexual Abuse and Assault Prevention and Intervention ensures that individuals in family and residential settings are protected by measures relating to these precise topics.

*Comment.* One commenter recommended that DHS promulgate a separate set of standards to prevent abuse in facilities that detain children. The group expressed that a significantly improved accounting for the needs of and special risks faced by such youth is necessary.

*Response.* DHS has considered this comment and, as a policy matter, declines to set forth differing abuse-prevention standards depending on whether a specific detainee population happens to be present at a specific point in time. Because DOJ’s standards address juvenile-only facilities through either the juvenile justice system or the criminal justice system, DOJ’s standards specifically included a definition of a juvenile facility. See 77 FR 37105, at 37115. But immigration detention facilities and temporary holding facilities are not so easily characterized. For example, family unit detention includes juveniles as well as adults. PREA protections apply to a family unit detention facility in the same manner

that they apply to other immigration detention facilities. The potential benefits of creating a separate set of standards for this context are not apparent, especially in light of the fact that the applicable standards in Part A are robust.

With respect to juveniles detained outside of family units, as noted above, unaccompanied alien children are generally placed with ORR almost immediately; ORR is responsible for making decisions related to the care and custody of such children in their charge. For the 72-hour intervening period up to which DHS may generally maintain custody, concerns about abuse should be alleviated by the strong requirements in both subparts that generally prohibit juveniles from being held with adult detainees in non-familial situations. DHS believes that the final standards on juvenile and family detainees, with the revisions noted above, sufficiently protect juveniles in immigration detention and holding facilities. Due to these factors, DHS has declined to promulgate a wholly separate set of standards for facilities that house juveniles.

*Comment.* One comment suggested explicit requirements that, absent exigent circumstances, juveniles have access to daily outdoor recreation; a number of groups suggested the same standard for large muscle exercise, legally required special education services, and—to the extent possible—other programs.

*Response.* Except to the extent affected by standards designed to prevent, detect, and respond to sexual abuse and assault in detention facilities, access to activities and other services is outside the scope of this rulemaking. Therefore, it is not necessary to include a list of specific kinds of juvenile detainee activities and access in these standards.

*Comment.* One advocacy group suggested a requirement that children have meaningful access to their attorneys during interactions with DHS officials, including such interactions after transfer to HHS/ORR.

*Response.* This comment is outside the scope of this rulemaking. DHS therefore declines to address it here.

#### **Limits to Cross-Gender Viewing and Searches (§§ 115.15, 115.115)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule required policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff

of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or bowel movement under medical supervision. The standards also required that staff of the opposite gender announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing. The proposed rule prohibited cross-gender strip searches except in exigent circumstances, or when performed by medical practitioners and prohibits facility staff from conducting body cavity searches of juveniles, requiring instead that all body cavity searches of juveniles be referred to a medical practitioner.

In Subpart A, the proposed rule generally prohibited cross-gender pat-down searches of female detainees, unless in exigent circumstances. The proposed rule permitted cross-gender male detainee pat-down searches when, after reasonable diligence, staff of the same gender was not available at the time the search or in exigent circumstances. The proposed rule required that any cross-gender pat-down search conducted pursuant to these exceptions be documented. The proposed rule required these policies and procedures to be implemented at the same time as all other requirements placed on facilities resulting from this rulemaking. The proposed rule did not prohibit cross-gender pat-down searches in § 115.115 of Subpart B because of the exigencies encountered in the holding facility environment and the staffing and timing constraints in those small and short-term facilities.

In both immigration detention facilities and holding facilities the proposed rule prohibited examinations of detainees for the sole purpose of determining the detainee’s gender. The proposed rule further required that all security and law enforcement staff be trained in proper procedures for conducting all pat-down searches.

##### *Changes in Final Rule*

In paragraph (i) of § 115.15, DHS changed the text to prohibit a facility from searching or physically examining a detainee for the sole purpose of determining the detainee’s genital characteristics. The previous language used the phrase “gender” instead of “genital characteristics.” The final rule also revises paragraph (i) to allow a detainee’s gender to be determined as part of a standard medical examination that is routine for all detainees during intake or other processing procedures. The final rule also revises §§ 115.15(j)

and 115.115(f) to clarify that pat-down searches must be conducted consistent with all agency policy.

#### Comments and Responses

*Comment.* A number of commenters believed the same prohibition on cross-gender pat-down searches should apply to all detainees. Two sets of advocacy groups and another organization suggested eliminating paragraph (b), which allows cross-gender searches of males in limited circumstances. A number of these and other groups suggested changing paragraph (c) to prohibit all cross-gender pat-down searches, not just for female detainees, except in exigent circumstances; some members of Congress commented in favor of doing so in order to meet “civil confinement standards.”

Multiple commenters, including the NPREC Commissioners, criticized the inclusion of “exigent circumstances” as an exception to cross-gender searches. These commenters perceived the exception to be overly broad. One commenter expressed dissatisfaction with the term “reasonable diligence” for similar reasons. The commenter suggested a standard that would require facilities to have sufficient male and female staff to sharply limit cross-gender pat-down searching of men. Another commenter recommended narrowing the circumstances under which cross-gender pat downs of males are permitted.

A number of advocacy groups suggested explicitly requiring that facilities cannot restrict a detainee’s access to regularly available programming or other opportunities in order to comply with the restrictions on cross-gender viewing and searches.

*Response.* DHS adopted a standard that generally prohibits, with limited exceptions, cross-gender pat-down searches of female and male detainees in order to further PREA’s mandate of preventing sexual abuse without compromising security in detention, or infringing impermissibly on the employment rights of officers.

DHS declines to incorporate the commenters’ suggestion to extend the same coverage for both male and female pat-down searches. Female detainees are especially vulnerable to sexual abuse during a pat-down search because of their disproportionate likelihood of having previously suffered abuse. According to studies, women with sexual abuse histories are particularly traumatized by subsequent abuse.<sup>12</sup> For

detainees who have experienced past sexual abuse, even professionally conducted cross-gender pat-down searches may be traumatic and perceived as abusive. *See Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (*en banc*) (striking down cross-gender pat downs of female inmates as unconstitutional “infliction of pain” when there was evidence that a high percentage of female inmates had a history of traumatic sexual abuse by men and were being traumatized by the cross-gender pat-down searches).

Because females are disproportionately vulnerable to sexual abuse and trauma in the cross-gender pat down context, the prohibition of such pat downs unless there are exigent circumstances is a crucial protection in furtherance of PREA. DHS goes a step further than DOJ by also prohibiting cross-gender pat downs of male detainees, but allows for two exceptions—exigent circumstances, and circumstances where staff of the same gender are not available. The slightly different standard reflects the fact that men are less likely to be abused by cross-gender pat-down searches.

A categorical prohibition on cross-gender pat-down searches of male detainees except in exigent circumstances may not be operationally possible at facilities that detain males but have higher proportions of female staff. Such facilities could not guarantee the availability of adequate numbers of male staff without engaging in potential employment discrimination as a result of attempts to inflate staffing of one gender. Likewise, DHS declines to require facilities to maintain male and female staff sufficient to avoid cross-gender pat-down searches in all cases. Such a mandate could result in the unintended consequence of employment discrimination in facilities.

In response to commenters concerned that prohibiting cross-gender pat downs will lead to a restriction of detainees’ access to programming, DHS notes that any restriction based on a lack of appropriate staffing for pat downs is unacceptable and is not standard practice. DHS will ensure that

*Principles for Women Offenders*, at 37, NIC (2003) (“In addition, standard policies and procedures in correctional settings can have profound effects on women with histories of trauma and abuse, and often act as triggers to retraumatize women who have post-traumatic stress disorder (PTSD).”); Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 *Women’s Stud. Q.* 102, 102 (2004) (“For women with previous histories of abuse, prison life is apt to simulate the abuse dynamics already established in these women’s lives, thus perpetuating women’s further revictimization and retraumatization while serving time.”).

immigration detention facilities are allowing detainees equal access to programming without regard to detainee gender or staffing limitations.

*Comment.* Multiple commenters and other groups expressed concerns with the phrase “incidental to routine cell checks” and suggested it be removed as an exception allowing cross-gender viewing, a sentiment with which former NPREC Commissioners commented they agreed. One commenter suggested the phrase could allow a facility to not take needed steps and then simply claim staff viewing is exempted as incidental.

*Response.* DHS respectfully disagrees with the commenters that viewing incidental to routine cell checks is a gateway for abuse in detention. The final rule provides adequate protection by requiring each facility to have policies and procedures that oblige staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

*Comment.* Two comments suggested removing the provisions that allow cross-gender searches when safety, security, and related interests are at stake, out of apparent concern that the provision’s breadth would allow facilities to “mask abusive use of searches.”

*Response.* Maintaining safety, security and other related interests in detention in order to protect detainees, staff, contractors, volunteers, and visitors is the highest priority for DHS. Searches are an effective and proven tool to ensure the safety of every person in the detention environment. As such, the final standard maintains paragraph (a), which explains why searches are a necessary part of detention.

*Comment.* Two comments suggested that the provision in paragraph (i) regarding preventing searches for the sole purpose of determining “gender” be revised to instead prevent searching solely for determining “genital characteristics.” In the following sentence of the provision, the groups also suggest that “genital status” replace “gender” for when employees can take other steps to determine. Another advocacy group suggested clear standards for classifying as male or female based on a range of issues including self-identification and a medical assessment, and not based solely on external genitalia or identity documents.

Regarding the same provision, another commenter suggested removing “as part of a broader medical examination conducted in private, by a medical practitioner” as a means for making the

<sup>12</sup> See Barbara Bloom, Barbara Owen, and Stephanie Covington, *Gender-Responsive Strategies: Research, Practice, and Guiding*

determination, and instead replacing it with “through a routine medical examination that all detainees must undergo as part of intake or other processing procedure.”

*Response.* After considering the comments regarding paragraph (i), DHS has revised the language to prevent searches for the sole purpose of determining “a detainee’s genital characteristics” instead of “a detainee’s gender.” DHS also clarifies that while medical examinations may be done to determine gender, they must be part of a standard medical exam that is routine for all detainees during intake or other processing procedures. DHS believes that the final rule allows a range of issues to be considered for gender determination. In addition to medical examinations, the determination may be made during conversation and by reviewing medical records.

*Comment.* One advocacy group suggested that searches of transgender and intersex detainees should have clear standards and by default be conducted by female personnel, as the group contends risk of sexual abuse is generally lower when the search is conducted by females.

Two comments suggested adding a provision in paragraphs (j) and (f), for Subparts A and B, respectively, to require that same-gender searches for transgender and intersex detainees be conducted based on a detainee’s gender identity absent a safety-based objection by the detainee. One commenter also suggested that we replace the phrase “existing agency policy” with “these regulations, and compatible agency policy” for clarity.

*Response.* DHS respectfully disagrees with the commenters about including specific provisions within this section describing how pat-down searches should be conducted for transgender and intersex detainees. While a facility can, on a case-by-case basis, adopt its own policies for pat-down searches of transgender or intersex detainees, the agency does not believe that an additional mandatory rule is necessary in this context. DHS believes pat-down searches must be conducted in a professional manner for all detainees and is reluctant to carve out unique pat-down search standards for transgender and intersex detainees. Additional standards may make the regulation more cumbersome to implement on a day-to-day basis.

DHS declines to change the wording of §§ 115.15(j) and 115.115(f) to “compatible agency policy,” because once a facility adopts the standards set forth in this regulation, the facility is expected to abide by the standards in

cross-gender viewing and searches. Existing agency policy will not conflict with these standards. In consideration of the commenter’s concern, however, DHS has revised the final rule for clarity. The final rule now requires pat-down searches to be conducted “consistent with security needs and agency policy, including consideration of officer safety.”

*Comment.* Multiple comments dealt with juvenile pat-down searches. One group suggested that training for employees, contractors, and volunteers having contact with juveniles must include child-specific modules. Another commenter suggested a requirement that male juveniles only be subjected to cross-gender pat-down searches in exigent circumstances.

*Response.* In addition to the “floor” set by this regulation, DHS has established procedures for the custody and processing of juveniles for intake or transfer to ORR. DHS also provides training related to the treatment of juveniles in basic training and in follow-up training courses on a periodic basis. For example, ICE’s Family Residential Standards, applicable to juveniles in the immigration detention facility context, provide that a pat-down search shall only occur when reasonable and articulable suspicion can be documented. The standard on searches also provides a requirement for explicit authorization by the facility administrator or assistant administrator in order for a child resident fourteen years old or younger to be subject to a pat-down, requires facilities to have further written policy and procedures for such searches, and provides that such searches should be conducted by a staff member of the same gender as the detainee. The stated goal of the standard is to ensure that residential searches are conducted without unnecessary force and in ways that preserve the dignity of the individual being searched. All staff must receive initial and annual training on effective search techniques. Standards applicable to all minors held by ICE ensure that the least intrusive practical search method is employed and include similar pat-down parameters to those described above. These policies are the best practices for the agency and subsequent revisions to the final rule are unnecessary.

*Comment.* Regarding the Subpart B-specific paragraph (d), one collective group comment suggested provisions be added requiring agency policies addressing health, hygiene, and dignity in facilities, requiring replacement garments and access to showers when necessary, and allowing separate

showering for transgender and intersex detainees.

*Response.* These issues are of great importance to DHS, but requiring such separate policies would be outside the scope of this rulemaking. Section 115.115(d) requires policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, with limited exceptions.

Given the limited infrastructure of holding facilities (most do not include showers), DHS does not believe that requiring separate showering for transgender and intersex detainees is an efficient use of limited resources.

*Comment.* One commenter suggested the standards should embody American Bar Association Standards on the Treatment of Prisoners. Those standards may provide strategies and devices to allow personnel of the opposite gender of a prisoner to supervise the prisoner without viewing the prisoner’s private bodily areas.

*Response.* DHS believes that the requirements set forth in §§ 115.15 and 115.115 establish sufficient safeguards to limit the cross-gender viewing of detainees by staff, and are fully consistent with the above-referenced standards.

#### **Accommodating Detainees With Disabilities and Detainees With Limited English Proficiency (§§ 115.16, 115.116)**

##### *Summary of Proposed Rule*

The standards in the proposed rule required each agency and immigration detention facility to develop methods to ensure that inmates who are LEP or disabled are able to report sexual abuse and assault to staff directly, and that facilities make accommodations to convey sexual abuse policies orally to inmates with limited reading skills or who are visually impaired. The proposed standards required each agency and immigration detention facility to provide in-person or telephonic interpretation services in matters relating to allegations of sexual abuse, unless the detainee expresses a preference for a detainee interpreter and the agency determines that is appropriate.

##### *Changes in Final Rule*

In response to a comment received regarding another section of the standards, DHS is modifying this language by clarifying that a detainee may use another detainee to provide interpretation where the agency determines that it is both appropriate and consistent with DHS policy.

*Comments and Responses*

*Comment.* One commenter expressed concern that further explanation, outside of “literature describing the protection” for detainees, is necessary.

*Response.* DHS recognizes the importance of ensuring that all detainees, regardless of disability or LEP status, can communicate effectively with staff without having to rely on detainee interpreters, in order to facilitate reporting of sexual abuse as accurately and discreetly as possible and to provide meaningful access to the agency’s sexual abuse and assault prevention efforts. As a result, this standard includes other methods of communication aside from written materials to ensure that every detainee is educated on all aspects of the agency’s efforts to prevent, detect, and respond to sexual abuse. Such methods include in-person, telephonic, or video interpretive services, as well as written materials that are provided in formats or through methods that ensure effective communication with detainees who may have disabilities that result in limited literate and vision abilities.

The final standard, in conjunction with Federal statutes and regulations protecting the rights of individuals with disabilities and LEP individuals, protects all inmates while providing agencies with discretion in how to provide requisite information and interpretation services. The final standard does not go beyond that which is required by statute, but clarifies the agencies’ specific responsibilities with regard to PREA related matters and individuals who are LEP or who have disabilities.

**Hiring and Promotion Decisions (§§ 115.17, 115.117)***Summary of Proposed Rule*

The standards in the proposed rule prohibited the hiring of an individual that may have contact with detainees and who previously engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity. The standards also required that any substantiated allegation of sexual abuse made against staff be taken into consideration when making promotion decisions. The standards in the proposed rule also required a background investigation before the agency or facility hires employees, contractors, or staff who may have contact with detainees. The standards further required updated

background investigations every five years for agency employees and for facility staff who may have contact with detainees and who work in immigration-only facilities.

*Changes in Final Rule*

DHS is adopting the regulation as proposed.

*Comments and Responses*

*Comment.* Commenters suggested changing the background investigation standard’s language to include making the investigation a requirement for staff that work in facilities that house a mix of residents, including non-immigration inmates, but may have contact with detainees. The commenters suggest separating this requirement out from the investigation requirement for all facility staff who work in immigration-only detention facilities for purposes of clarity.

*Response.* DHS recognizes the critical importance of performing thorough background investigations as part of the hiring and promotion process. DHS remains committed to ensuring such background investigations are conducted prior to hiring new staff that may have contact with detainees, or before enlisting the services of any contractor who may have contact with detainees. However, DHS declines to expand the requirement for background investigations to include staff that work in facilities with non-immigration inmates and do not have contact with detainees due to the lack of DHS authority.

*Comment.* Commenters suggested requiring that background investigations for all employees who may have contact with juveniles must include records related to child abuse, domestic violence registries and civil protection orders. One commenter also suggested these background requirements be explicit for all new staff that may have contact with female detainees.

*Response.* DHS agrees that criminal records related to allegations that a potential employee has engaged in child abuse, domestic violence registries and civil protection orders are an important component of the background investigation. The standard background investigation process for employees and staff already includes the search of such records. Therefore, no additional changes are required.

*Comment.* A commenter recommended that DHS investigate to discover if border officers themselves have been hurt as children or adults because of the commenter’s belief that if it is in their history, they will be more apt to abuse others.

*Response.* DHS declines to implement a per se rule that a past history as a victim of abuse will serve as an automatic disqualifier for employment. Past victimization is not necessarily a useful indicator of future likelihood to engage in abuse. Moreover, DHS believes that any blanket rule disqualifying past victims of abuse from employment would be discriminatory and cannot be accepted.

*Comment.* Regarding the Subpart A standard on hiring and promotion, a commenter stated that it is unclear why paragraph (g)—applying the requirements of the section otherwise applicable to the agency also to contract facilities and staff—only appears in this section on hiring and promotion issues, rather than in all standards.

*Response.* DHS included § 115.17(g) to clarify that any standards applicable to the agency also extend to any contracted facilities and staff, as well. By its terms, much of the rest of the regulation also applies to non-DHS facilities, to the extent that they meet the definition of immigration detention facility under Subpart A. Although paragraph (g) may be redundant, DHS is retaining it for clarity nonetheless.

**Upgrades to Facilities and Technologies (§§ 115.18, 115.118)***Summary of Proposed Rule*

The standards in the proposed rule required agencies and facilities to take into account how best to combat sexual abuse when designing or expanding facilities and when installing or updating video monitoring systems or other technology.

*Changes in Final Rule*

DHS is adopting the regulation as proposed.

*Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

**Evidence Protocols and Forensic Medical Examinations (§§ 115.21, 115.121)***Summary of Proposed Rule*

The standards contained in the proposed rule required agencies and facilities responsible for investigating allegations of sexual abuse to adopt a protocol for the preservation of usable physical evidence as well as to provide detainee victims access to a forensic medical examination at no cost to the detainee. The standard further required that such developed protocols be appropriate for juveniles, where applicable, and that outside victim

services be available after incidents of sexual abuse to the extent possible.

In situations when the component agency or facility is not responsible for investigating alleged sexual abuse within their facilities, the proposed standards required them to request that the investigating entity follow the relevant investigatory requirements set out in the standard.

#### *Changes in Final Rule*

DHS made one change to this provision, providing that a Sexual Assault Forensic Examiner (SAFE) or a Sexual Assault Nurse Examiner (SANE) should be used where practicable.

#### *Comments and Responses*

*Comment.* With respect to forensic medical examinations, some advocacy groups commented that before a child undergoes such an examination or interview, facility officials should contact and provide advance notice to the juvenile's legal guardian or other appropriate person or entity. For unaccompanied alien children, the groups suggest requiring the agency to immediately notify and consult with HHS/ORR regarding the forensic examination and facilitate the immediate transfer upon request of ORR and the juvenile. One commenter suggested adding a provision in case a legal guardian is an alleged perpetrator, in which case the agency should be required to notify a designated state or local services agency under applicable mandatory reporting laws.

*Response.* DHS declines to make the suggested revisions because they would have no practical application in this context. First, it would not be appropriate to immediately transfer a juvenile who was sexually assaulted, even if requested by ORR and the juvenile, as the juvenile should first be referred to an appropriate medical care professional and local law enforcement agency, potentially in conjunction with the appropriate child welfare authority. Responsibility for determining who has legal authority to make decisions on behalf of the juvenile would lie with the investigating law enforcement agency and the medical provider because the juvenile would be a victim involved in a criminal investigation.

Second, juveniles in the family residential program would be present as a member of a family unit and therefore would be with an individual who possesses authority for making legal determinations for the juvenile present at the facility.

With respect to the comment about reporting abuse by a parent or guardian, DHS notes that agencies are already

required by applicable state laws to report all incidents of child sexual abuse or assault, including incidents where the parent or legal guardian is the perpetrator, to designated law enforcement agencies. The law enforcement official is then responsible for ensuring that child welfare services are notified where appropriate. Therefore, the inclusion of this provision in these standards is not necessary.

*Comment.* A commenter recommended that DHS provide a means for protection from removal—including withholding of removal, prosecutorial discretion, or deferred action—while an investigation into a report of abuse is ongoing, and also require facilities to provide application information to detainee victims and, if applicable, parents, guardians, or legal representatives.

*Response.* DHS recognizes that in some cases, it may be appropriate for ICE not to remove certain detainee victims.<sup>13</sup> However, DHS does not believe that every detainee who reports an allegation should necessarily receive some type of relief or stay of removal. OPR has the authority to approve deferred action for victimized detainees when it is legally appropriate.

As mandated in §§ 115.22(h) and 115.122(e), all alleged detainee victims of sexual abuse that is criminal in nature will be provided U nonimmigrant status (also known as “U visa”) information. OPR and Homeland Security Investigations (HSI) have the delegated authority for ICE to certify USCIS Form I-918, Supplement B for victims of qualifying criminal activity that ICE is investigating where the victim seeks to petition for U nonimmigrant status.

Because these are routine agency practices and subject to agency discretion, DHS has declined to make changes in the final rule to specifically address the various prosecutorial discretion methods that may be used. ICE can and will use these prosecutorial discretion methods for detainees with substantiated sexual abuse and assault claims.

<sup>13</sup> See U.S. Immigration and Customs Enforcement, Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> and U.S. Immigration and Customs Enforcement, Policy No. 10075.1, Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

*Comment.* One commenter recommended that facilities make updated lists of resources and referrals to appropriate professionals available if and when assault happens.

*Response.* DHS declines to make this recommended edit to the current provision because it is outside the scope of the provision. Section 115.53 currently requires facilities to have access for detainees to current community resources and services and should satisfy the commenter's request.

*Comment.* One collective comment from advocacy groups suggested a number of added provisions for proposed paragraph (c)'s forensic medical examination requirement. The groups suggested that the facility arrange for the examination “when developmentally appropriate” and that another requirement be added that the examination is performed by a SAFE or a SANE, with other qualified medical practitioners only being allowed to examine if a SAFE or SANE cannot be made available. The agency or facility would then have to document efforts to provide a SAFE or SANE. Regarding such examinations for juveniles, the groups suggested requiring that, except in exigent circumstances, the evaluations be conducted by a qualified professional with expertise in child forensic interviewing techniques.

*Response.* It is not necessary for a medical practitioner to be a SAFE or SANE to be qualified to perform a complete forensic examination. Many detention facilities are located in rural communities where there are healthcare professionals who are qualified to perform forensic exams, but may not have a SAFE or SANE designation. Adding a SAFE or SANE requirement to the provision could in some circumstances lead to delayed treatment, as there might not be a SAFE or SANE nearby to the facility. As a result, DHS declines to absolutely require use of a SAFE or SANE. DHS, however, has added to the standard that examinations should be performed by a SAFE or SANE where practicable. With respect to the comment about developmentally appropriate evaluations, DHS notes that under §§ 115.21(a) and 115.121(a), uniform evidence protocols must be developmentally appropriate.

#### **Policies To Ensure Investigation of Allegations and Appropriate Agency Oversight (§§ 115.22, 115.122)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule mandated that each allegation of sexual abuse have a



completed investigation by the appropriate investigative authority. Each agency and immigration detention facility would establish and publish a protocol for investigation for investigating or referring allegations of sexual abuse. All allegations received by the facility would be promptly referred to the agency and, unless the allegation did not involve potential criminal behavior, promptly referred for investigation to an appropriate law enforcement agency. Finally, when an allegation of detainee abuse that is criminal in nature is being investigated, each agency would ensure that any alleged detainee victim of criminal abuse is provided access to relevant information regarding the U nonimmigrant visa process.

#### *Changes in Final Rule*

DHS made one clarification to both subparts, in paragraphs (h) and (e), respectively, that replaces the term “U nonimmigrant visa information” with “U nonimmigrant status information.” This change is consistent with the term used in the Form I-918 (Petition for U Nonimmigrant Status). DHS also changed both paragraphs to make clear its intention that the information be timely provided.

#### *Comments and Responses*

*Comment.* In connection with the proposed requirement that each facility ensure allegations are reported to an appropriate law enforcement agency for criminal investigation, several commenters recommended that DHS remove the exception for allegations that do not involve potentially criminal behavior. One group stated that any allegation of sexual abuse as defined in proposed § 115.6 is potentially criminal.

*Response.* DHS agrees with the commenter that both appropriate agency oversight and criminal referrals are essential components of DHS efforts in this context. DHS is therefore implementing standards that require strong and transparent agency and facility protocols for reporting and referring allegations of sexual abuse. Under the regulation, covered agencies and facilities must promptly report all sexual abuse allegations to the appropriate administrative offices, without exception. Also under the regulation, covered agencies and facilities must promptly refer all potentially criminal sexual abuse allegations to a law enforcement agency with the legal authority to conduct criminal investigations.

DHS agrees that acts of sexual abuse, as defined in this regulation, most often involve “potentially criminal behavior.”

DHS anticipates, however, that covered agencies and facilities may at times receive complaints that are framed as sexual abuse allegations, but do not rise to the level of potentially criminal behavior. For consistency with the DOJ standards, and to ensure that mandatory referrals do not deplete scarce criminal investigative resources, DHS declines to require referral to a criminal investigative entity in all cases.

*Comment.* Commenters also recommended that DHS insert a requirement that the facility head or an assignee must request the law enforcement investigation, and that the facility’s own investigation must not supplant or impede a criminal one.

*Response.* DHS declines to require the facility head to request the law enforcement investigation and declines to incorporate a requirement that the facility’s own investigation must not supplant or impede a criminal one. These revisions are not necessary because under this regulation, PBNDS 2011, and the SAAPID, all investigations into alleged sexual assault must be prompt, thorough, objective, fair, and conducted by qualified investigators. Furthermore, facilities are required to coordinate and assist outside law enforcement agencies during their investigations and therefore not impede those investigations. DHS declines to add the suggested language because it does not strengthen the investigative mandates that are currently in place.

*Comment.* A commenter suggested, regarding the requirement that the facility ensure incidents be promptly reported to the JIC, ICE’s OPR, or the DHS OIG, as well as the appropriate ICE Field Office Director (FOD), that the language “ensure that the incident is promptly reported” be replaced with “report.”

*Response.* In some cases, the incident will be reported by an ERO officer and not an employee of the facility or the facility administrator. In such cases, the facility will have met the standards of the provision by ensuring that the incident was reported while not doing the reporting itself. Therefore, DHS declines making this addition as it does not believe this change will make the provision more effective.

*Comment.* Multiple commenters suggested a requirement that the detainee victim not be removed while an investigation is pending, unless the detainee victim specifically and expressly waives this prohibition in writing. In the case of a family unit, the recommendation would require that no non-abuser family members be removed during the pending investigation. The

groups also suggested the standard prevent the victim from being transferred to another facility in a way that materially interferes with the investigation of the allegation unless essential to the protection of the victim, in which case the agency must ensure that the victim continues to be available to cooperate with the investigation.

Several advocacy groups, including a number of collective advocate comments, suggested a further provision be added to require that the agency ensure the victim is not removed from the United States if the victim indicates a wish to petition for U nonimmigrant status and moves to file such a petition within a reasonable period, so long as the victim cooperates with the investigation and the allegations are not found to be unfounded. In such a case, one group suggested the agency should be required to ensure the victim is not removed before obtaining necessary certified documents to apply for such status; others suggested a bar on removal unless the U nonimmigrant petition is denied by USCIS.

*Response.* DHS recognizes that in some cases, it may be appropriate for ICE not to remove certain detainee victims.<sup>14</sup> However, DHS does not believe that every detainee who reports an allegation should receive some type of stay of removal. OPR has the authority to approve deferred action for victimized detainees when it is legally appropriate. As mandated in §§ 115.22 (h) and 115.122 (e), all alleged detainee victims of sexual abuse that is criminal in nature will be provided U nonimmigrant status information. OPR and HSI have the delegated authority for ICE to certify USCIS Form I-918, Supplement B for victims of qualifying criminal activity that ICE is investigating where the victim seeks to petition for U nonimmigrant status. Because these are routine agency practices and subject to agency discretion, DHS has declined to make changes in the final rule to specifically address the various prosecutorial discretion methods that may be used. ICE can and will use these prosecutorial discretion methods for detainees with

<sup>14</sup> See U.S. Immigration and Customs Enforcement, Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> and U.S. Immigration and Customs Enforcement, Policy No. 10075.1, Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.



substantiated sexual abuse and assault claims.

Furthermore, when a victimized detainee is petitioning for U nonimmigrant status, appears to have been a victim of qualifying criminal activity, and appears to meet the helpfulness requirement for the investigation or prosecution, prosecutorial discretion should be utilized by ICE. To prevent unintended removals, OPR must sign off on any ERO request to remove a victimized detainee when an investigation has been filed and is pending. DHS does not believe that adding the suggested language substantially strengthens the current provision as it is current practice and therefore DHS declines the recommendation.

*Comment.* Several commenters suggested that there be increased access to existing types of legal status for abuse survivors.

*Response.* DHS is currently able to provide detainee victims with information concerning U nonimmigrant status when the sexual abuse is criminal in nature. DHS may also effect deferred action or significant public benefit parole when appropriate. DHS declines to make additional changes in this rulemaking because any additional access to existing types of legal status for abuse victims other than what is currently authorized would be outside the scope of this rulemaking.

*Comment.* Several advocacy groups recommended the standards relating to access to U nonimmigrant status information contain more detailed requirements. A number of comments suggested expanding the provision to ensure that the information include instructions on how to apply and contact legal experts for information to assist with the process. Some of these comments suggested specifically providing that the PSA Compliance Manager (or his or her assignee)—rather than the “agency”—should ensure the alleged detainee victim be provided access to the information, in order to clarify who has responsibility for providing the U nonimmigrant status information. One group recommended that access to U nonimmigrant status information be provided not later than two weeks following an incident.

*Response.* DHS agrees that these provisions should be more specific, and therefore has clarified the regulatory text to make clear its intention that access to the information should be provided in a timely manner—i.e., within a reasonable period of time, under the totality of the circumstances. This change is consistent with current ICE practice and responsive to the

concerns highlighted by the commenters, and reserves appropriate flexibility for the agency to tailor its practice to specific circumstances. DHS notes that ICE already provides access to approved informational materials or appropriate national hotlines.

Given the potentially broad scope of this provision (which applies to all allegations of sexual assault), DHS believes that additional changes would be unnecessary and potentially counterproductive to the goal of providing timely, accurate, and useful access to information. For instance, with respect to the question of who ought to provide U nonimmigrant status information, DHS agrees with the commenter that a facility’s PSA Compliance Manager is one good option for providing such information. However, ICE OPR would also provide such information pursuant to the SAAPID, section 5.7, which states that “in cases where the allegation involves behavior that is criminal in nature, OPR, in coordination with the FOD and/or HSI SAC, as appropriate, will ensure any alleged victim of sexual abuse or assault who is an alien is provided access to U non-immigrant visa information. . . .”

DHS does not believe that including these detailed requirements in a regulatory provision or designating the PSA Compliance Manager as the individual responsible for providing the information to qualifying detainees would strengthen this provision or provide more support to the detainee. DHS notes that it also already provides such information to the public on DHS Web sites and through DHS’s Blue Campaign to end human trafficking.

*Comment.* Several advocacy groups suggested that the standard require the facility head or his or her assignee to make every effort to ensure that the victim has legal counsel who can provide advice on petitions for U nonimmigrant status, unless law enforcement investigators were to determine the allegation to be unfounded.

*Response.* DHS declines to add the suggested language with respect to legal counsel. Immigration detention facilities already provide information about legal services to detainees, consistent with existing standards regarding access to the law library and other information about legal services. Facilities also facilitate access to legal counsel through visitation and communication by telephone. DHS notes that § 115.53 requires facilities to ensure detainees have access to current community resources and services.

*Comment.* One group recommended that access to U nonimmigrant status information be provided not later than two weeks following an incident.

*Response.* ICE’s SAAPID, section 5.7, sets forth the agency’s responsibilities for providing U nonimmigrant status information to sexual assault victims. The Directive states that OPR, in coordination with the FOD and/or HSI SAC, will ensure alleged victims of sexual abuse or assault who have made allegations involving criminal behavior will be provided access to U nonimmigrant status information. DHS believes that this policy ensures victims will have timely access to the U nonimmigrant status information. Accordingly, DHS declines to implement a two week regulatory requirement.

*Comment.* Collective comments from advocates suggested a requirement that the agency designate various qualified staff members or DHS employees to complete USCIS Form I-918, Supplement B for any detainee victim of sexual abuse who meets U nonimmigrant status certification requirements. A comment noted that this “is meant to prevent qualified agency personnel from declining to assist a detainee with a U visa application.” The same comment noted that in some cases, agencies do not complete the Supplement B “because of a lack of understanding [that] completing Supplement B is not an admission of liability on the part of the agency but simply an acknowledgement that the detainee was or is likely to be helpful in an investigation.”

*Response.* U nonimmigrant status is available to victims of certain qualifying crimes under U.S. laws who assist law enforcement in the investigation or prosecution of the criminal activity. The only agencies that have authority to certify the Form I-918, Supplement B are those Federal, State, or local agencies with responsibility for the investigation or prosecution of a qualifying crime or criminal activity, including agencies with criminal investigative jurisdiction. See 8 CFR 214.14(a)(2). OPR and HSI have been delegated the authority for ICE to complete and certify the USCIS Form I-918, Supplement B when they are the investigating authority on a Federal case for victims of qualifying criminal activity. ERO does not have this delegated authority because ERO does not have criminal investigative jurisdiction.

In most instances where a detainee would seek to petition for U nonimmigrant status, the appropriate investigative authority and therefore the

certifying agency would be local law enforcement. With respect to the specific request that DHS prevent qualified agency personnel from declining to assist a detainee with a U nonimmigrant petition, DHS declines to set such policy in this context. DHS has clearly delegated authority to select officers who may certify a U nonimmigrant petition. These officers receive appropriate training with regard to this process and must use their professional judgment when deciding whether to certify petitions. DHS does not believe it is necessary or appropriate to require additional involvement in the certification process for U nonimmigrant petitions.

*Comment.* One commenter suggested that DHS extend the visa information provisions to include a requirement that an alleged detainee victim of sexual abuse receive notification and assistance for Special Immigrant Juvenile status and T nonimmigrant status (commonly known as the “T visa”).

*Response.* DHS declines to accept the suggested language, as T nonimmigrant status and Special Immigrant Juvenile (SIJ) status are outside the scope of this rulemaking. Whereas an alleged incident of sexual assault of a detainee may constitute a qualifying criminal activity for U nonimmigrant status, this rulemaking is not germane to T nonimmigrant status, which is for certain victims of a severe form of human trafficking. SIJ status is applicable to an alien child who must meet certain criteria including: (1) Having been declared dependent on a juvenile court, or legally committed to or placed under the custody of a state agency, individual, or entity; (2) that the child cannot be reunified with a parent because of abuse, abandonment, neglect, or a similar reason under state law; and (3) that it is not within the best interest of the child to return to his/her home country. See 8 U.S.C. 1101(a)(27)(f). For those unaccompanied alien children who may seek SIJ status, DHS’s custody of the unaccompanied alien child would generally be limited to 72 hours after determining that the child is an unaccompanied alien child, after which the child would be transferred from DHS custody to HHS/ORR custody. As a result, DHS would no longer have jurisdiction over the unaccompanied alien child, making notification and assistance for SIJ status outside the scope of this rule.

*Comment.* Two comments suggested standards be added—in accordance with what a comment described as standard child welfare practices when juveniles are survivors of sexual abuse—to require that if the alleged detainee victim is an

“unaccompanied alien child in removal,” the PSA Compliance Manager or his or her assignee notify ORR immediately and facilitate the immediate transfer of the juvenile to ORR, so long as the detainee victim wishes to remain in the United States while the investigation is pending. Additionally, the groups suggest that if the detainee victim is a juvenile in a family unit and the sole parent or legal guardian in that unit has allegedly victimized any juvenile, the PSA Compliance Manager or its assignee be required to consult with the designated state or local mandatory reporting agency regarding the release and placement of all juvenile(s) in the family unit with a state or local social services agency. The group suggests that if the state or local social services agency refrains from assuming custody but a criminal or administrative investigation results in “a finding,” the juveniles must be deemed unaccompanied and ORR must be notified for the transfer.

*Response.* DHS declines to add the suggested language concerning this population. Unaccompanied alien children are generally transferred to an HHS/ORR facility within 72 hours. Moreover, taken together, various provisions in the regulations appropriately address the concern raised by the comment. Section 115.14 addresses issues relating to juvenile detainees. If an alleged victim is under the age of 18, §§ 115.61(d) and 115.161(d) require the agency to report the allegation to the designated state or local services agency under applicable mandatory reporting laws. Per §§ 115.64 and 115.116, upon learning of an allegation that a detainee was sexually abused, the first responder must separate the alleged victim and abuser. DHS believes the requirements in these referenced sections provide sufficient protections that adequately meet the goals of the comments’ suggested changes.

#### **Staff Training (§§ 115.31, 115.131)**

##### *Summary of Proposed Rule*

The standards in the proposed rule required all employees that have contact with detainees as well as all facility staff receive training concerning sexual abuse, with refresher training provided as appropriate. The standards mandated that current staff complete the training within one year of the effective date of the standard for immigration detention facilities and within two years of the effective date of the standard for holding facilities.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* A number of advocacy group commenters objected to the timeframe for initial training. With respect to Subpart A’s requirement that the agency train, or require the training of, all facility staff and agency employees who may have contact with immigration detention facility detainees within one year, one advocacy group suggested that the standard require training completion within a shorter time period of six months. With respect to Subpart B, commenters suggested that all training pertaining to holding facilities be completed within one year of this publication.

*Response.* DHS has considered these comments and determined that the proposed standard still provides the most aggressive timeframe appropriate for training in immigration detention facilities. DHS’s timeframe is in line with the DOJ standard’s one-year period for employees who may have contact with inmates. DHS declines to shorten the timeframe for training in holding facilities, in light of the large number of CBP personnel who will receive the training.

*Comment.* Commenters suggested that training be ongoing, with a number of groups suggesting adopting DOJ’s language on mandatory refresher training every two years and refresher information on current sexual abuse and harassment policies in years when training is not required. According to some advocacy groups, the intent of the ongoing training rather than one-time training would be to ensure that staffs focus on zero tolerance and appreciation of an abuse-free environment, to allow staff to share experiences about implementation of the standards, and to increase the likelihood that training themes are internalized in daily staff-detainee interactions.

*Response.* With respect to Subpart A, the proposed rule stated that the agency or facility shall provide refresher information every two years. With respect to Subpart B, the proposed rule stated that the agency shall provide refresher information, as appropriate. DHS proposed these refresher requirements to foster a culture of awareness, without denying its component agencies the flexibility necessary to adjust refresher training requirements to respond to operational realities. Considerations include the time and cost of developing adequate training that is sufficiently tailored to

the unique immigration detention population and the time and cost for staff to participate in such training.

With respect to Subpart A specifically, DHS, through CRCL and ICE, has developed a training module on "Preventing and Addressing Sexual Abuse and Assault in ICE Detention" which the ICE Director required in ICE's 2012 SAAPID to have been already completed for all ICE personnel who may have contact with individuals in ICE custody and which is also required for newly hired officers and agents. This module specifically addresses the zero-tolerance policy for sexual abuse and assault, among other issues. The training has recently been updated to incorporate certain terms and language from the proposed rule, and will be updated again following this final rule. ICE believes that this training module addresses the substantive concerns expressed by the commenters.

*Comment.* One commenter suggested that contractors be included in the training requirements along with current facility staff and agency employees, and that it should be specified that the training be by DHS or using DHS-approved materials, and that the agency documentation requirement in Subpart B be applicable to contractors and volunteers in addition to employees.

*Response.* Section 115.31, outlining training requirements for detention facility staff, embraces contractors who work and provide regularly recurring services in detention facilities. The rule's definition of contractor excludes individuals, hired on an intermittent basis to provide services for the facility or the agency. These contractors, who do not provide services *on a recurring basis pursuant to a contractual agreement*, are covered under section 115.32 of these standards. These PREA standards are applicable within one year to the facilities required to implement them; PBNDS 2011 § 2.11, which is in the process of being implemented through modification agreements, which have already been implemented in a large number of over-72-hour facilities, also requires staff training on a facility's sexual abuse or assault prevention and intervention program for employees, volunteers and contract personnel and in refresher training based on level of contact with detainees, among other criteria, with the zero-tolerance policy being a requirement for having any contact with detainees. Additionally, some facilities that have not yet agreed to modification agreements are operating under PBNDS 2008, which contains a substantially similar training requirement for employees, volunteers,

and contract personnel on those standards' Sexual Abuse and Assault Prevention and Intervention Program, with annual refresher training thereafter. Finally, DHS will endeavor to ensure that facilities are compliant with PREA standards as quickly as operational and budget constraints will allow, ensuring that SPCs, CDFs and dedicated IGSAAs are compliant within 18 months of the effective date of this regulation. For these reasons, contractor and volunteer personnel will be adequately aware of the zero-tolerance policy.

*Comment.* Two advocacy groups suggested language be added to ensure that staff who may interact with detainees understand the training, either through a comprehension examination or through some form of verification of training.

*Response.* The mandatory training module mentioned above for ICE employees who have contact with detainees contains 10 pre-test questions and 10 post-test questions covering key teaching points. The learner must receive an 80% passing score on the post-test to receive verification of completing the training. The slides include the correct answers and additional explanation following each question. DHS is confident this training module serves the purposes of examination and verification. Once an immigration detention facility has adopted these standards, the agency will ensure pursuant to this section that all facility staff, including employees or contractors of the facility, complete similar training. Subsection (c) already requires that the agency and each facility shall document that staff have completed applicable training.

*Comment.* One commenter stated that all components of the DOJ training standard should be incorporated into the DHS standard. Another commenter recommended generally that the standard on staff training should be revisited to be in line with DOJ's standard. Similarly, the former NPREC Commissioners suggested adding the following training components from the Commission's draft standards and DOJ's final standards: The right of inmates and employees to be free from retaliation for reporting sexual abuse and sexual harassment; the dynamics of sexual abuse and sexual harassment in confinement; the common reactions of sexual abuse and sexual harassment victims; and how to detect and respond to signs of threatened and actual sexual abuse. The former Commissioners and other groups also expressed concern that the provision should include training on sensitivity to culturally

diverse detainees, some of which may have different understandings of acceptable and unacceptable sexual behavior.

*Response.* The DHS provision regarding staff training provides detailed and comprehensive expectations for training. DHS rejects using the DOJ standard's exact language because DHS's standard provides the agency greater flexibility to ensure that the provision is consistent with existing detention standards. ICE's current training curriculum focuses on promoting techniques of effective communication with detainees from all backgrounds and in a variety of settings. The curriculum is a skills-based approach that emphasizes the importance of interacting with all detainees in a culturally sensitive manner. ICE intends to continue to provide such training, and to modify it as necessary in the coming years. ICE does not believe, however, that an independent regulatory requirement to conduct such training would meaningfully enhance the experience of ICE detainees.

*Comment.* Some advocacy groups focused on need for specifically addressing training for juveniles for employees who may be in contact with them. A collection of groups suggested a training requirement in this area that would include factors making youth vulnerable to sexual abuse and sexual harassment; adolescent development for girls and boys, including normative behavior; the prevalence of trauma and abuse histories among youth in confinement facilities; relevant age of consent and mandatory reporting laws; and child-sensitive interviewing techniques.

*Response.* DHS appreciates the commenter's input, and will consider including this information in future curricula. For purposes of this rulemaking, however, DHS is satisfied that the current list of training requirements in regulation is sufficiently detailed to accomplish the core goal, while leaving the agency flexibility to prioritize and develop training on additional topics over time. As noted above, the current list of topics is consistent with existing detention standards (PBNDS 2011, PBNDS 2008, and FRS) covering approximately 94% of ICE detainees, on average, excluding those detainees who are held in DOJ facilities (and are therefore covered by the DOJ rule). Additionally, regarding training geared toward juveniles, all ICE Field Office Juvenile Coordinators (FOJCs) are required to attend training to fulfill their responsibilities to find suitable placement of juveniles in

facilities designated for juvenile occupancy, and all ERO officers undergo basic training that includes a juvenile component. FOJCs are trained in the demeanor, tone and simple type of language to use when speaking to all minors and on the importance of building rapport with them to reinforce a feeling of safety. Maintaining flexibility to adapt these training requirements through policy will ensure employees in contact with juveniles are trained based upon the most current developments relating to juvenile interaction and protection.

*Comment.* One group suggested adding a requirement that training be tailored to the gender of the detainees at the employee's facility, with the employee receiving additional training if reassigned from a facility that houses detainees of only one sex to a facility housing only detainees of the opposite sex.

*Response.* As with the comment immediately above, DHS intends that all detainees be protected from sexual abuse and assault through implementation of comparable measures across the board for all detainees in covered facilities. Additionally, DHS has considered general concerns about employee transfer and is confident that the training standard's requirement for refresher information, both in Subpart A and in Subpart B, will address the potential for any changes in training needs over time or between facilities.

*Comment.* An advocacy group expressed concern about the provision in paragraph (a)(7) regarding training on effectively and professionally communicating with detainees, including lesbian, gay, bisexual, transgender, intersex, and gender non-conforming (LGBTIGNC) detainees, stating that the standard should extend further to include sensitivity training. Another group suggested this provision also explicitly include detainees who do not speak English, and detainees who may have survived trauma in their countries of origin.

*Response.* DHS has considered these suggestions; however, the 2012 SAAPID—which requires training for all ICE personnel who may have contact with individuals in ICE custody—provides for training on vulnerable populations, including ensuring professional, effective communication with LGBTIGNC detainees and other vulnerable individuals. The 2012 SAAPID also includes training on accommodating LEP individuals. DHS believes these training requirements to be sufficient to address the concerns regarding sensitivity for LGBTIGNC, LEP, and trauma survivor detainees. For

the same reasons expressed above, DHS declines to incorporate these requirements into the regulation.

*Comment.* One group suggested replacing the training provision in paragraph (a)(8) regarding procedures for reporting knowledge or suspicion of sexual abuse with training on “how to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures.”

*Response.* DHS believes it is not necessary to broaden proposed paragraph (a)(8) in this way. The intent of the enumerated requirements in paragraph (a) was to designate specific elements of sexual abuse training which are mandated for all employees who have contact with detainees and for all facility staff. Additionally, paragraph (a) of each provision already requires generally that training for facility staff as well as employees, contractors, and volunteers, respectively, address fulfilling the responsibilities under each Subpart's standards. The proposed revision would be redundant and potentially confusing.

*Comment.* A group suggested adding a training provision on complying with relevant law related to mandatory reporting of sexual abuse to outside authorities.

*Response.* DHS has considered this comment and determined that proposed paragraphs (8) and (9) requiring training on various aspects of reporting sexual abuse or suspicion of abuse are sufficient to cover this and other aspects of reporting.

#### **Other Training; Notification to Detainees of the Agency's Zero-Tolerance Policy (§§ 115.32, 115.132)**

##### *Summary of Proposed Rule*

The standard in § 115.32 of the proposed rule required all volunteers and contractors at immigration detention facilities that have contact with detainees receive training concerning sexual abuse. The standard in § 115.132 of the proposed rule required the agency to make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the policy is available for detainees.

##### *Changes in Final Rule*

DHS clarified that the training requirements in the Subpart A standard apply to contractors who provide services to the facility on a non-recurring basis. DHS also revised the title of the standard for clarity and consistency. As noted above, contractors

who provide services to the facility on a recurring basis are covered by § 115.31.

DHS also removed the word “may” from paragraph (c) of the same standard, for consistency with paragraph (a). Prior to the change, the substantive training requirement in this section applied to those “who have contact with detainees,” but the documentation requirement applied to those “who may have contact with immigration detention facility detainees.”

##### *Comments and Responses*

*Comment.* One advocacy group was concerned that the training requirements applicable to contractors and volunteers should be the same as described in proposed § 115.31(a) for employees, with additional training being provided based on the services the individuals provide and level of contact they have with detainees.

*Response.* DHS has considered this suggestion; however, because immigration detention facilities host a wide range of volunteers and specialized contractors who provide valuable services to facilities and detainees, requiring the same training level for these individuals may result in a reduction or delay in services. The proposed separate unique standard in Subpart A allowing for areas of flexibility for volunteers and other contractors who provide services on a non-recurring basis was determined to be more sufficient to accomplish the core education goal without unintended impact. The standard sets a “floor” for basic training under the regulation, but also directs additional training for volunteers and other contractors based on the services they provide and level of contact they have with detainees.

*Comment.* A comment from an advocacy group raised the same concerns with this standard regarding the timeframe prior to initial training, the lack of mandatory refresher training, and lack of an examination to test each trainee's comprehension.

*Response.* DHS declines to make any changes to § 115.32 for the same reasons described regarding these suggested changes to §§ 115.31 and 115.131.

*Comment.* Some commenters were concerned that there should be a requirement that these types of facility workers receive comprehensive training, including LGBTI-related training. An advocacy group suggested training for volunteers and contractors include child-specific modules and prevent re-victimization of children who are victims of sexual abuse.

*Response.* DHS appreciates the commenter's input, and will consider

including this information in future curricula. For purposes of this rulemaking, however, DHS is satisfied that the current list of training requirements in regulation is sufficiently detailed to accomplish the core goal, while leaving the agency flexibility to prioritize and develop training on additional topics over time. As noted above, the current list of topics is consistent with existing detention standards.

*Comment.* A group suggested the standard should include a time limit in which volunteers or contractors must be trained to prevent ambiguity over the timing for these types of individuals to come into compliance before contact with detainees would be forbidden.

*Response.* The final rule is effective May 6, 2014. Covered facilities must meet the requirements of § 115.32 by the date that any new contract, contract renewal, or substantive contract modification takes effect.

*Comment.* One advocacy group suggested that DHS develop comprehensive training materials, including information about conducting appropriate, culturally-sensitive communication with immigration detainees and how staff can fulfill their responsibilities under the PREA standards.

*Response.* DHS agrees with this suggestion, but does not believe additional rule revisions are necessary. Paragraph (a) of the Subpart A standard already requires a facility to ensure that all volunteers and contractors who have contact with detainees have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures. DHS will take reasonable steps to ensure that staff, contractors, and volunteers are familiar with and comfortable using appropriate terms and concepts when discussing sexual abuse with a diverse population, and equipped to interact with immigration detainees who may have experienced trauma.

### **Detainee Education (§ 115.33)**

#### *Summary of Proposed Rule*

The standard in the proposed rule mandated that upon custody intake, each facility provide detainees information about the agency's and the facility's zero-tolerance policies with respect to all forms of sexual abuse, including instruction on a number of specified topics.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* One commenter stated that the standards should contain additional explanation to detainees regarding the PREA standards beyond the explanations, information, notification, and orientation descriptions in the proposed standard. The commenter was concerned that detainees fear reporting seemingly based upon potential retaliation.

*Response.* Paragraph (a) of the proposed standard already required that, at a minimum, the intake process at orientation contain instruction on, among other areas, "Prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings." DHS believes this explicitly enumerated content requirement, along with the other five minimum requirements, are sufficient to address the commenter's concern.

*Comment.* One advocacy group expressed concerns that the proposed standard failed to address the education of current detainees who will not receive the information at the time of their intake; the commenting group suggested such detainees be required to complete the education within a relatively short specified period of the effective date of the DHS standards, such as one month.

Some commenters expressed concerns over the potentially overwhelming nature of the amount of information contained in an up-front education requirement and the possibility that detainees may not fully understand DHS's multi-faceted initiative upon intake, a potentially stressful time.

A number of advocacy groups suggested adding a 30-day time period following intake for completion of instruction on all the areas that were to be addressed upon intake in the proposed standard; within this period, the agency would provide comprehensive education to detainees either in person or through video.

One group suggested requiring facilities to repeat PREA education programs every 30 days, of which the detainee could opt out.

*Response.* The average length of stay in immigration detention facilities is approximately 30 days, and the median length of stay is shorter still—8 days. Thus it is common that a detainee will be confined in a facility for less than one month, and it would not be practical or effective to place a one-month-from-effective date requirement for education for those detainees who

have already gone through intake prior to the effective date of the final rule.

Likewise, there would not be a practical need to provide refresher education after 30 days from intake; this negates the need for any opting-out of such refresher education. Providing the information up-front to detainees is not only the most practical solution given the nature of immigration detention, but also ensures the detainee is informed at the earliest point possible to maximize prevention of sexual abuse and assault.

After the intake education and in cases where intake has taken place prior to the effective date of this final rule, detainees can refer back to aids such as the Detainee Handbook and posters with sexual abuse prevention information, as needed.

*Comment.* Some commenters suggested that additional information should be conveyed to detainees, including information regarding their legal rights. One advocacy group suggested revising the provision on the Detainee Handbook to require that the Handbook contain more comprehensive information, including detainees' rights and responsibilities related to sexual abuse, how to contact the DHS OIG and CRCL, the zero-tolerance policy, and other policies related to sexual abuse prevention and response.

*Response.* DHS agrees that the information described is important for protecting detainees. Accordingly, DHS has already required public posting and distribution of similar information under paragraphs (d) and (e) of the proposed standard. ICE's Detainee Handbook contains detailed information about sexual abuse and assault, including definitions for detainee-on-detainee and staff-on-detainee sexual abuse and assault; information about prohibited acts and confidentiality; instructions on how to report assaults to the facility, the FOD, DHS, or ICE; next steps after a sexual assault is reported; what to expect in a medical exam; understanding the investigative process; and the emotional consequences of sexual assault. DHS believes that in addition to the paragraphs (d) and (e), the information provided in the Detainee Handbook provides sufficient protection to address the commenters' concerns. ICE will review and update the Detainee Handbook as necessary or useful.

*Comment.* One group suggested requiring that upon a detainee's transfer to another facility, the detainee receive a refresher of the facility's sexual abuse prevention, detection, and response standards.

*Response.* A general orientation process that includes the information

described in this standard is a requirement each time a detainee enters a new facility, including when transferred from another facility; therefore, it is not necessary to create a separate standard regarding refresher information upon an immigration detainee's transfer.

*Comment.* Regarding the proposed standard to ensure education materials are accessible to all detainees, one advocacy group suggests adding a requirement that if a detainee cannot read or does not understand the language of the orientation and/or Handbook, the facility administrator would provide the material using audio or video recordings in a language the detainee understands, arrange for the orientation materials to be read to the detainee, or provide a translator or interpreter within seven days.

*Response.* DHS understands the concern expressed by this comment; however, the standards found in §§ 115.16 and 115.116 regarding accommodating LEP detainees are adequate to address any problems with accessibility with respect to orientation materials. Under those provisions, the agency and each facility must ensure meaningful access to all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse—which would include the education requirements at orientation. Moreover, DHS policy addresses DHS-wide efforts to provide meaningful access to people with limited English proficiency. Information regarding these efforts is publicly available at the following link: <http://www.dhs.gov/department-homeland-security-language-access-plan>. To further strengthen §§ 115.16 and 115.116, DHS revised the language to require the component and each facility to provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for another detainee to provide interpretation and the agency determines that such interpretation is appropriate and consistent with DHS policy.

*Comment.* Some members of Congress commented generally that the standard regarding detainee education should be revised to be in line with DOJ's standard.

*Response.* DHS's detainee education provision is detailed and comprehensive. It is also tailored to the unique characteristics of immigration detention and the variances among confinement facilities for DHS detainees. DHS believes that merely repeating the DOJ standard would be

inappropriate in this context. The major difference between the two Departments' standards is that DOJ is responsible for ensuring that current inmates receive the PREA education within one year of the rule's implementation. DHS's detainee population has an average length of stay of 30 days, resulting in a much more transient population. To ensure that all current detainees receive the PREA-related information, DHS relies on several material sources posted throughout the facilities, such as handbooks, pamphlets, notices, local organization information, PSA Compliance Manager information, etc. For those detainees that are LEP, visually impaired, or otherwise disabled, DHS provides the necessary resources, such as interpreters, for those detainees to still obtain the knowledge that is provided by the posted visuals.

#### **Specialized Training: Investigations (§§ 115.34, 115.134)**

##### *Summary of Proposed Rule*

The standards in the proposed rule required that the agency or facility provide specialized training to investigators that conduct investigations into allegations of sexual abuse at confinement facilities and that all such investigations be conducted by qualified investigators.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed, with a minor technical change clarifying the scope of the documentation requirement.

##### *Comments and Responses*

*Comment.* Some commenters suggested additional details of the specialized investigative training be expressly required by the standard, including techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required for administrative action or prosecution referral. One group suggested the standard expressly require this specialized training to be separate from staff training.

*Response.* DOJ's final rule regarding specialized training standardizes training for a broad spectrum of federal, state and local investigators. DHS is not faced with the same challenges and maintains direct control over investigators and their training. DHS believes that its current policies and procedures effectively govern specialized training for investigators.

General training on investigation techniques is included in OPR Special Agent Training and is covered in OPR's Investigative Guidebook and other internal policies and training. In addition, ICE's 2012 SAAPID prescribes more detailed requirements for the content of specialized investigator training, requiring that such training for agency investigators cover, at a minimum, interviewing sexual abuse and assault victims, sexual abuse and assault evidence collection in confinement settings, the criteria and evidence required for administrative action or prosecutorial referral, and information about effective cross-agency coordination in the investigation process. DHS believes that this standard maintains a proper focus on PREA implementation—training tailored for sexual abuse detection and response through the investigative process.

DHS declines to require the specialized training provision to state that such training be provided separately from staff training. The fact that the PREA standards differentiate between staff training and specialized training and specifically denote the types of agency employees and facility staff who must participate demonstrate DHS's commitment to ensuring that additional higher-level training will be provided to those who require it.

*Comment.* One group requested clarification in the standard as to whether DHS intends the specialized training apply to persons responsible for investigations in state, local, or private facilities, in addition to training for ICE and CBP personnel.

*Response.* To clarify, while the agency is responsible for and will be directly training its own personnel in this manner, the standard also requires each facility to train their own personnel that will be working on the investigations addressed in the standard. Any criminal investigations will continue to be handled by the relevant outside law enforcement personnel.

*Comment.* One group suggested a provision be added expressly requiring that investigators receive the training mandated for employees and for contractors and volunteers under §§ 115.31 and 115.32, respectively.

*Response.* Paragraph (a) of this section makes clear that investigators must receive the general training mandated for employees and facility staff under § 115.31, in addition to the specialized training outlined by § 115.34.

## Specialized Training: Medical and Mental Health Care (§ 115.35)

### Summary of Proposed Rule

The standard in the proposed rule required that the agency provide specialized training to DHS employees who serve as medical and mental health practitioners in immigration detention facilities where such care is provided.

### Changes in Final Rule

DHS is adopting the regulation as proposed.

### Comments and Responses

*Comment.* Commenters suggested that the standard be expanded for medical and mental health practitioners. These commenters made the following recommendations:

1. Practitioners who are not DHS or agency employees but who work in the facilities should receive similar specialized training, and any facility that does not use DHS medical practitioners should provide training for its own medical providers;

2. Such practitioners should receive the training mandated for employees and for contractors and volunteers under §§ 115.31 and 115.32, respectively, depending upon the practitioner's status at the agency;

3. The agency should maintain documentation that medical and mental health practitioners have received and understand the training, either from the agency or elsewhere;

4. The practitioners should receive special training for sensitivity to culturally diverse populations, including appropriate terms and concepts to use when discussing sex and sexual abuse, and sensitivity and awareness regarding past trauma that may have been experienced by immigration detainees;

5. The training be universally implemented and ingrained into the work of all employees, contractors, and volunteers coming into detainee contact; and

6. A number of groups suggested that the standard contain training specifically on LGBTI issues, including training to ensure competent, appropriate communications with LGBTIGNC detainees.

*Response.* With respect to the first recommendation, DHS believes that adding standards requiring facility medical staff to receive training to ensure that victims of sexual abuse are examined and treated thoroughly and effectively is redundant. The staff are already receiving the necessary training provided through § 115.35(c). Adding more specific criteria in this section

concerning specialized training to medical providers would make the regulations redundant and cumbersome. DHS declines to make this revision.

With respect to the second and third recommendations, DHS believes that adding standards mandating that practitioners receive the training under §§ 115.31 and 115.32, respectively, would also be redundant. The medical and mental health practitioners would already be obligated to receive the training required under §§ 115.31 and 115.32, as the positions fall under the definitions of staff, contractor, and volunteer listed in § 115.5 of this final rule. Under §§ 115.31 and 115.32 the training the practitioners receive would then be documented; as such DHS declines to make this revision.

With respect to the fourth recommendation, DHS believes that adding standards for sensitivity to culturally diverse populations, including appropriate terms and concepts to use when discussing sex and sexual abuse, and sensitivity awareness regarding past trauma that may have been experienced by immigration detainees, would be superfluous and potentially beyond DHS's relative expertise when compared to the extensive training on medical and mental health care already received by certified medical health care professionals. Furthermore, any new or additional terms or concepts will likely be taught during the required training described in § 115.35(c). Adding this specific requirement to this standard would also be redundant and therefore, not add to the goal or integrity of the rule. DHS declines to make this revision.

With respect to the fifth recommendation, DHS believes that additional revisions are unnecessary to ensure that training is universally implemented and ingrained into the work of all employees, contractors, and volunteers coming into detainee contact. The portions of this regulation on training and education are designed to ensure that all employees, contractors, and volunteers are trained and educated to prevent, detect and respond to sexual abuse of detainees while in DHS custody. Inserting additional explicit requirements would be redundant. DHS therefore declines to revise the proposed rule in response to this comment.

With respect to the sixth recommendation, DHS believes that adding a standard requiring training specifically on LGBTI issues, including training to ensure competent, appropriate communications with LGBTI detainees, would be redundant to current ICE practice and policy, as well

as provisions of the proposed rule. The 2012 SAAPID—required to have been already completed for all ICE personnel who may have contact with individuals in ICE custody and required for newly hired officers and agents—provides training on vulnerable populations, including ensuring professional, effective communication with LGBTI detainees. Furthermore, under §§ 115.31 and 115.131, practitioners will already be required to receive training relating to this population of detainees. Section 115.32 requires practitioner volunteers and contractors to receive similar training as well, due to their close level of contact to most if not all detainees. DHS therefore declines to revise the proposed rule in response to this comment.

*Comment.* One advocacy group suggested that in paragraph (a), the basic specialized training provision of the standard, the qualifier “where medical and mental health care is provided” be removed to clarify in the agency's detention standard that all immigration detention facilities should provide access to medical and mental health care.

*Response.* Views on the general structure of immigration detention facility medical and mental care are outside the scope of this rulemaking.

## Assessment for Risk of Victimization and Abusiveness (§§ 115.41, 115.141)

### Summary of Proposed Rule

The standards in the proposed rule mandated that the facility assess all detainees on intake to identify those likely to be sexual aggressors or sexual victims and required that the detainees be housed to prevent potential sexual abuse. The standard for immigration detention facilities further required that the facility reassess each detainee's risk of victimization or abusiveness between 60 and 90 days from the date of initial assessment as well as any other time when warranted to avoid incidents of abuse or victimization.

### Changes in Final Rule

Sections 115.41 and 115.141 of the final rule have been revised to require that assessments for risk of victimization or abusiveness include an evaluation of whether the detainee has been previously detained in addition to previously incarcerated. A technical revision also is incorporated into § 115.41(a) to clarify that the victims that the provision describes are sexual abuse victims.

### Comments and Responses

*Comment.* A number of advocacy groups suggested that among the risk



factors listed in the standard, DHS should also require the facility to consider whether a detainee is “perceived” to be LGBTIGNC. (The proposed rule focused on whether the detainee “has self-identified” as LGBTIGNC.) Commenters argued that the risk of sexual victimization for those who are perceived as LGBTIGNC is similar to the risk of sexual victimization for those who self-identify as LGBTIGNC.

*Response.* DHS disagrees with the addition of “perceived” LGBTIGNC status to the criteria which facilities must consider in assessing detainees for risk of sexual victimization would assist in accurate identification of likely victims. Unlike self-identification as LGBTIGNC (currently included in paragraph (c)(7) of the standard), a detainee’s “perceived” LGBTIGNC status cannot be reliably ascertained by facility staff as it will vary based on individual perceptions and cannot be standardized. In addition, a requirement for facility staff to make subjective determinations regarding an individual’s LGBTIGNC status may lead to potentially discriminatory decisions by staff.

*Comment.* Some commenters and advocacy groups encouraged DHS to consider options other than detention for vulnerable populations. For example, some groups suggested requiring that vulnerable individuals—including LGBT and mentally ill detainees—should be detained in only extraordinary circumstances or be candidates for alternatives to detention under the standards, including humanitarian parole, bond release, in-person and telephonic check-ins, or electronic monitoring. Others suggested that LGBT individuals or sexual abuse victims who cannot be safely housed by the government be released or granted prosecutorial discretion rather than be detained.

*Response.* DHS believes that existing ICE screening methods and practices sufficiently address the concern expressed by these commenters. The agency’s Risk Classification Assessment (RCA) instrument evaluates the potential vulnerability of all individuals apprehended by ICE to determine whether detention is appropriate, or whether some form of release under supervision or alternatives to detention may be preferable. RCA screenings consider a wide range of factors that may represent a special vulnerability in the custody context, including physical or mental illness or disability, sexual orientation/gender identity, and prior history of abuse or victimization, among others.

*Comment.* A collection of advocacy groups suggested adding the word “abuse” to paragraph (a) when describing intake identification of potential victims, which would seemingly more fully describe the kind of potential sexual victimization.

*Response.* DHS agrees with the concern expressed in this comment and has made the recommended change.

*Comment.* Two collective comments from many groups also suggested explicitly requiring that the vulnerability assessments be conducted using an objective screening instrument, to ensure useful assessments and avoid any confusion.

*Response.* DHS believes that §§ 115.41 and 115.141 as currently written clearly set forth the factors that a facility must consider to adequately assess detainees for risk of sexual victimization. With respect to Subpart A, ICE’s current screening methods for assigning detainees to a particular security level employ the standardized RCA instrument to guide decision-making using objective criteria and a uniform scoring system; in addition, the specific criteria in the regulation complement already existing classification requirements in ICE’s detention standards that are designed for the purpose of assigning detainees to the least restrictive housing consistent with safety and security. If DHS were to require the use of an objective screening instrument in all immigration detention facilities, the cost of developing and implementing such an instrument in all covered facilities would be prohibitive for ICE.

*Comment.* With respect to paragraph (c), which sets forth additional considerations for the assessment for risk of victimization, commenters suggested adding a provision that the facility consider information made available by the detainee through the assessment process. Additionally, they suggest revising the “previous incarceration” factor to also include previous detention.

*Response.* The proposed and final rule mandate that information made available by the detainee through the assessment process be considered as part of the screening, through the requirement at paragraph (c)(9) that facilities consider “the detainee’s own concerns about his or her physical safety.” DHS accepts the proposed revision to paragraph (c)(4) to require that previous detention history, as well as previous incarceration history, be considered.

*Comment.* One commenter suggested a requirement that female detainees and minors be screened, assessed, and

provided with treatment during confinement.

*Response.* The proposed and final rules clearly require that female detainees and minors be afforded each of the protections outlined by the standards, including with regard to screening, assessment, and treatment.

*Comment.* A commenter suggested adding a specific requirement for assessment with respect to juvenile detainees (including juvenile overnight detainees in the holding facility context). The comment suggested that qualified professionals conduct such assessments out of sight and sound of any adult detainees outside of the family unit, and that if a family unit member is suspected of posing a danger to the health or well-being of the juvenile, qualified professionals conduct such assessments out of sight and sound of all adult detainees.

*Response.* Juveniles in custody as part of the Family Residential Program pursuant to § 115.14 are accompanied by an adult family member who would be present during any questioning, unless the presence of the adult would pose a risk to the juvenile.

Moreover, DHS believes that §§ 115.14 and 115.114, in conjunction with §§ 115.41 and 115.141, provide sufficient, comprehensive protection to juvenile detainees in immigration detention and holding facility settings. The §§ 115.14 and 115.114 standards ensure that the need to protect the juvenile’s well-being (and that of others) is observed, while providing that the juvenile be detained in the least restrictive setting appropriate to the juvenile’s age and special needs. They also reinforce the importance of any other applicable laws, regulations, or legal requirements.

Sections 115.41(a) and 115.141(b) are intended to ensure the safety of all detainees (including juveniles) who may be held overnight in holding facilities with other detainees. Paragraph (c) in both sections also makes certain that the agency considers the age of the detainee as a criterion in assessing the detainee’s risk for sexual victimization. This standard, as proposed and in final form, is consistent with DOJ’s standards and—in conjunction with §§ 115.14 and 115.114—will protect juveniles in holding facilities.

The DHS standard provides more detailed protection than the DOJ standard by stating explicitly that staff must ask each detainee about his or her own concerns regarding physical safety. Moreover, DHS notes that it is impractical to require, in the context of holding facilities, that all conversations with juveniles take place “out of sight



and sound.” Given the many facilities that fall within the definition of holding facilities, separate spaces are not always available. Finally, DHS notes that unaccompanied alien children, as defined by 6 U.S.C. 279, are generally transferred to an HHS/ORR facility within 72 hours.

#### Use of Assessment Information (§ 115.42)

##### Summary of Proposed Rule

The standard in the proposed rule required the facilities to use the information obtained in the risk assessment process to separate detainees who are at risk of abuse from those at risk of being sexually abusive. The proposed standard provided that facilities shall make individualized determinations about how to ensure the safety of each detainee, and required that, in placing transgender or intersex detainees, the agency consider on a case-by-case basis whether a placement would ensure the detainee’s health and safety, and whether the placement would present management or security problems. The proposed standard also provided that transgender and intersex detainee placement be reassessed at least twice each year, and that such detainee’s own views as to their safety be given serious consideration.

##### Changes in Final Rule

DHS is adopting the regulation as proposed.

##### Comments and Responses

*Comment.* One advocacy group and some commenters suggested that the rule allow the agency to place LGBTI detainees with other LGBTI detainees on a voluntary basis, for the purpose of protecting such detainees. Similarly, commenters suggested provisions—described as being partly based on DOJ standards both regarding adult confinement facilities and civil juvenile detention facilities—that would prohibit LGBTI unit assignment solely on the basis of identification or status, but which would allow for such detainees to agree to be assigned to an LGBTI housing area, so long as detainees in any such facility, unit, or wing have access to programs, privileges, education, and work opportunities to the same extent as other detainees. Some members of Congress commented generally that the standard regarding housing of LGBTI detainees should be revisited to be in line with DOJ’s standard.

*Response.* As DHS noted in the proposed rule, the proposal does not include a ban on assigning detainees to particular units solely on the basis of

sexual orientation or gender identity, but requires that the facility consider detainees’ gender self-identification and make an individualized assessment of the effects of placement on detainee mental health and well-being. DHS believes that retaining some flexibility will allow facilities to employ a variety of options tailored to the needs of detainees with a goal of offering the least restrictive and safest environment for individuals. DHS acknowledges that placement of detainees in special housing for any reason is a serious step that requires careful consideration of alternatives. In consideration of the risks associated with special housing, DHS takes great care to ensure that detainees who are placed in any type of special housing receive access to the same programs and services available to detainees in the general population.

*Comment.* One advocacy group suggested modifying paragraph (b) to provide that in addition to considering gender self-identification in making placement decisions, the facility should also consider sexual orientation and gender identity.

*Response.* The protections outlined in paragraph (b) of this standard are intended to address issues and concerns unique to transgender and intersex detainees, including the use of physical anatomical traits and medical assessments to appropriately classify and house individuals. DHS believes that safety and welfare concerns related to screening of gay, lesbian, bisexual, and other gender non-conforming individuals are adequately addressed by the requirements of §§ 115.41 and 115.42.

*Comment.* Regarding the same paragraph, commenters suggested that the first sentence be clarified to state more specifically that “[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female detainees, and in making other housing and programming assignments, the agency or facility” is to consider the issues included in the proposed provision. The stated purpose of this change is to “put[] facility staff on clear notice that transgender detainees can be housed based on their gender identity.”

*Response.* As recommended by the commenters, the proposed and final rules prohibit facilities from making placement decisions for transgender or intersex detainees solely on the basis of identity documents or physical anatomy. Covered facilities making assessment and housing decisions for a transgender or intersex detainee must consider a variety of factors, including the detainee’s gender self-identification and health and safety needs, the

detainee’s self-assessed safety needs, and the advice of a medical or mental health practitioner.

DHS declines to incorporate the additional specific reference to single-gender facilities, to maintain flexibility to address these issues through guidance, on case-by-case basis, and consistent with developing case law.

*Comment.* One comment suggested applying the rest of the paragraph to the “agency” as well as facilities. This change would require the agency to consider the relevant factors not only once the detainee has arrived at a given facility, but before sending the detainee to that facility. This could eliminate the need to transfer a transgender or intersex detainee from one single-gender facility to another.

*Response.* DHS declines to make the additional suggested changes. Although the PREA standards do not specifically state that the agency consider enumerated factors for transgender and intersex detainee placement, they do provide effective guidelines for assessing risk for all detainees pursuant to § 115.41. This section mandates that the facility use the risk assessment information to inform assignment of detainees to housing, recreation and other activities, and volunteer work. This section also describes additional factors for the facility to use in its assessment of transgender and intersex detainees in particular and requires the agency to make individualized determinations to ensure the safety of each detainee. Because DHS, unlike DOJ, has more direct oversight regarding the treatment of all detainees in immigration detention facilities, DHS determined that requiring the agency to also use the risk assessment information would not provide additional protections for transgender and intersex detainees, and could cause operational confusion about the facility’s responsibilities under this section.

*Comment.* Commenters suggested adding a prohibition on any facilities, for the purpose of preventing sexual abuse, adopting restrictions on detainees’ access to medical or mental health care, or on manners of dress or grooming traditionally associated with one gender or another. One comment suggested there could be constitutional concerns if such access were to be restricted.

*Response.* DHS has determined that an explicit prohibition against restrictions on access to medical or mental health care is unnecessary. Access to medical or mental health care that is medically necessary and appropriate may not be limited under ICE’s detention standards. In addition,

grooming and dress requirements are generally outside the scope of this rule. Neither the NPREC Commission Report nor the DOJ final rule included standards on this issue, and DHS did not raise this issue for comment in its NPRM. Although DHS declines to include in this final rule a provision on this issue, we note that as a matter of practice, ICE generally does not accept or have dress or appearance restrictions based on gender. NDS and PBNDS 2008 and 2011 reaffirm detainees' right to nondiscrimination based on gender and sexual orientation.

*Comment.* In paragraph (c), two comments suggested that the qualifying phrase “[w]hen operationally feasible” be removed to ensure that facilities always provide transgender and intersex detainees with the ability to shower privately.

*Response.* DHS declines to make the proposed change, based on infrastructural limitations of housing and showering capacities at many facilities. While some immigration detention facilities may have the infrastructural capacity to permit transgender and intersex detainees to shower privately, this cannot be guaranteed at all facilities. DHS therefore requires the flexibility in § 115.42 to accommodate facilities where only open shower areas exist for detainee use.

*Comment.* One commenter suggested that detainees with no criminal record should not be housed alongside criminal detainees.

*Response.* DHS believes that existing ICE classification processes and related requirements for detention facilities sufficiently address this concern, ensuring that housing decisions are based on an objective and standardized assessment of each detainee's criminal background and likely security risks.

*Comment.* A human rights advocacy group and former Commissioners of NPREC recommended that immigration detainees be housed separately from inmates; the advocacy group suggested that if cohabitation is in fact necessary, the detainees should be assigned to cells or areas that allow for no unsupervised contact between detainees and inmates. The former Commissioners stated there should be heightened protection for those immigration detainees identified as abuse-vulnerable during the screening process.

*Response.* ICE contracts with detention facilities generally require that immigration detainees be housed separately from any criminal inmates that may also be present at the facility. DHS notes that a categorical prohibition on commingling of immigration and

criminal detainees may not yield sufficient benefits to justify the cost, because detention facilities generally use a classification system, like the system employed by ICE, to govern the housing and programming activities of its inmates to ensure safety.

#### **Protective Custody (§ 115.43)**

##### *Summary of Proposed Rule*

The proposed standard provided that vulnerable detainees may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made—and only until an alternative housing arrangement can be implemented. The standard also provided that segregation shall not ordinarily exceed 30 days. In addition, the proposed standard provided that, to the extent possible, involuntary protective custody should not limit access to programming.

##### *Changes in Final Rule*

The final standard adds a requirement for facilities to notify the appropriate ICE FOD no later than 72 hours after the initial placement into segregation, whenever a detainee has been placed in administrative segregation on the basis of a vulnerability to sexual abuse or assault.

Upon receiving such notification, the ICE FOD must review the placement to consider its continued necessity, whether any less restrictive housing or custodial alternatives may be appropriate and available, and whether the placement is only as a last resort and when no other viable housing options exist.

The final standard clarifies that it applies to administrative segregation of vulnerable detainees for a reason connected to sexual abuse or assault. As noted below, ICE has issued a segregation review policy directive which establishes policy and procedures for ICE review and oversight of segregated housing decisions. The final standard also makes technical changes in paragraphs (a) and (b) for the purpose of clarity.

##### *Comments and Responses*

*Comment.* Numerous groups, including a collection of advocacy groups and former Commissioners of NPREC, criticized the language regarding the “ordinarily” 30-day limit on protective housing as providing too much leeway for facilities to maintain that no better alternatives were available. The groups suggested restricting more narrowly any extensions, with some groups stating there should be no exceptions to the 30-

day limit, instead substituting either release and potential alternatives to detention thereafter if the detainee cannot be safely housed in a detention facility, or more appropriate housing away from the problematic facility. Another human rights group suggested requiring any facility housing detainees in administrative segregation for more than 30 days to notify the appropriate agency supervisor, to conduct a prompt review of the continuing necessity for the segregation—also recommended by the former Commissioners—and to work with the facility to establish an alternative housing situation. Some other groups suggested specific processes regarding notification of the FOD after various periods of days of administrative segregation, with one group suggesting further official notification and consideration of detainee transfer to general population in an alternate facility or placement in an alternative to the detention program.

Some groups suggested DHS consider altogether releasing victim-detainees anytime a facility cannot safely separate them without resorting to protective custody, with such custody being reserved for only limited, emergency, or exigent situations.

*Response.* A categorical 30-day limitation on the use of administrative segregation to protect detainees may not be possible depending on available alternative housing and custodial options for ensuring the safe placement of vulnerable detainees. However, DHS agrees that agency oversight over cases of administrative segregation would assist in effectuating the spirit of the standard, and has amended the standard to require agency review of such cases in order to ensure the continued appropriateness of segregation and to evaluate whether any less restrictive custodial alternatives may be appropriate and available.

Furthermore, ICE has finalized a segregation review policy directive which establishes policy and procedures for ICE review and oversight of segregated housing decisions. The ICE segregation review directive is intended to complement the requirements of PBNDS 2011, PBNDS 2008, NDS, and other applicable ICE policies. Proceeding by policy in this area is consistent with § 115.95 of the regulation, which authorizes both agencies and facilities to implement policies that include additional requirements. The directive would also be consistent with § 115.43(e) of the final rule, which requires facilities to notify the appropriate FOD no later than 72 hours after initial placement into segregation whenever a detainee has

been placed administrative segregation on the basis of a vulnerability to sexual abuse or assault.

*Comment.* With respect to supervisory staff review during administrative segregation periods, one commenter suggested that the facility administration be required to notify the FOD when a detainee has been held in segregation for 20 days. The comment also suggested the review occur each week after seven days “for the remaining 20 days,” rather than every week for the first 30 days and every 10 days thereafter.

*Response.* The final rule includes a change that requires facilities to notify the local ICE FOD no later than 72 hours after initial placement into segregation if a detainee has been held in administrative segregation on the basis of a vulnerability to sexual abuse or assault. The final rule also retains the other extensive review requirements contained in the proposed rule, because facility staff review of ongoing segregation placement is an effective tool. As noted above, ICE has finalized a directive for ICE to review and provide oversight of a facility’s decision to place detainees in segregated housing.

*Comment.* Former Commissioners of NPREC additionally found the term “reasonable efforts” problematic for imprecision, stating that its interpretation could vary among facilities.

*Response.* DHS believes that “reasonable efforts” to provide appropriate housing for vulnerable detainees will necessarily vary across facilities, depending on available resources and the circumstances of individual cases, and cannot be defined with precision *ex ante*.

*Comment.* Regarding protective custody for juvenile detainees, one commenter suggested a maximum limit of two days. Another suggested language that would require facilities to make best efforts to avoid placing juveniles in isolation, and that would prohibit—absent exigent circumstances—agencies from denying juveniles daily large-muscle exercise and legally required education services, along with other programs and work opportunities to the extent possible. This group recommended that when isolation is necessary to protect a juvenile, the facility must document the reason it is necessary, review the need at least daily, and ensure daily monitoring by a medical or mental health professional.

*Response.* DHS has determined such a provision to be unnecessary, since unaccompanied juveniles are generally not detained in ICE’s detention system for longer than 72 hours, during which

time they would not be placed in protective custody. In addition, DHS notes that access to activities and other services is outside the scope of this rulemaking, except to the extent affected by standards designed to prevent, detect, and respond to sexual abuse and assault in detention facilities.

*Comment.* One advocacy group suggested a provision be added to the standard to require facilities to submit a quarterly report to ICE ERO containing statistics and reasons regarding protective custody. The provision would also require that, as part of the standards’ auditing process, the agency review all instances involving the use of administrative segregation, and that—where a facility is found to have relied on segregation for purposes other than as the least restrictive means—the facility be subject to appropriate remedial measures consistent with the overall audit scheme.

*Response.* DHS believes that current facility reports to ICE regarding individual instances of protective custody, as required by ICE’s detention standards, suffice to facilitate effective agency oversight of these cases. As noted above, ICE has finalized a directive for ICE to review and provide oversight of a facility’s decision to place detainees in segregated housing, and this directive includes additional reporting requirements.

*Comment.* Some advocate comments, including one from former Commissioners of NPREC, suggested further oversight or record-keeping similar to DOJ’s standards for facilities where protective custody or administrative segregation are implemented. A number of these groups, including two collective group comments, suggested that proposed paragraph (a) be modified or a new paragraph be created to ensure “detailed documentation” of the reasons for placing an individual in administrative segregation and also include “the reason why no alternative means of separation from likely abusers can be arranged.” The same groups also suggested similar changes—in line with DOJ’s standards—to proposed paragraph (c), including documenting duration of protective custody and requiring reasonable steps to remedy conditions that limit access, including a prohibition on denial of access to telephones and counsel. In a similar vein, one group suggested the agency be informed each time a suspected victim is placed in custody. Former Commissioners suggested that any segregated individuals have access to programs, privileges, education, and work opportunities to the extent possible, but if restricted, required

documentation of: the limited opportunities, the duration, and the reasons therefor.

*Response.* ICE’s existing detention standards uniformly require that facilities document the precise reasons for placement of an individual in administrative segregation, as well as (under PBNDs 2008 and 2011) any exceptions to the general requirement that detainees in protective custody be provided access to programs, visitation, counsel, and other services available to the general population to the maximum extent practicable, consistent with the practices advocated by commenters. ICE has also finalized a segregation review policy directive which establishes policy and procedures for ICE review and oversight of segregated housing decisions.

*Comment.* Some groups and a collective comment of advocates suggested including a provision that would make explicit that protective custody always be accomplished in the least restrictive manner capable of maintaining the safety of the detainee and the facility; commenters expressed concern about long-term detrimental health effects from segregation. One commenter stated his belief that segregation can be used for punitive purposes rather than to protect detainees, which should be addressed.

*Response.* DHS believes the concern is adequately addressed by the revised rule, which requires that use of administrative segregation to protect vulnerable populations be used only as a last resort and when no other viable housing option exist.

*Comment.* One advocacy group suggested detailed requirements describing the minimum privileges of detainees in protective custody, including normal access to educational and programming opportunities; at least five hours a day of out-of-cell time, including at least one hour daily large muscle exercise that includes access to outdoor recreation; access to the normal meals and drinking water, clothing, and medical, mental health and dental treatment; access to personal property, including televisions and radios; access to books, magazines, and other printed material; access to daily showers; and access to the normal correspondence privileges and number of visits and phone calls, including but not limited to comparable level of contact with family, friends, legal guardians, and legal assistance.

*Response.* Existing ICE detention standards address in detail the minimum programs, services, and privileges to which detainees in segregation must be afforded access,

including recreation, visitation, legal counsel and materials, health services, meals, correspondence, religious services, and personal hygiene items, among others. DHS does not believe that this level of specificity is necessary to additionally include in this regulation.

#### **Detainee Reporting (§§ 115.51, 115.151)**

##### *Summary of Proposed Rule*

Sections 115.51 and 115.151 of the proposed rule required agencies to enable detainees to privately report sexual abuse, prohibit retaliation for reporting the abuse, and related misconduct. The proposed standards required DHS to provide instruction to detainees on how to confidentially report such misconduct. The proposed standards also required that DHS provide and facilities inform detainees of at least one way to report sexual abuse to an outside public or private entity that is not affiliated with the agency, and that is able to receive and immediately forward the detainee's reports of sexual abuse to agency officials, while allowing the detainee to remain anonymous, upon request.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* Commenters expressed general concern regarding the manner in which reporting opportunities may be available. One advocacy group suggested that allowing posting of information regarding consular notification as a means to satisfy the requirement that detainees have at least one way to report sexual abuse outside the agency is inadequate because cultural or other concerns may prevent victims from being able or willing to inform an official of their government. The group also expressed concern that other avenues be available to the detainee regardless of whether detained in a holding facility. Former Commissioners of NPREC stressed the need for detainees to have the ability to report sexual abuse to non-staff outside the agency or facility, while another commenter suggested there be either a separate entity or an assigned trustworthy officer to whom a detainee could report an incident. One organization stated the standard should require proactive notification to detainees of opportunities to report crimes confidentially, one-on-one, to an auditor.

*Response.* DHS believes that these provisions adequately address the important need for detainees to have

multiple methods of reporting sexual assault and abuse. This key protection requirement is reflected in the standard and in current agency practices. With regard to immigration detention facilities, detainees can report incidents in several ways, including by calling the JIC or the point of contact listed on the sexual abuse and assault posters.

Detainees may also call the OIG, the Community and Detainee Helpline, or report incidents to CRCL. The Detainee Handbook and posters provide contact information to detainees and also note that detainee reports are confidential. With respect to holding facilities, detainees are provided with multiple ways to privately report sexual abuse, including reporting to the DHS OIG.

*Comment.* The former Commissioners suggested including volunteers and medical and mental health practitioners in the standard due to their unique situation of common contact with detainees.

*Response.* The purpose of this provision is to ensure that the agency and facilities create effective procedures for detainee incident reporting. Although the provision does not explicitly address reporting to volunteers or healthcare practitioners, nothing in this standard prohibits such reporting. In this connection, DHS notes that volunteers and healthcare practitioners will receive specialized training regarding how to recognize and handle detainees who have been sexually abused or assaulted and how to respond to detainee allegations. DHS believes that volunteers and healthcare practitioners will be a valuable resource for detainees, but declines to add specific regulatory provisions for individual avenues of reporting, beyond those already identified in the regulation.

*Comment.* Some members of Congress commented generally that the standard regarding abuse reports and responses to reports of abuse should be revisited to be in line with DOJ's standard.

*Response.* DHS respectfully notes that with regard to detainee reporting, the final standards are closely aligned with DOJ's inmate reporting provisions. The final standard allows for multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities.

*Comment.* One organization suggested that any translations of a detainee's complaints should be provided by a "neutral" translation company at no cost to the detainee.

*Response.* DHS routinely uses translation services during interviews and when taking complaints. When staff

members or employees do not speak the same language as the detainee, they may use a third party translation service that is under contract with the agency. The translation service fees are not charged to the detainee and although the fees are paid by DHS, the translation companies are not otherwise affiliated with the agency.

*Comment.* An organization stated that the standard should include a provision allowing staff to report sexual abuse anonymously.

*Response.* Under the final standard staff are required to report incidents of sexual abuse, and may fulfill that obligation by reporting outside the chain of command. Separate and apart from this obligation, staff may call the JIC and OIG with anonymous reports of sexual abuse and assault. Therefore, DHS declines to add a specific regulatory provision allowing staff to report abuse anonymously.

*Comment.* The former Commissioners suggested including an explicit provision in this standard and in § 115.52 prohibiting any report by a detainee regarding sexual abuse from being referred to a staff member who is the subject of the complaint.

*Response.* DHS recognizes the importance of ensuring that alleged abusers are not involved in any way with a detainee who lodges a complaint, and agrees that referral to the subject of a complaint would be inappropriate. Accordingly, multiple provisions of this regulation separate the detainee victim from the subject of a complaint, including a requirement that the agency review and approve facility policies and procedures for staff reporting. Moreover, the regulation requires such procedures to include a method by which staff can report outside of the chain of command. More comprehensive, appropriately tailored rules will be contained therein.

Similarly, § 115.66 requires that volunteers, staff, and contractors who are suspected of perpetrating sexual abuse be removed from duties requiring detainee contact, and § 115.166 requires agency management to take appropriate action when an allegation has been made. Further, §§ 115.64 and 115.164 require covered entities, upon learning of an allegation that a detainee was sexually abused, to separate the alleged victim and abuser. Current policy would prevent an individual who is the subject of an allegation from being responsible for investigating the allegation. Taken together, these factors sufficiently address the concern that underlines the comment, and DHS declines to amend the regulatory text to further address the issue.

*Comment.* A human rights advocacy group suggested that the standard specify that detainees are able to make free, preprogrammed calls to the OIG and CRCL, and that facilities must provide access to telephones, along with contact information to reach consular officials.

*Response.* Under current agency practice, all calls made by a detainee to the OIG and the JIC are preprogrammed and free of charge. CRCL is unable to handle a large volume of calls from detainees and is not staffed outside of business hours, but detainees may send written complaints to CRCL, including by email. The standard already requires that facilities provide instructions on how detainees may contact their consular official.

*Comment.* An advocacy group and former Commissioners of NPREC recommended including a provision that DHS will not remove from the country or transfer to another facility detainees who report or make a grievance regarding sexual abuse before the investigation of the abuse is complete, except at the detainee's request.

*Response.* DHS routinely considers whether detainees are suitable candidates for alternatives to detention or prosecutorial discretion. Certainly, DHS through ICE evaluates the detention status and removal proceedings for any sexual abuse victim to determine whether the detainee should be placed on an order of supervision, released on bond, or whether he or she is eligible for a form of prosecutorial discretion such as deferred action or parole. ICE's OPR has the authority to approve deferred action for victimized detainees on a case-by-case basis where appropriate. As mandated in §§ 115.22(h) and 115.122(e), all alleged detainee victims of sexual abuse that is criminal in nature will be provided U nonimmigrant status information. OPR and HSI have the delegated authority to certify USCIS Form I-918, Supplement B for victims of qualifying criminal activity that ICE is investigating where the victim seeks to petition for U nonimmigrant status. Because these are routine agency practices and subject to agency discretion, DHS has declined to make changes in the final rule to specifically address the various methods that could be used to release a detainee victim from detention. The agency, through ICE, can and will use these methods for detainees with substantiated sexual abuse and assault claims. DHS does not believe that a uniform stay of removal for all aliens who lodge complaints is warranted.

With regard to transfers, ICE policy 11022.11, entitled Detainee Transfers, governs the transfer of all aliens in ICE custody. Pursuant to the policy, transfers are discouraged unless a FOD or his or her designee deems the transfer necessary for the following reasons: (a) To provide appropriate medical or mental health care; (b) to fulfill an approved transfer request by the detainee; (c) for the safety and security of the detainee, other detainees, detention personnel, or any ICE employee; (d) at ICE's discretion, for the convenience of the agency when the venue of DOJ Executive Office for Immigration Review proceedings is different than the venue in which the alien is detained; (e) to transfer to a more appropriate facility based on the detainee's individual circumstances and risk factors; (f) upon termination of facility use; or (g) to relieve or prevent facility overcrowding. ICE's transfer policy is designed to limit transfers for all aliens and provides adequate protection for aliens who have sexual abuse complaints or grievances.

*Comment.* One group suggested that the standard provide for young survivors of sexual abuse to have the option of release on their own recognizance and to remain lawfully in the United States during the investigation. Another organization and a collective comment of advocacy groups stated that the standard should provide for an assessment of any alleged victim who has reported abuse to determine if he or she would be safer under alternatives to detention.

*Response.* DHS routinely considers whether detainees are suitable candidates for alternatives to detention. Certainly, DHS through ICE evaluates the detention status of any sexual abuse victim to determine whether the detainee should be placed on an order of supervision, released on bond, or granted parole or deferred action. Because these are routine agency practices and subject to agency discretion, DHS has declined to make changes in the final rule to specifically address the various methods that could be used to release a detainee victim from detention.

*Comment.* Some commenters expressed concern in regard to both this reporting standard and other of the proposed standards that detainees may fear speaking up due to retaliation or are unlikely to report incidences of sexual abuse to officers.

*Response.* DHS acknowledges that some detainees may fear reporting sexual abuse. As such, the final standard includes §§ 115.67 and 115.167 which protect detainees from

retaliation. Also, the standard as well as current practices provide multiple ways a detainee can report sexual abuse that do not involve confronting an officer or staff member.

*Comment.* One collective comment from advocacy groups suggested that DHS make explicit in paragraph (a) that the policies and procedures to be developed by the agency to ensure multiple ways of private detainee reporting are to be available while in custody and after release or removal.

*Response.* The agency recognizes the benefit to detainees of reporting incidents of sexual abuse or assault to a private entity. Detainees in immigration facilities already have access to phone numbers for many private organizations that provide assistance in response to a wide range of complaints or inquiries.

Once a detainee has been removed or is otherwise no longer in agency custody, the agency is not obligated to provide reporting procedures. However, it is available to former detainees to contact the OIG, the JIC, CRCL or a private entity to report any incidents even after they are no longer in agency custody.

## Grievances (§ 115.52)

### Summary of Proposed Rule

The standard contained in the proposed rule prohibited the facility from imposing any deadline on the submission of a grievance regarding sexual abuse incidents. The standard mandated that facilities allow detainees to file a formal grievance at any time before, during, after, or in lieu of lodging an informal complaint related to sexual abuse. The standard further required the facility to issue a decision on the grievance within five days of receipt.

### Changes in Final Rule

DHS is modifying paragraph (e) by adding a requirement that the facility respond to an appeal of the grievance decision within 30 days and by requiring facilities to send all grievances related to sexual abuse to the appropriate ICE Field Office Director at the end of the grievance process.

### Comments and Responses

*Comment.* Some commenters suggested that DHS provide additional processes and procedures for emergency grievances. One advocacy group suggested that proposed paragraph (c)'s requirement for protocol on time-sensitive, immediate-threat grievances is too open-ended, as it should set out criteria or guidance as to what facilities'

procedures should accomplish and require agency approval of the procedures. Another organization stated the filing process itself for an emergency at-risk grievance should be explicitly included in the standard, for when a detainee alleges he or she is subject to a substantial risk or imminent sexual abuse.

*Response.* The final standard is meant to enhance existing agency policies and detention standards that seek to prevent, detect, and respond to sexual abuse incidents by establishing general regulatory requirements for immigration detention facilities. ICE's detention standards provide detailed grievance procedures, including requirements for individual facility emergency grievance processes. Common elements of these procedures have been included in the regulatory language. However, the agency believes that its longstanding grievance procedures are comprehensive and adequately address the public's concerns. Furthermore, each facility's grievance procedures are inspected to ensure that they are being properly executed.

*Comment.* An advocacy group suggested that proposed paragraph (e)'s grievance-response timeframe should also include a provision adding a 30-day maximum time limit for the agency's response to an appeal of an agency's decision on a grievance.

*Response.* DHS accepts the suggested revision to the grievance appeal process described in paragraph (e) by including a requirement to respond to an appeal of the grievance decision within 30 days.

*Comment.* Regarding the substance of the grievance itself, a group suggested that the standard should require that no sexual abuse-related grievance should be denied based upon any detainee failure to properly fill out and submit a formal grievance; the substance of the grievance should be sufficient to trigger the facility's response on the merits.

*Response.* Any allegation of sexual assault is thoroughly investigated by the agency or by local law enforcement, if appropriate. The fact that a grievance form was not properly filled out or submitted would never be grounds to not investigate a detainee's abuse claim.

*Comment.* A commenter expressed concern that the standard should require facilities to provide DHS with a copy of each grievance and disposition so DHS can effectively monitor the facilities.

*Response.* DHS has revised the regulatory text to require facilities to send all grievances related to sexual abuse and the facility's decisions with respect to such grievances to the

appropriate ICE Field Office Director at the end of the grievance process. In addition, facilities are required under §§ 115.89 and 115.189 to keep all grievances on file. Each facility is inspected under §§ 115.88 and 115.188 to ensure that it is following the grievance process and handling each grievance properly.

#### **Detainee Access to Outside Confidential Support Services (§ 115.53)**

##### *Summary of Proposed Rule*

The standard contained in the proposed rule required agencies to provide detainees with access to outside confidential support services and that the information about these services will be provided to them. The standard further required that detainees and these confidential support services will have reasonable communication in as private a manner as possible.

##### *Changes in Final Rule*

DHS is adding paragraph (d) requiring facilities to inform detainees, prior to giving them access to outside resources, of the extent to which such communications will be monitored and to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

##### *Comments and Responses*

*Comment.* One commenter suggested that when an assault occurs, facilities should make available to detainees updated lists of resources and referrals to professionals.

*Response.* DHS agrees that detainees should have access to resources and referrals to professionals when appropriate. The final standards adequately address these needs in this section and also in §§ 115.21, 115.81–83. This section provides that each facility use available community resources and services to provide support to detainees. In addition, § 115.53 requires facilities to maintain or attempt to enter into agreements with community service providers or national organizations that provide legal advocacy and emotional support. Section 115.33 also requires facilities to provide detainees with information about local organizations that can assist detainees. A detainee does not have to wait for his or her allegation to be substantiated before being able to use these services; the facility must make the services available much earlier on.

Section 115.21, which covers forensic medical examinations, requires facilities to make use of outside victim services following sexual abuse incidents. These services include rape crisis center

information, a qualified staff member from a community-based organization, or a qualified agency staff member. Section 115.21 also provides that a forensic medical examination shall be arranged when appropriate for medical or evidentiary reasons and at no cost to the detainee.

Sections 115.81–115.83 require referrals for medical follow-up, unimpeded access to emergency medical treatment and crisis intervention services, medical and mental health evaluations, and follow-up services.

*Comment.* Commenters expressed concerns over confidentiality provisions in this standard. Regarding the outside support services, an advocacy group stated that all communications between detainees—particularly LGBTI detainees—and such organizations should remain confidential, with a detainee being notified when confidentiality of a communication is not guaranteed. Two collections of advocacy groups expressed similar concern, calling for replacing “in as confidential a manner as possible” with complete confidentiality, and adding requirements for an exception that—when such confidentiality is not possible—the facility document the reason(s) therefor and inform the detainee of the extent of monitoring and the extent of any forwarding of reports of abuse to authorities under mandatory reporting laws. Some members of Congress also stated that full confidentiality is necessary in communications with service providers like rape crisis counselors. Another advocacy group as well as a collection of youth, immigration and disability groups and a human rights group focused, respectively, on the specific needs for confidentiality in regard to medical and mental health care records and also trauma and support services.

*Response.* DHS agrees that it is important for all victims, regardless of their sexual orientation, to have access to confidential services. The standard requires agencies to “enable reasonable communication between detainees and these organizations and agencies, in as confidential a manner as possible.” Unfortunately, DHS cannot guarantee complete confidentiality in all situations, because it may be difficult for agencies to ensure complete confidentiality with all forms of communication due to factors such as the physical layout of the facility or the use of automatic phone monitoring systems, which may be difficult to suspend for support calls without requiring the detainee to make a specific request. As a result of confidentiality

concerns, DHS added paragraph (d), which will require facilities to inform detainees prior to giving them access to outside resources, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

As ICE's Detainee Handbook explains, communications between detainees and investigators are private and detainees' medical and administrative files are locked in secure areas to ensure confidentiality.

DHS encourages facilities to establish multiple procedures for detainee victims of sexual abuse to contact external advocacy and support groups. While not ensuring ideal privacy, phones may provide the best opportunity for detainees to ask for assistance in a timely manner. Privacy concerns may be addressed through other means of contacting outside organizations, such as allowing confidential correspondence, opportunities for phone contact in more private settings, or the ability of the detainee to make a request to contact an outside advocate through a chaplain, clinician, or other service provider.

### **Third-Party Reporting (§§ 115.54, 115.154)**

#### *Summary of Proposed Rule*

Standards 115.54 and 115.154 in the proposed rule required facilities to establish a method to receive third-party reports of sexual abuse and publicly distribute information on how to report such abuse on behalf of a detainee.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

### **Staff Reporting Duties (§§ 115.61, 115.161)**

#### *Summary of Proposed Rule*

The standards in the proposed rule required that staff immediately report: (1) Any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in a facility; (2) retaliation against detainees or staff who reported such an incident; and (3) any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The proposed standards prohibited the agency from revealing any information related to a sexual abuse report to

anyone other than to the extent necessary to make medical treatment, investigation, law enforcement, and other security and management decisions.

#### *Changes in Final Rule*

DHS now explicitly requires covered staff to report retaliation against detainees or staff who participated in an investigation of an incident of sexual abuse that occurred in a facility. Previously, the reporting requirement in these standards did not explicitly cover such retaliation (although it did cover retaliation against detainees or staff who reported an incident of sexual abuse). Otherwise, DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* A commenter suggested expanding paragraph (a) to require staff to report not only "any knowledge, suspicion, or information regarding . . . retaliation against detainees or staff who reported" an incident of sexual abuse, but also any knowledge, suspicion, or information regarding retaliation against detainees or staff that provided information pertaining to such an incident.

*Response.* DHS agrees that anti-retaliation measures are of paramount importance in this context, and has therefore included a range of measures, including §§ 115.67 and 115.167, intended to deter retaliatory conduct. Under these provisions, agency employees (and others) may not retaliate against any person, including a detainee, for, *inter alia*, reporting, complaining about, or participating in an investigation into an allegation of sexual abuse.

With respect to staff reporting specifically and in response to the comment, DHS revised §§ 115.61(a) and 115.161(a) to require all staff to immediately report retaliation against detainees or staff who reported or participated in an investigation about sexual abuse incidents. Prior to this revision, the reporting requirement did require reporting about retaliation against detainees or staff who reported an incident of sexual abuse, but did not explicitly cover reports of retaliation against individuals who participated in investigations.

*Comment.* An advocacy group suggested adding language to paragraph (a) that would allow staff to anonymously report sexual abuse and harassment of detainees.

*Response.* DHS agrees that it is essential for staff to have anonymous methods of reporting sexual abuse and assault incidents. Under 2006 agency

policy and the SAAPID, agency staff is required to ensure immediate reporting of any incident of sexual abuse or assault by the facility to the local ICE personnel, who must then notify the ICE JIC telephonically within two hours and in writing within 24 hours. Reporting directly to the JIC allows staff to report incidents anonymously without having to report up through their chain of command. DHS believes that the allowance of anonymous reporting is adequately addressed between these policies and paragraph (a) of this standard which allows for "methods by which staff can report outside of the chain of command." Because an express regulatory provision would be redundant to a number of measures that are currently in place, and because DHS believes that the anonymous reporting option must be carefully controlled to ensure that staff also meet their mandatory reporting duties properly and effectively, DHS does not believe that the recommended added language is necessary.

### **Protection Duties (§§ 115.62, 115.162)**

#### *Summary of Proposed Rule*

The standards contained in the proposed rule required that when an agency employee or facility staff has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she must take immediate action to protect the detainee.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

### **Reporting to Other Confinement Facilities (§§ 115.63, 115.163)**

#### *Summary of Proposed Rule*

The standards contained in the proposed rule mandated that upon receiving an allegation that a detainee was sexually abused while confined at another facility, the facility receiving the allegation must (1) notify the appropriate office of the facility where the sexual abuse is alleged to have occurred as soon as possible, but no later than 72 hours after receiving the allegation; and (2) document the efforts taken under this section. The agency office that receives such notification, to the extent covered by the regulation, must ensure the allegation is referred for investigation.



*Changes in Final Rule*

DHS is modifying the notification language in paragraph (a) for both § 116.63 and § 115.163 to require agencies and facilities that receive allegations of abuse at a different facility to notify the appropriate office of the agency or the administrator of the facility where the alleged abuse occurred.

*Comments and Responses*

*Comment.* The former Commissioners of NPREC recommended that DHS define who specifically in the agency or facility is required to notify another facility, upon receiving an allegation of detainee sexual abuse in another facility. The group suggested following the DOJ PREA final rule by using the term “facility head.”

*Response.* DHS understands the concern of confusion as to who is responsible for reporting allegations to other confinement facilities and has subsequently revised § 115.63. With regard to Subpart A, the SAAPID requires that when an alleged assault is reported at another facility, the facility receiving the allegation report it to the administrator of the facility where the alleged sexual abuse or assault occurred. DHS revised § 115.63, which complements the SAAPID, and also revised § 115.163 to now require notification to “the appropriate office of the agency or the administrator of the facility where the alleged abuse occurred.” The provision allows notification to the appropriate office of the agency because in some cases the allegations may concern ICE or CBP holding facilities for which notification to the JIC would be more appropriate, for any of a range of reasons. Under the DHS standard as well as the DOJ standard, if a covered facility learns of sexual abuse in another facility, the covered facility will notify the other facility, and document such notification in writing. DHS believes that as currently written the provision satisfies the concern for facility to facility reporting and does not believe that adding “facility head” will strengthen the provision as currently written.

For Subpart B facilities, where detention is relatively brief, and in order to minimize delay, the agency official responsible for notifying another confinement facility of an allegation of sexual abuse will depend on which office receives the allegation. DHS believes that specifying “facility head” within this section will limit which office can either notify or be notified and may therefore postpone the communication between facilities

which would not be in the best interest of the victim. For this reason, DHS believes that the provision will be most effective as currently written and declines to adopt the “facility head” language.

**Responder Duties (§§ 115.64, 115.164)***Summary of Proposed Rule*

The standards contained in the proposed rule required that the first employee or staff member that responds to the sexual abuse report separate the alleged victim and abuser and preserve and protect the crime scene until evidence can be collected.

*Changes in Final Rule*

DHS is adopting the regulation as proposed.

*Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

**Coordinated Response (§§ 115.65, 115.165)***Summary of Proposed Rule*

Sections 115.65 and 115.165 in the proposed rule required a multidisciplinary team approach in the response to an incident of sexual abuse.

*Changes in Final Rule*

DHS revised each standard to clarify that notification requirements related to the transfer of detainee victims of sexual abuse will differ depending on whether or not the receiving facility is covered by these standards. As in the proposed rule, when the receiving facility is not covered by these standards, the sending facility must inform the receiving facility of the incident and the victim’s potential need for medical or social services, unless the victim requests otherwise. Otherwise, DHS is adopting the regulation as proposed.

*Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

**Protection of Detainees From Contact With Alleged Abusers (§§ 115.66, 115.166)***Summary of Proposed Rule*

The standard in the proposed rule with respect to immigration detention facilities required the agency or facility to remove from all duties requiring detainee contact, pending the outcome of an investigation, staff, contractors, and volunteers suspected of perpetrating sexual abuse. The standard with respect to holding facilities

required agency management to consider such removal for each allegation of sexual abuse, and to do so if the seriousness and plausibility of the allegation make removal appropriate.

*Changes in Final Rule*

DHS is adopting the regulation as proposed.

*Comments and Responses*

*Comment.* Some commenters suggested that as with immigration detention facilities, holding facilities that have staff, contractors, or volunteers that are suspected of sexual abuse should remove such persons from all duties requiring detainee contact pending the outcome of an investigation. They believe that requiring removal is important for the protection of the victim as well as others in the facilities. An advocacy group commented that leaving § 115.166(a) unrevised will leave open the possibility for a perpetrator to continue to have access to the detainees during the reporting and investigating processes.

*Response.* DHS believes that the language used in § 115.166 is the appropriate approach to protect detainees while an investigation is pending in a holding facility. DHS recognizes the desire for consistency between Subpart A and Subpart B of the regulation. However, DHS believes that § 115.166, as proposed and in final form, appropriately addresses the unique needs associated with holding facilities, including limited staffing resources. Furthermore, § 115.166 requires supervisors to affirmatively consider removing staff pending the completion of an investigation, and to remove them if the seriousness and plausibility of the allegation make such removal appropriate (as opposed to automatically placing employees on administrative duties even where, for example, the allegations are not plausible because the subject of the allegation was not on duty at the time of the alleged incident).

With respect to ICE holding facilities, the SAAPID reinforces the regulation by requiring the removal of an ICE employee, facility employee, contractor, or volunteer suspected of perpetrating sexual abuse or assault to be removed from all duties requiring detainee contact pending the outcome of an investigation. The term “suspected of” is intended to allow the agency or facility a modest exercise of discretion with respect to whether any suspicion exists. By requiring that the individual be “suspected of” perpetrating sexual abuse and assault, DHS intends to



ensure that staff, contractors, and volunteers are not removed for plainly implausible or plainly erroneous allegations (e.g., a detainee may claim that a specific staff member assault him when, in fact, that staff member was not at the facility during the alleged incident).

DHS believes that by assigning staff, contractors, and volunteers to duties away from detainees when necessary, DHS will provide sufficient protection to detainees.

*Comment.* Some commenters suggested adding the same language that is currently in DOJ's PREA final rule concerning collective bargaining agreements. The DOJ standard prevents an agency or governmental entity responsible for collective bargaining on the agency's behalf from entering into or renewing any collective bargaining agreement or other agreement that limits the agency's ability to remove staff suspected of perpetuating sexual abuse from contact with any inmates pending the outcome of an investigation. The commenters believe that this adjustment will prevent DHS from entering into collective bargaining agreements that frustrate the objective of the standard.

*Response.* DHS respectfully declines to add the language concerning collective bargaining agreements. DHS believes adding the language suggested by the commenters is unnecessary. The DHS rule requires affirmative steps in response to an allegation of sexual abuse. Removal from detainee interaction during the investigation process is required for staff, contractors, and volunteers suspected of perpetrating sexual abuse in immigration detention facilities. In response to an allegation of sexual abuse in a holding facility, agency management shall remove any staff, contractor, or volunteer from duties requiring detainee contact pending the outcome of an investigation, where the seriousness and plausibility of the allegation make removal appropriate. This provides a greater level of protection and requires more significant affirmative action than a limitation on collective bargaining agreements.

*Comment.* Some commenters suggested changing § 115.66 to apply not to staff, contractors, or volunteers that are "suspected of perpetrating" sexual abuse, but to staff, contractors, or volunteers that are "alleged to have perpetrated" sexual abuse.

*Response.* PBNDS 2011 uses the term, "suspected of perpetrating." The use of conflicting terms could pose bargaining issues. "Suspected of perpetrating" allows for a modest exercise of discretion to determine whether an

allegation has any reasonable basis in fact. DHS believes that the use of the term "suspected of perpetrating" as opposed to "alleged to have perpetrated" will adequately ensure the safety and security of detainees.

#### **Agency Protection Against Retaliation (§§ 115.67, 115.167)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule required that agency and facility staff and employees not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force.

##### *Changes in Final Rule*

DHS added a new paragraph (b) to Subpart A of the final rule which requires the agency or facility to "employ multiple protection measures, such as housing changes, removal of alleged staff or detainee abusers from contact with victims, and emotional support services for detainees or staff that fear retaliation for reporting sexual abuse or for cooperating with investigations."

##### *Comments and Responses*

*Comment.* Many commenters suggested adding language that will protect from retaliatory deportation any detainees who report, complain about, or participate in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force.

*Response.* DHS agrees that removal should never be used solely to retaliate against a detainee who reports sexual abuse. To address this concern, §§ 115.67 and 115.167 explicitly prohibit any retaliatory behavior, which is a broader form of protection and is therefore adequate to address this risk.

*Comment.* Multiple commenters suggested that the standards in §§ 115.67 and 115.167 should be replaced with the corresponding DOJ PREA standards. Some members of Congress commented generally that the retaliation standard should be revisited to be in line with DOJ's standard. One commenter notes that the DOJ PREA standards detail specific protection measures that the agency must take to ensure retaliation does not occur.

*Response.* In response to comments about aligning DHS's § 115.67 standards with DOJ's, DHS again reviewed the DOJ final rule and added a new paragraph to Subpart A of the final rule, which

requires the agency to use multiple measures to protect detainees who fear reporting sexual abuse or fear cooperating with investigations.

DHS did not incorporate the language used in DOJ's paragraph (a) because DHS's language provides greater protection by prohibiting retaliation immediately, instead of relying on a policy to be drafted in the future. Given ICE's more direct oversight over its immigration detention facilities, the agency is in a better position to prohibit and take action against acts of retaliation by detainees or staff. DOJ's paragraph (d) was not incorporated for the same reason, and because status checks are redundant—for 90 days following a report of sexual abuse, the agency or facility must monitor to see if there are facts that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. DHS believes that its final rule is tailored effectively to immigration detention and therefore, does not need to mirror the DOJ rule to provide adequate protection to detainees.

DHS chose not to include proposed language about employing multiple protection measures in Subpart B. Given the relatively short time of detention in holding facilities, housing assignments are not applicable. Section 115.164, Responder Duties, includes a requirement to separate the alleged victim and abuser. With respect to the comment regarding providing emotional support services to staff, note that CBP offers a full range of assistance to agency employees through the WorkLife4You Program and the Employee Assistance Program.

*Comment.* One commenter suggested the addition of a paragraph in § 115.67 that would require the facility's PSA Compliance Manager, or assignee, to make sure the mandates of § 115.22 are fulfilled.

*Response.* Sections 115.11(d) and 115.111(d) already serve this function by ensuring the PSA Compliance Manager has "sufficient time and authority to oversee facility efforts to comply with facility sexual abuse prevention and intervention policies and procedures."

*Comment.* One commenter suggested that this standard explicitly address transferring victims as a form of retaliation or as a means of protection from alleged perpetrators.

*Response.* DHS recognizes the need to eliminate unnecessary detainee transfers. Eliminating unwarranted transfers of sexual assault victims for retaliatory reasons are a high priority for the agency. ICE Policy 11022.11,

entitled Detainee Transfers, was developed and implemented to reduce detainee transfers and specifically notes that transfers should not be conducted unless certain articulated factors are considered by the FOD or his or her designee. DHS believes that the protections afforded by ICE's transfer policy apply to all detainees, not just those who have made sexual assault allegations or those participating in investigations. Section 115.67 of these standards also includes an explicit prohibition against any form of agency retaliation against victims of sexual abuse or assault, including retaliatory housing changes.

### Post-Allegation Protective Custody (§ 115.68)

#### Summary of Proposed Rule

The standard contained in the proposed rule required the facility to place detainee victims of sexual abuse in a supportive environment that is the least restrictive housing option possible. The standard provided that detainee victims shall not be returned to the general population until proper re-assessment is completed. The standard further required that detainee victims are not to be held for longer than five days in any type of administrative segregation, except in unusual circumstances or at the request of the detainee.

#### Changes in Final Rule

The final rule adds a requirement for facilities to notify the appropriate ICE FOD whenever a detainee victim has been held in administrative segregation for 72 hours.

Upon receipt of such notification, the final rule also requires that the ICE FOD conduct a review of the placement to consider whether the placement is only as a last resort and when no other viable housing options exist, and whether—in the case of a detainee victim held in administrative segregation for longer than five days—whether the placement is justified by extraordinary circumstances or is at the detainee's request.

#### Comments and Responses

*Comment.* One advocacy group suggested adding a statement in paragraph (b) requiring the facility to report to the agency within 24 hours the placement of suspected sexual abuse victims in protective custody.

*Response.* As noted above, the final rule adds a requirement for facilities to notify the appropriate ICE FOD whenever a detainee victim has been held in administrative segregation for 72

hours. ICE notes that it has also chosen to proceed by policy in this area, as noted above in the discussion relating to § 115.43.

*Comment.* Some commenters suggested further defining the term “unusual circumstances” in paragraph (b) to include the actual circumstances in which prolonged protective custody might be warranted. Commenters wrote that vulnerable detainees may request protective custody for a prolonged period of time because they are unaware of their rights.

An advocacy group suggested that the agency supervisor be notified when a detainee is placed in administrative custody for more than five days. Once the agency supervisor is notified, this person should be tasked with conducting a review of the segregation as well as looking for other placements for the detainee as long as the detainee is not subject to mandatory detention.

*Response.* The final standard includes new requirements for agency notification whenever an individual has been held in administrative segregation for 72 hours, and agency review of such cases to determine whether the placement is only as a last resort and when no other viable housing options exist. Where a detainee victim has been held in administrative segregation for longer than five days, the agency must also review whether the placement is justified by extraordinary circumstances, or is at the detainee's own request. DHS does not believe that further definition of the term “unusual circumstances” is necessary based on any concern that detainees' lack of awareness of their rights will lead them to request prolonged protective custody. In ICE's experience, detainees are not likely to affirmatively request continued protective custody unless they desire to remain segregated. This final rule includes strong provisions on detainee education in this context.

*Comment.* One commenter stated that protective custody should only be used as a last resort.

*Response.* Section 115.68 has been revised to require the FOD to determine whether the placement in segregation is used only as a last resort and when no other viable housing options exist.

*Comment.* One commenter recommended that paragraph (c) have a defined timeline for reassessments.

*Response.* Paragraph (b) of this standard imposes a 5-day limitation on the continuous segregation of detainee victims in protective custody, inclusive of any time necessary to complete a re-assessment. The final rule also requires facilities to notify the ICE FOD whenever a detainee victim has been

held in administrative segregation for 72 hours.

*Comment.* Multiple commenters suggested that, for alleged victims who have been placed in post-allegation protective custody, DHS should incorporate a strong presumption of full release from custody, potentially under programs that provide alternatives to detention.

*Response.* Under the regulation, the facility shall place detainee victims of sexual abuse in a supportive environment that is the least restrictive housing option possible. A detainee who is in post-allegation protective custody shall not be returned to the general population until completion of a proper re-assessment, taking into consideration any increased vulnerability of the detainee as a result of the sexual abuse. In light of the strong protections required under this standard, and because alternatives to detention programs continue to be available under the regulation, DHS declines to incorporate a presumption in favor of release. In addition to the detainee's personal vulnerability, DHS will continue to make release decisions based upon other generally applicable factors, including, *inter alia*, individual security considerations, applicable statutory detention mandates, and available custodial options in each case.

### Criminal and Administrative Investigations (§§ 115.71, 115.171)

#### Summary of Proposed Rule

The standards contained in the proposed rule required investigations by the agency or the facility with the responsibility for investigating the allegation(s) of sexual abuse be prompt, thorough, objective, and conducted by specially trained, qualified investigators. The proposed standard also required agencies and facilities to conduct an administrative investigation of (1) any substantiated allegation and (2) any unsubstantiated allegation that, upon review, the agency deems appropriate for further administrative investigation.

#### Changes in Final Rule

DHS made minor revisions to the Subpart B provision, to clarify that responsibility for conducting criminal and administrative investigations or referring allegations to the appropriate investigative authorities ultimately lies with the agency, and not the facility. Otherwise, DHS is adopting the regulation as proposed.

#### Comments and Responses

*Comment.* Commenters suggested that all allegations of sexual abuse be

investigated, including third party and anonymous reports. There was a recommendation that DHS cross-reference this standard with § 115.34 with regard to the requisite qualifications of the investigator.

*Response.* Section 115.22 requires that all allegations of sexual abuse be investigated. The purpose of § 115.71(a) is to clarify investigative responsibility (e.g., the division of responsibility between the agency/facility/state/local law enforcement) and to require that investigators be properly trained and qualified. Allegations may be made directly by a detainee or by a third party such as an attorney, a family member, another detainee, a staff member, or an anonymous party. The source of the allegation does not affect the requirement that all allegations of sexual abuse be investigated. DHS clarifies here that specialized training for investigators is addressed in § 115.34.

*Comment.* There were several advocacy groups that suggested that prosecutorial discretion be exercised with regard to victims and witnesses of sexual abuse and assault, especially young survivors of sexual abuse and assault. Other commenters suggested that victims be given the option of release on their own recognizance during the investigation process with the understanding that they would remain in the United States lawfully. A similar suggestion was made by another commenter in that victims should be given the ability to be released on their own recognizance, on bond, or through an alternative detention program and the ability to stay in the United States while the investigation is carried out.

*Response.* Tools for prosecutorial discretion already are available for victims of sexual abuse and assault.<sup>15</sup> Deferred action refers to the decision-making authority of ICE, among other entities, to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority. Deferred action can be used by ICE for any alien victim, including a victim in detention, due to the victim's status as an important witness in an ongoing investigation or prosecution.

Administrative Stay of Removal (ASR) is another discretionary tool that permits ICE to temporarily delay the removal of an alien. Any alien, or law enforcement agency on behalf of an alien, who is the subject of a final order of removal may request ASR from ICE. An ASR may be granted after the

completion of removal proceedings up to the moment of physical removal.

Longer term immigration relief may be available, including in the form of U nonimmigrant status. U nonimmigrant status protects victims of qualifying crimes (including sexual assault and felonious assault) who have suffered substantial mental or physical abuse as a result of the crime and are willing to assist law enforcement authorities in the investigation or prosecution of the criminal activity. U nonimmigrant status is self-petitioning and requires a law enforcement certification.

DHS also routinely considers whether detainees may be suitable candidates for release on their own recognizance or on bond, or participation in an alternative to detention program.

#### **Evidentiary Standard for Administrative Investigations (§§ 115.72, 115.172)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule required that agencies not impose a standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

#### **Reporting to Detainees (§ 115.73)**

##### *Summary of Proposed Rule*

The standard found in § 115.73 in the proposed rule required the agency to notify the detainee of the result of the investigation when the detainee is still in immigration detention, as well as where otherwise feasible.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* One advocacy group suggested that holding facilities have a comparable provision with what is currently proposed for immigration detention facilities. They further suggested that there be an attempt for DHS to forward the outcome of the investigation to the detainee, especially when the detainee is still in detention due to their belief that if there is a lack of incident follow-up there will be a lack of accountability within the holding facility.

*Response.* DHS notes that DOJ did not apply its standards regarding reporting to inmates in the context of lockups, due to the short-term nature of lockup detention. Similarly, due to the short-term nature of detention in holding facilities, DHS declines to accept the suggestion to include a provision on detainee notification of investigative outcomes for allegations made in holding facilities.

*Comment.* Some commenters suggested that DHS's proposed standard should follow the DOJ standard. The DOJ standard describes what type of notification will be delivered to the inmate concerning their abuser and the investigation, that such notifications will be documented, and that notifications will no longer be required when the inmate/victim is released from custody. A commenter wrote that failure to provide updates on the agency's response to an allegation of sexual abuse increases the survivor's anxiety about future abuse and decreases the survivor's belief that his or her report is being taken seriously.

*Response.* DHS does not believe it is necessary to adopt the DOJ standard on notifications. ICE already has the responsibility to inform detainees of the outcome of any investigation as well as any responsive action taken. In instances in which the detainee has been moved to another facility, coordination between facilities is required, in part to ensure that the investigative outcome can be shared with the detainee.

With regard to notifying the detainee of actions taken against an employee, DHS agrees that agency follow-up can be of great importance to victims, and therefore requires the agency to notify the detainee as to the result of the investigation and any responsive action taken. In the immigration detention facility context, DHS has also undertaken to perform this follow-up whenever feasible, even after the detainee has been released from custody. As DHS noted in its proposal, DHS believes that its approach strikes the proper balance between staff members' privacy and the detainee's right to know the outcome of the investigation.

In light of the breadth of the DHS provision, DHS notes that in its experience, state privacy laws and union guidelines may prohibit sharing certain information about disciplinary actions taken against employees. Releasing details about an employee's punishment could be in violation of these privacy laws or policies. DHS cannot require that specific information about sanctions taken against an

<sup>15</sup> See generally *id.*

employee be included in post-investigation follow-up with the detainee. However, consistent with the regulatory text, where the information is available to the agency and can be provided in accordance with law, it will be provided.

### **Disciplinary Sanctions for Staff (§§ 115.76, 115.176)**

#### *Summary of Proposed Rule*

The standards contained in the proposed rule provided that staff shall be subject to disciplinary actions up to and including termination for violating agency sexual abuse policies, and that termination shall be the presumptive disciplinary sanction for staff that engaged in or threatened to engage in sexual abuse, as defined in the regulation. The proposed standards further provided that if a staff member is terminated for violating such policies, or if a staff member resigns in lieu of termination, a report must be made to law enforcement agencies (unless the activity was not criminal) and to any relevant licensing bodies, to the extent known.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* One commenter suggested that repeat offenders should be subjected to criminal and civil sanctions, and facilities that have recurrences of sexual abuse and assault claims (paying specific attention to juvenile facilities) should be penalized and closely monitored. Another commenter suggested that if multiple substantiated cases of sexual abuse have been found in a facility, the facility should be closed or lose its contract with DHS.

*Response.* DHS declines to make the requested revision to the standard. DHS does not have criminal prosecution authority. Furthermore, the PREA statute itself does not provide for civil penalties, as suggested by the comment. DHS takes extremely seriously any allegations or substantiated incidents of sexual abuse. All facilities will be closely monitored for how they respond to sexual abuse and assault reports; address safety, medical, and victim services issues; and coordinate criminal and administrative investigative efforts. While monitoring is recognized as a crucial element, DHS does not concur with the suggestion that facilities with recurring allegations or a higher number of allegations should always be penalized, as the subsequent

investigation may or may not substantiate an allegation. In addition, detainee population size must be taken into account when assessing the number of allegations at a given facility over a period of time. However, when investigations or audits reveal a policy, procedural, or systemic issue at the facility that has contributed to sexual abuse or assault, DHS will use its authority to ensure that corrective actions are promptly taken. DHS emphasizes the importance of working with the facility to take corrective and preventive action as the appropriate response.

DHS recognizes that detainees who are minors have special vulnerabilities. With the exception of juveniles in the Family Residential Program, and rare cases where minors with criminal records are held in juvenile detention facilities, most juveniles are in the care and custody of HHS/ORR, other than the brief period of time that such unaccompanied juveniles are in ICE custody prior to transfer to ORR. The monitoring of those facilities is within the purview of HHS and outside the scope of DHS authority.

*Comment.* One commenter recommended that any person(s) regardless of whether they are staff, contractors, or volunteers, and regardless of whether they work in a DHS facility or contract facility, should be removed from their position at a detention facility for violating agency sexual abuse or sexual harassment policies.

*Response.* DHS agrees that violation of agency sexual abuse and assault policies merits discipline of employees and contractors, up to and including removal. However, DHS does not have authority to require contract facilities to remove employees from employment entirely, but only to require reassignment to a position where there will not be contact with detainees. As such, the comment cannot be implemented as recommended.

### **Corrective Action for Contractors and Volunteers (§§ 115.77, 115.177)**

#### *Summary of Proposed Rule*

The standards contained in the proposed rule required that any contractor or volunteer who has engaged in sexual abuse be prohibited from contact with detainees. The proposed rule further required that reasonable efforts be made to report to any licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* One commenter suggested that entities that have repeat offenses be subject to both criminal and civil sanctions by the agency. The commenter further suggested that contracted parties be subject to the same standards as non-contracted parties and should have further repercussions for their actions other than employee dismissal. The commenter suggested that a facility found to have repeat incidents should be subject to harsher penalties and be monitored more closely.

*Response.* Similar to the response regarding §§ 115.76 and 115.176, DHS believes that a change is not warranted or appropriate to prescribe both criminal and civil sanctions. DHS does not have criminal prosecution authority and the PREA statute similarly does not provide for civil penalties. Nevertheless, DHS takes extremely seriously any allegations or substantiated incidents of sexual abuse.

Contract employees are subject to the same standards as agency employees and investigations into allegations made against contractors are no less thorough than those made against agency employees. All facilities will be closely monitored for how they respond to sexual abuse and assault reports; address safety, medical, and victim services issues; and coordinate criminal and administrative investigative efforts. DHS believes that the best approach to remedy a situation of recurring sexual abuse and assault claims varies with the circumstances, and may include disciplining or removing individual employees involved in the abuse, working with the facility to take corrective and preventive action, regular facility monitoring, as well as terminating a contract with a facility in its entirety.

*Comment.* One commenter recommended that any person(s) violating agency sexual abuse or sexual harassment policies be removed from their position at the detention facility regardless of whether the employee is staff, a contractor, or a volunteer and regardless of whether the person works in a DHS facility or contract facility.

*Response.* As discussed above in response to the comment received on §§ 115.76 and 115.176, DHS agrees that violation of agency sexual abuse and assault policies merits discipline of employees and contractors, up to and including removal. However, DHS does not have authority to require contract

facilities to remove employees from employment entirely, but only to require reassignment to a position where there will not be contact with detainees. Accordingly, the comment cannot be implemented as recommended.

### **Disciplinary Sanctions for Detainees (§ 115.78)**

#### *Summary of Proposed Rule*

The standard contained in the proposed rule mandated that detainees be subject to disciplinary sanctions after they have been found to have engaged in sexual abuse. The standard mandates that discipline be commensurate with the severity of the committed prohibited act and pursuant to a formal process that considers the detainee's mental disabilities or mental illness, if any, when subjecting the detainee to disciplinary actions.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

*Comment.* One commenter suggested that paragraph (a) specify that detainees will only face disciplinary action for detainee-on-detainee sexual abuse because the language in paragraph (e). Paragraph (e) prohibits the facility from disciplining a detainee for sexual contact with staff unless there is a finding that the staff member did not consent to such contact.

*Response.* DHS declines to make the proposed change to paragraph (a) because this modification would preclude DHS from disciplining a detainee found to have engaged in sexual contact with a non-consenting staff member (pursuant to paragraph (e) of this standard). DHS believes it is important to retain the authority to discipline a detainee for engaging in sexual abuse of a staff member.

*Comment.* One commenter suggested that two provisions from the DOJ PREA standard be adopted by DHS. One provision in the DOJ rule allows for the facility to require the abuser to participate in mental health interventions as a condition of access to programming or other benefits. The other provision in the DOJ rule allows for an agency to prohibit, in its discretion, all sexual activity between inmates and if such activity occurs, the agency may discipline the inmates for this activity. It further specifies that the agency is not able to deem such activity to be sexual abuse if it determines that the activity is not coerced.

*Response.* DHS declines to accept either of the proposed changes from this

comment. Whereas the purpose of incarceration by DOJ includes punishment and rehabilitation—thus making therapy and counseling more widely appropriate—the purpose of immigration detention is to facilitate appearance at immigration proceedings and removal. Accordingly, mandating therapy or counseling as a condition of access to programming or other benefits would not be appropriate in this context.

DHS notes, however, that § 115.83 of the regulation includes provisions for voluntary access to ongoing medical and mental health care for sexual abuse victims and abusers, when deemed appropriate by mental health practitioners. With regard to the second proposal, DHS also rejects the recommendation to prohibit a finding of sexual abuse when there is no element of coercion in sexual activity between detainees. This clarification is unnecessary as the standards define detainee-on-detainee sexual abuse to exclude incidents of consensual sexual conduct between detainees. A provision explicitly authorizing the agency to prohibit all sexual activity between detainees (including consensual sexual activity) is similarly unnecessary, as ICE's detention standards already contain such a prohibition.

*Comments.* A few advocacy groups suggested specifying in paragraph (b) that the circumstances of the prohibited act, the detainee's disciplinary history, and the sanctions imposed for comparable offenses by other detainees with similar histories should be taken into consideration when determining the appropriate disciplinary action. These advocacy groups stated that it is important that the sanctions against detainees be appropriate and fair for the offense. One commenter stated that adding this additional language will help prevent the misuse of the regulations to inappropriately punish LGBTI detainees.

*Response.* DHS concurs with the commenters that disciplinary sanctions must be fair and appropriate. With this very objective in mind, the regulation provides that each facility holding detainees in custody shall have a detainee disciplinary system with progressive levels of reviews, appeals, procedures, and documentation procedure, which imposes sanctions in an objective manner commensurate with the severity of the disciplinary infraction. In addition, the regulation requires the disciplinary process to consider whether a detainee's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be

imposed on the detainee. DHS believes that these protections are sufficient to ensure that disciplinary sanctions are fair and appropriate, and therefore DHS does not adopt the changes requested by the commenters on this point.

*Comments.* An advocacy group suggested that there be a new § 115.178 in Subpart B applicable to holding facilities. This recommended standard would include a provision in which when there is probable cause that a detainee has sexually abused another detainee, the issue shall be referred from the agency to the proper prosecuting authority. This provision would further require the agency to inform any third-party investigating entity of this policy. The advocacy group believed that it was an oversight that DHS did not include this section in Subpart B of the proposed rule.

*Response.* DHS appreciates the comment recommending addition of a new § 115.178 applicable to holding facilities only. However, DHS declines to make this change because DHS does not discipline detainees in holding facilities. Sections 115.21 and 115.121 set forth requirements to ensure each agency and facility establishes a protocol for the investigation of allegations of sexual abuse, or the referral of allegations of sexual abuse to the appropriate investigative authorities. In general, the appropriate investigative authority is responsible for making referrals for prosecution. Accordingly, DHS declines to add a new § 115.178 as suggested.

### **Medical and Mental Health Assessments; History of Sexual Abuse (§ 115.81)**

#### *Summary of Proposed Rule*

The standard contained in the proposed rule required that pursuant to the assessment for risk of victimization and abusiveness in § 115.41, facility staff will ensure immediate referral to a qualified medical or mental health practitioner, as appropriate, for detainees found to have experienced prior sexual victimization or perpetrated sexual abuse. For medical referrals, the medical professional was required to provide a follow-up health evaluation within two working days from the date of the initial assessment. For mental health referrals, the mental health professional was required to provide a follow-up mental health evaluation within 72 hours from the date of the referral.

#### *Changes in Final Rule*

The final rule includes minor changes to paragraph (a). The phrase "subject to

the circumstances surrounding the indication” was removed and the term “as appropriate” was moved within the paragraph.

#### *Comments and Responses*

*Comment.* One commenter suggested that there should be specific provisions within the standard concerning the follow-up mental health services after the initial evaluation.

*Response.* Section 115.81 requires that detainees who have experienced prior sexual victimization or perpetrated sexual abuse receive referrals for follow-up medical and/or mental health care as appropriate. In addition, ICE’s detention standards provide comprehensive requirements for the mental health care of all detainees, including follow-up mental health evaluations as appropriate, and referral to external specialized providers as necessary. Because ICE detention standards outline these requirements, adding a provision specifically targeted to sexual abuse and assault victims is not necessary.

*Comment.* A human rights group suggested that paragraph (a) be written more clearly and specifically about what the circumstances might be concerning when a staff member would make a referral for a detainee to seek a follow-up with a medical or mental health practitioner. The commenter suggested that if DHS does not choose to clarify this language, DHS should remove the language altogether.

*Response.* DHS agrees with the comment. Upon consideration, DHS decided to strike the phrase “subject to the circumstances surrounding the indication” from § 115.81(a).

*Comment.* Multiple commenters suggested adding the confidentiality provision that is currently in the DOJ PREA rule. The statement would ensure that the information relating to a sexual abuse or assault incident will remain limited to medical and mental health practitioners and other staff, as necessary. Access to information would be as necessary to inform treatment plans and security and management decisions, such as housing, bed placement, work, education, and program assignments, or as otherwise required by Federal, State, or local law.

*Response.* Section 115.61 of the standards requires that information related to a sexual abuse incident be limited to those needed to protect the safety of the victim, provide medical treatment, investigate the incident, or make other pertinent security and management decisions. DHS believes that this provision adequately addresses the concern expressed by these commenters.

*Comment.* An advocacy group recommended adding a statement that is in the DOJ final rule concerning detainee consent. The DOJ rule states that if a detainee confirms prior sexual victimization, unless the detainee is less than 18 years of age, the medical and mental health practitioners must obtain consent from the detainee before reporting the information.

*Response.* Again, § 115.61 of the standards requires that information related to a sexual abuse incident be limited to the information needed to protect the safety of the victim, provide medical treatment, investigate the incident, or make other pertinent security and management decisions. DHS believes that this provision adequately addresses the concern expressed by these commenters.

*Comment.* A commenter suggested that a provision be added for women and girls to be screened, assessed, and provided with treatment during confinement. The commenter urged for this provision to be mandated for minors.

*Response.* The proposed and final rules clearly require that female detainees and minors be afforded each of the protections outlined by the standards, including with regard to screening, assessment, and treatment.

#### **Access to Emergency Medical and Mental Health Services (§§ 115.82, 115.182)**

##### *Summary of Proposed Rule*

The standards in the proposed rule required detainee victims of sexual abuse to have timely, unimpeded access to emergency medical treatment at no financial cost to them.

##### *Changes in Final Rule*

DHS made a minor change to the final rule by deleting the phrase “where appropriate under medical or mental health professional standards” in § 115.82(a) because the phrase was superfluous. DHS revised § 115.182 to clarify that for holding facilities as well as immigration detention facilities, emergency medical treatment and crisis intervention services will be provided in accordance with professionally accepted standards of care. The relevant portion of § 115.182 now mirrors the language in § 115.82. DHS also deleted the phrases “in immigration detention facilities” and “in holding facilities” from § 115.82(a) and § 115.182(a) respectively, to clarify the scope of the provision.

#### *Comments and Responses*

*Comment.* Multiple commenters suggested that DHS include in § 115.182

specific provisions concerning the types of treatment available to detainees from emergency medical providers. Under § 115.82, these treatments include emergency contraception and sexually transmitted infections prophylaxis, which are particularly time-sensitive. One of the legal associations further suggested that § 115.182 also contain a provision that would allow for referrals for follow-up services and continued care by the agency or facility for detainees to continue treatment upon transfer to another facility or release from custody.

*Response.* DHS has considered the comments, and has revised § 115.182 to mirror § 115.82 by adding that detainee victims of sexual abuse in holding facilities shall have timely access not only to emergency medical treatment, but also to crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis in accordance with professionally accepted standards of care. DHS disagrees that detainee victims in holding facilities should receive referrals for follow-up care because the short-term nature of the detention makes this impracticable.

*Comment.* Multiple commenters suggested that this section be modified to ensure that victimized detainees receive expedited access to emergency contraception. This access should be provided as quickly as possible after the incident. The commenters believe this is an appropriate provision to include because emergency contraception can prevent pregnancy within five days of intercourse but it is more effective if it is taken within three days.

*Response.* The final rule clearly states that victims of sexual abuse “shall have timely unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception . . . in accordance with professionally accepted standards of care.” The medical professionals who provide care to detainees are in the best position to administer emergency contraception. Mandating a specific timeline is not appropriate for this regulation. DHS believes that the final rule, as written, will ensure that victims have timely access to emergency contraception.

*Comment.* Multiple commenters expressed concern about the lack of correct information and education about transmission of sexually transmitted diseases and infections. Commenters suggested expanding relevant provisions in this section to explicitly refer to all forms of sexual abuse. The language proposed would specifically include victims of oral, anal, or vaginal sexual

abuse due to non-consensual oral, anal, and vaginal touching or penetration. One of these commenters also suggested the removal of the phrase “where appropriate under medical or mental health professional standards,” written in paragraph (a) of this section.

*Response.* The final rule contains a thorough definition of sexual abuse and assault in § 115.6, which includes the specific areas of abuse as noted by the commenters. DHS declines to add to the definition of sexual abuse in this provision because it would be redundant and could potentially conflict with the final rule’s definition of sexual abuse and assault.

After considering the comments to § 115.82(a), DHS decided not to include the phrase “where appropriate under medical or mental health standards” in the final rule.

### **Ongoing Medical and Mental Health Care for Sexual Abuse Victims and Abusers (§ 115.83)**

#### *Summary of Proposed Rule*

The standard in the proposed rule required that victims of sexual abuse in detention receive access to ongoing medical and mental health care as necessary without financial cost to the victim. The standard also requires that this care be consistent with the community level of care for as long as such care is needed.

#### *Changes in Final Rule*

DHS made one minor change to the final rule by replacing the word “incarcerated” with “detained” in § 115.83(d).

#### *Comments and Responses*

*Comments.* A commenter had concerns about the medical and mental health care being age appropriate for all detainees, specifically citing children and adolescents. The commenter suggested adding the phrase “age appropriate” when referring to the medical and mental health evaluations and treatments discussed in paragraph (a).

*Response.* DHS recognizes the importance of detainees received “age appropriate” care. However, because medical personnel are expected and obligated to provide age appropriate care as a duty under the medical standard of care, adding this language would be superfluous.

*Comment.* A commenter expressed concern about victims of various forms of sexual abuse, which includes oral, anal, and vaginal abuse, receiving access to ongoing medical and mental health care services due to the misinformation

about the different ways sexually transmitted diseases can be spread. Therefore, the commenter suggests revising the language to specify the different types of sexual abuse that detainees may encounter.

*Response.* Sexual abuse and assault is thoroughly defined in § 115.6. The specific types of abuse set forth in the Definitions section apply to the final rule in its entirety.

*Comment.* A commenter suggested guaranteeing the confidentiality of medical and mental health records because confidential trauma counseling and medical and mental health care are essential to recovery.

*Response.* Maintaining the confidentiality of medical records is a DHS priority for every detainee. As such, ICE’s detention standards contain explicit requirements for ensuring this confidentiality in all circumstances. Given the overarching confidentiality concern, DHS does not believe that revising this section provides greater protection to detainees than that which is already contained in the proposed and final rules.

*Comment.* Commenters suggested the provision be edited to explicitly state the full range of services and information that should be made available to victims of sexual abuse. One commenter suggested that DHS align the final rule’s provision on pregnancy-related services with PBNDS. The commenter noted that under ICE PBNDS provide that when a detainee decides to terminate her pregnancy, ICE must arrange for transportation at no cost to the detainee. The commenter also noted that ICE PBNDS provide that ICE will assume all costs associated with the detainee’s abortion when the pregnancy results from rape or incest or when continuing the pregnancy will endanger the life of the woman. The commenter recommended that DHS include those provisions in paragraph (d) to build upon best practices and have consistent regulatory and sub-regulatory guidance.

*Response.* DHS agrees that women who become pregnant after being sexually abused in detention must receive comprehensive information about and meaningful access to all lawful pregnancy-related medical services at no financial cost. The final standard includes language that requires victims to receive timely and comprehensive information about all lawful pregnancy-related medical services, and that access to pregnancy-related medical services must be timely. Also, facilities are required to provide information about and access to “all lawful” pregnancy-related medical services. These requirements include by

implication the additional 2011 PBNDS provisions referenced above.

*Comment.* Commenters also suggested that DHS clarify that detention facilities must provide detainees medically accurate and unbiased information about pregnancy-related services, including abortion. The commenter stated that this is particularly relevant where the detention facility uses religiously affiliated institutions to provide care to inmates. The commenter stated that a woman should always be able to have accurate information about all of her options; information should never be provided with the intent to coerce, shame, or judge.

*Response.* DHS clarifies that the standard requires that covered detainee victims receive medically accurate and unbiased information, including information about abortion. This is part of the requirement that facilities provide “comprehensive” information about all lawful pregnancy-related medical services.

*Comment.* Commenters also suggested adding language clarifying that transportation services would be given to victims needing medical services when the detention facility is unable to provide such services in a timely manner.

*Response.* Additional guidance on transportation is unnecessary given the requirement that victims be provided “timely access” to all lawful pregnancy-related medical services—which, when necessary, includes transportation.

*Comment.* Commenters suggested that DHS remove the phrase “vaginal penetration” in paragraph (d) because pregnancy can occur without penetration.

*Response.* DHS does not believe that § 115.83(d) should be revised to include a broader definition of penetration. Paragraph (d) applies to a limited set of circumstances in which a female victim becomes pregnant after sexual abuse. Some sort of penetration pursuant to the definition in § 115.6 must occur in order for the victim to become pregnant. The phrase “vaginal penetration” provides a clear guideline to the agency or facility about when it is appropriate to administer pregnancy tests.

*Comment.* Commenters suggested that DHS remove the phrase “by a male abuser” because detainees could also be abused by females. The commenters expressed concern that if the language is retained, the victims of female abusers will not receive critical health care services.

*Response.* DHS declines to make the suggested revision, because the phrase “by a male abuser” in § 115.83(d) relates to the possibility of pregnancy, and in



no way mitigates a female victim's right to care if the abuser is female. The remaining provisions in § 115.83 apply to all incidents of detainee sexual abuse and are not limited by gender.

*Comment.* A commenter suggested that full confidential rape counseling or mental health care be provided to a sexual abuse victim. Another commenter suggested that the language be improved to include unmonitored telephone calls from detainee victims to non-governmental organizations or rape crisis organizations as opposed to the OIG or other offices affiliated with ICE or DHS. This commenter also stated that detainees do not always have phone access to call the JIC because some facilities may have the number blocked on their telephone system.

*Response.* While DHS appreciates the commenters' concern about the benefits of confidential rape counseling, mental health care, and unmonitored phone calls to lodge complaints or seek help, DHS believes that provisions relating to access to outside confidential support services set forth in § 115.53 are adequate to address these concerns.

*Comment.* Multiple commenters suggested that DHS clarify the regulations to include treatment for sexually transmitted infections, including HIV-related post-exposure prophylaxis for victims of sexual abuse. Commenters observed that paragraph (e) calls for access to testing, but not treatment. Commenters expressed concern that without treatment, sexually transmitted infections can lead to more serious and possibly permanent complications. They suggested that the regulation state explicitly that victims will receive ongoing regular treatment.

*Response.* DHS recognizes the importance of providing testing for sexually transmitted infections, and included paragraph (e) in the proposed rule which requires facilities to offer such tests, as medically appropriate to victims of sexual abuse while detained. DHS clarifies that paragraph (a) requires that all detainees who have been victimized by sexual abuse have access to treatment. Paragraph (b) requires that the evaluation and treatment include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to or placement in another facility or release from custody. DHS trusts that medical practitioners administering such tests will adhere to professionally accepted standards for pre- and post-test counseling and treatment.

### **Sexual Abuse Incident Reviews (§§ 115.86, 115.186)**

#### *Summary of Proposed Rule*

The standards in the proposed rule set forth requirements for sexual abuse incident reviews, including when reviews should take place and who should participate. The standards also required the facility to forward all reports and responses to the agency PSA Coordinator. The proposed rule further required an annual review of all sexual abuse investigations, in order to assess and improve sexual abuse intervention, prevention, and response efforts.

#### *Changes in Final Rule*

Section 115.86(a) now includes a requirement that facilities must conclude incident reviews within 30 days of the completion of the investigation. Section 115.186(a) now includes a requirement that the agency review shall ordinarily occur within 30 days of the agency receiving the investigation results from the investigative authority. The slightly different formulation for Subpart B reflects the fact that frequently the agency that oversees a holding facility is not the investigative authority.

Section 115.86(b) now requires facility incident review teams to (1) consider whether the incident or allegation was motivated by race, ethnicity, gender identity, or lesbian, gay, bisexual, transgender, or intersex identification status (or perceived status); and (2) consider whether the incident or allegation was motivated by gang affiliation or other group affiliation.

Section 115.86(c) now requires facility incident review teams to prepare a report of their findings and any recommendations for improvement and submit such report to the facility administrator, the FOD or his or her designee, and the agency PSA Coordinator. If no allegations were made at a facility during the annual reporting period, a negative report is required.

#### *Comments and Responses*

*Comment.* One comment suggested that DHS track whether the victims are LGBTIGNC. A commenter suggested that this would be a way to track whether the regulations are effective.

*Response.* DHS does not fully concur with the commenter's suggestion to track LGBTIGNC status in the incident review context. Many detainees choose to not disclose to staff or others in the detention setting that they identify as lesbian, gay, bisexual, transgender, or intersex. In the event that a detainee does not affirmatively disclose this

information in the context of making a report or otherwise, DHS believes it might be inappropriate to require staff to question the detainee about his or her sexual orientation and gender identity for these purposes. DHS believes that this could constitute a breach of detainees' privacy, especially detainees who prefer to not share this information openly.

DHS agrees, however, that LGBTIGNC status can contribute to vulnerability. DHS is therefore revising the Subpart A standard to require facilities to take into account whether the incident or allegation was motivated by race, ethnicity, gender identity, or lesbian, gay, bisexual, transgender, or intersex identification status (or perceived status); or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility. In practice, this requires the facility to affirmatively consider the possibility that these factors motivated the incident or allegation, and to record this information if known. It does not, however, require facilities to affirmatively inquire as to the victim's sexual orientation and gender identity. DHS also is adding a requirement to §§ 115.87(d)(2) and 115.187(b)(2) that the agency PSA Coordinator must aggregate information regarding whether the victim or perpetrator has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming.

*Comment.* Multiple commenters suggested matching DHS's proposed §§ 115.86 and 115.186 to DOJ's corresponding sections in their PREA rule. The relevant provisions of DOJ's rule include the following:

1. The review must be concluded within 30 days of the conclusion of the investigation.

2. The review team must include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

3. The review team must consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility.

4. The review team must examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse.

5. The review team must assess the adequacy of staffing levels in that area during different shifts.

6. The review team must assess whether monitoring technology should be deployed or augmented to supplement supervision by staff.

7. The review team must submit its report to both *the facility head* and the agency PREA compliance manager.

The commenters stated that the additional language would better protect detainees and encourage the overall goal of eliminating sexual abuse in facilities by helping facilities identify and fill gaps in current policies and procedures.

*Response.* DHS has considered each of these recommendations carefully, and has revised its proposal to incorporate provisions implementing items 1 and 3, as noted above. DHS understands the importance of reviewing reported incidents to better protect detainees and help facilities identify and fill gaps in current policies and procedures. To achieve this, §§ 115.87 and 115.187 require the collection of all case records associated with claims of sexual abuse, including incident reports. The data collected is required to be shared with the PSA Compliance Manager and DHS entities, including ICE leadership and, upon request, CRCL.

Under § 115.88, after this data is reviewed by agency leadership, the agency will issue a report that will identify problem areas and patterns to be improved upon, potentially including items 4–6 in the list above. In short, DHS believes that the final regulation sufficiently accounts for the considerations raised by the commenters.

*Comment.* One commenter suggested that DHS require that the PSA Compliance Manager be an upper-level facility official.

*Response.* DHS rejects the suggestion to require that the PSA Compliance Manager be an upper-level facility official, as facilities should have some discretion about whom they choose for this role. Smaller facilities may not always have an upper-level official available to fulfill the role of PSA Compliance Manager.

*Comment.* Commenters suggested that DHS require that all incident reviews be conducted by a team of upper-level management officials.

*Response.* DHS does not concur with the suggestion to require that all incident reviews be conducted by a team of upper-level officials as smaller facilities may not have the staffing resources and may elect to have an individual, the PSA Compliance Manager, conduct the review.

*Comment.* One commenter suggested that a paragraph be added stating that if a facility's annual review finds that

there has been no report of sexual abuse or assault then the report should reflect that information. Another commenter suggested that each facility's annual reviews be available to the public on their Web site as well as the agency's Web site.

*Response.* DHS agrees with the suggestion to require that facilities that do not have any sexual abuse or assault allegations in the reporting period still be required to submit a negative report. Facilities are required to provide results and findings of the annual review to the agency PSA coordinator. The PSA coordinator will use these reviews to develop the agency's annual report, which will be made available to the public through the agency's Web site. DHS does not believe, however, it is appropriate or necessary to mandate individual facilities post the annual review on their Web site, as the reviews can be accessed more easily through the single portal of the agency Web site.

*Comment.* A commenter suggested that DHS require all immigration detention facilities to comply with this standard immediately.

*Response.* DHS does not concur with the suggestion to add a different implementation timeline for incident reviews than the rest of the standards.

#### **Data Collection (§§ 115.87, 115.187)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule required the facility (in Subpart A) or agency (in Subpart B) to maintain case records associated with claims of sexual abuse. The standards required the agency to aggregate the incident-based data at least annually. The standards further mandated that upon request the agency would be required to provide all such data from the previous calendar year to CRCL.

##### *Changes in Final Rule*

Sections 115.87(a) and 115.187(a) now include a requirement that facilities keep data collected on sexual abuse and assault incidents in a secure location. Sections 115.87(d)(2) and 115.187(b)(2) have been revised to also require the PSA Coordinator to aggregate information about whether the victim or perpetrator has self-identified as LGBTIGNC. The requirement under Subpart B for the agency to provide all data collected under § 115.187 to the PSA Coordinator was removed in order to ensure that the requirements in both subparts were consistent. Such a requirement is not necessary and was not originally included under Subpart A because the PSA Coordinator has been designated as the agency point of

contact to aggregate relevant data pursuant to this regulation.

##### *Comments and Responses*

*Comment.* One commenter suggested that the data collected be kept in a secure area to which unauthorized individuals would not have access.

*Response.* DHS concurs with this concern and accepts the change suggested by the commenter.

*Comment.* One commenter suggested that paragraph (a) take effect immediately and require all facilities to begin acquiring and maintaining the necessary data.

*Response.* Currently facilities report all allegations through the agency Field Office, which is responsible for issuing a Significant Incident Report. The PSA Coordinator has access to all Significant Incident Reports as well as the electronic investigative case files of ICE's OPR. Therefore, it is not necessary to make the provision applicable immediately as a process is already in place. In any case, DHS does not concur with the suggestion to add a different implementation timeline for data collection than the rest of the standards.

*Comment.* A few commenters suggested that data be collected, analyzed, and maintained for all facilities, including contract facilities.

*Response.* The standard applies to all facilities, including contract facilities. Therefore the requirements in these sections regarding data collection also apply to all facilities.

#### **Data Review for Corrective Action (§§ 115.88, 118.188)**

##### *Summary of Proposed Rule*

The standards contained in the proposed rule described how the collected data would be analyzed and reported. The standards mandated that agencies use the data to identify problem areas, take ongoing corrective action, and prepare an annual report for each facility as well as the agency as a whole, including a comparison with data from previous years. The standards mandated that this report be made public through the agency's Web site or other means to help promote agency accountability.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* An advocacy group suggested that data be reviewed from all facilities in which immigration detainees are confined.

*Response.* The standard, including data review, applies to all facilities.

*Comment.* An advocacy group suggested that the reports that are published on the public Web site be updated at least annually.

*Response.* Annual reports will include assessments and information about progress and corrective actions from prior years.

#### **Data Storage, Publication, and Destruction (§§ 115.89, 115.189)**

##### *Summary of Proposed Rule*

The standards in the proposed rule described how to store, publish, and retain data collected pursuant to §§ 115.87 and 115.187. The standard required that the agency make the aggregated data publicly available at least annually on its Web site and shall remove all personal identifiers.

##### *Changes in Final Rule*

The final rule adds a requirement in both subparts that the agency maintain sexual abuse data collected pursuant to the above-described standard on data collection (§§ 115.87 and 115.187) for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

##### *Comments and Responses*

*Comment.* Multiple commenters suggested that data be securely retained under agency record retention policies and procedures, including a requirement to retain the collected data for a minimum period of time, preferably 10 years as contained in the DOJ standard.

*Response.* DHS has considered this comment and concurs that data collected must be retained for an adequate length of time. Given the interests involved and the possibility for legal action based on an incident, a longer period—such as 10 years—would more appropriately account for such interests. DHS agrees with the commenters, and the final rule adds a paragraph requiring the agency to maintain the collected data for a minimum of 10 years after the date of initial collection, unless otherwise prohibited by law.

*Comment.* A commenter suggested that data from state and local public facilities in which immigration detainees are confined should also be made publicly available.

*Response.* The data retention requirement applies to all data collected by facilities covered by the standards or by the agency. All facilities are required to provide sexual abuse and assault data to the agency PSA coordinator. The PSA coordinator will use this data to develop the agency's annual report, which will

be made available to the public through the agency's Web site.

*Comment.* One commenter suggested replacing the Subpart B provision with materially identical language, except that the commenter removed part of an internal cross-reference.

*Response.* DHS declines to incorporate this revision, in the interest of ensuring clarity and consistency purposes with the parallel provision in Subpart A.

#### **Audits of Standards (§§ 115.93, 115.193)**

##### *Summary of Proposed Rule*

The proposed rule mandated that audits under these sections shall be conducted pursuant to §§ 115.201 through 115.205 of Subpart C. In Subpart A, the standard required audits of each immigration detention facility at least once every three years. The proposed rule allowed for expedited audits if the agency has reason to believe that a particular facility is experiencing problems related to sexual abuse. The Subpart B standard required, within three years, an initial round of audits of each holding facility that houses detainees overnight. Following the initial audit, the Subpart B standard required follow-up audits every five years for low-risk facilities and every three years for facilities not identified as low risk. All audits were required to be coordinated by the agency with CRCL.

##### *Changes in Final Rule*

Section 115.93 previously required the agency to ensure that "each of its immigration detention facilities" is audited at least once during the initial three-year period. Due to confusion expressed by some commenters, DHS now requires the agency to ensure that "each immigration detention facility" is audited at least once during the initial three-year period. In the interest of clarity, DHS modified § 115.93(b) to allow the agency to "require" rather than "request" an expedited audit and allows the agency to provide resource referrals to facilities to assist with PREA-related issues. DHS also revised §§ 115.93 and 115.193 to allow CRCL to request expedited audits if it has reason to believe that such an audit is appropriate.

##### *Comments and Responses*

*Comment.* Some commenters, including advocacy groups, expressed concern regarding whether contract facilities would be subject to auditing. Commenters advised clarifying that audit standards in their entirety would be a requirement for all facilities,

including facilities run by non-DHS private or public entities, and that they all be audited on the same timeframe. One advocacy group suggested adding clarifying language that describes auditing of "each facility operated by the agency, or by a private organization on behalf of the agency." It was also recommended that the standards clarify the point at which the audit requirement is triggered based upon the standards, particularly with regard to contract facilities. Former NPREC Commissioners also recommended the standards clarify that it is prohibited to hold detainees in any custodial setting where external audits are not applicable.

*Response.* Under the standards as proposed and in final form, DHS must ensure that each covered immigration detention facility and holding facility, as defined in §§ 115.5, 115.12, and 115.112, undergoes an audit. DHS has revised § 115.93(a) as indicated above for clarity.

Regarding the timeframe for implementation of audits, both subparts include a clear standard that for covered facilities established prior to July 6, 2015, ICE and CBP coordinate audits within the timeframe specified. Additionally, under § 115.193, CBP will ensure holding facilities that hold detainees overnight and established after July 6, 2015 are audited within three years.

DHS clarifies that in the immigration detention facility context, a facility will not be audited until it has adopted the PREA standards. However, DHS notes that immigration detention facilities are subject to regular inspections under current contracts and detention standards regardless of whether they are considered a covered facility pursuant to this regulation or whether they have adopted the PREA standards. DHS, through ICE, is committed to endeavoring to ensure that SPCs, CDFs, and dedicated IGSAAs adopt the standards set forth in this final rule within 18 months of the effective date. Additionally, DHS, through ICE, will make serious efforts to initiate the renegotiation process so the remaining covered facilities adopt the standards and become subject to auditing as quickly as operational and budgetary constraints will allow. As noted previously, ICE can remove detainees from facilities that do not uphold adopted sexual abuse and assault practices.

*Comment.* Commenters suggested that a paragraph be added to the Subpart A standard requiring CRCL to create a process by which a member of the public is able to recommend an

expedited audit of any facility if he or she believes that the facility may be experiencing sexual abuse problems. The collection of groups also recommended allowing the agency to order such an expedited audit of a DHS-run facility and to request the expedited audit of a contract facility for such problems. These groups believe that this modification to the section is necessary for clarification purposes.

*Response.* DHS has considered these comments, but does not believe that any benefit of standing up such a formal process justifies the potential resource and logistical difficulties involved, especially given the many ways in which the public can already raise such issues with DHS. Members of the public always have the ability to reach out to CRCL regarding any matter of interest or potentially problematic aspect with regard to DHS's programs and mission, through CRCL's complaint form or simply in writing. Additionally, as noted previously regarding immigration detention facilities, detainees themselves are able to report sexual abuse or assault problems in several ways, including by calling the JIC or the point of contact listed on the sexual abuse and assault posters. Detainees or members of the public may also call the JIC and the OIG or report incidents to CRCL. The Detainee Handbook and posters provide contact information to detainees and also note that detainee reports are confidential.

Regarding agency ability to request audits, § 115.93(b) was revised in order to clarify that the agency can require an expedited audit if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. Section 115.193 instructs the agency to prioritize audits based on whether a facility has previously failed to meet the standards.

*Comment.* Some commenters suggested that holding facilities have an audit cycle of three years as opposed to its proposed audit cycle of five years. Commenters wrote that five years is an inadequate period of time as compared to the DOJ standards. The former NPREC Commissioners wrote that in all of its research on the issue of prison rape, NPREC did not find that that size, physical structure or passing an audit eliminated the need for oversight of a facility or agency. NPREC wrote that many facilities that were classified as having "low" incidents of sexual abuse by the data collected by BJS were often facilities where there were leadership and culture issues, lack of reporting, lack of access to medical and mental health, and notoriously poor investigative structures.

*Response.* ICE has 149 holding facilities and CBP has 768 holding facilities, for a total of 917 holding facilities. In considering the appropriate audit cycle for holding facilities, DHS took into account the extremely high number of facilities, as well as the unique elements of holding facilities and the variances between holding facilities. For example, some holding facilities are used for detention on a handful of occasions per year, or less, and some holding facilities are in public view (for example, in the airport context). Requiring more frequent audits in those situations is neither operationally practical nor the most efficient use of resources.

With this in mind, DHS proposed that all holding facilities that house detainees overnight would be audited within three years of the final rule's effective date. Thereafter, holding facilities would be placed into two categories: (1) Facilities that an independent auditor has designated as low risk, based on its physical characteristics and passing its most recent audit; and (2) facilities that an independent auditor has not designated as low risk. Facilities that are not determined to be low risk will adhere to the three year audit cycle recommended by commenters. Facilities that are determined to be low risk will follow a five year audit cycle.

In making its proposal and considering the comments received, DHS carefully considered the appropriate allocation of resources to ensure an appropriate audit strategy that allocates the greatest portion of limited resources to areas that are potentially higher risk. DHS also took into account the variety of holding facilities. For example, not all holding facilities are consistently used; some may be used to house detainees overnight only a handful of times per year, and some may generally be used to house only one detainee at a time.

With respect to the concerns raised by the former Commissioners of NPREC, DHS agrees that size, physical structure, and past audit history should not eliminate the need for oversight of a facility or agency. Accordingly, DHS is requiring regular, independent, rigorous oversight of all immigration detention facilities and immigration holding facilities, regardless of each facility's size, physical structure, and past audit history. DHS also agrees with the former Commissioners that facilities with apparently "low" incidence of sexual abuse still require careful scrutiny, not least because of the possibility of under-reporting, poor investigative structures, and other factors cited by the former

Commissioners. Upon consideration, however, DHS has determined that rather than leading to the conclusion that all facilities must be audited every three years, these factors lead to the conclusion that DHS ought to implement robust standards across the board.

Upon consideration, DHS believes its audit program is comprehensive, robust, and cost-efficient. DHS therefore maintains this program in the final rule.

#### **Additional Provisions in Agency Policies (§ 115.95, 115.195)**

##### *Summary of Proposed Rule*

The standards in the proposed rule provided that the regulations in both Subparts A and B establish minimum requirements for agencies and facilities. Additional requirements from the agencies and facilities may be included.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

#### **Scope of Audits (§ 115.201)**

##### *Summary of Proposed Rule*

The standard contained in the proposed rule mandated the coordination with CRCL on the conduct and contents of the audit as well as how the audits are to be conducted.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* A commenter suggested that an audit committee make appropriate recommendations to Congress, which the commenter believed would ensure PREA compliance.

*Response.* DHS has considered this comment but believes sufficient protections are in place under the auditing standards and other standards to reasonably ensure sexual abuse prevention is maximized. Recommendations from audits are best addressed by the agency and the facility in coordination. Furthermore, because DHS is accountable to Congress and the public, the agency will provide information about audits as required by Congressional and/or FOIA requests, as well as pursuant to the proactive disclosure requirement of 115.203(f).

*Comment.* A commenter recommended that facility audit

mechanisms currently in place incorporate questions and checklists relating to compliance with the PREA standards. Some examples of current mechanisms that the commenter provided were detention service monitors, external facility audits, and CRCL investigations.

*Response.* Due to implementation of these PREA standards, external auditing will be required for all covered confinement settings, to be carried out in the manner in which the auditing requirements are most effectively and functionally implemented. DHS declines to prescribe in regulations a specific form or process for this independent oversight.

*Comment.* A commenter suggested that ICE and contract employee “whistleblowers” should be protected, encouraged, and should have direct access to auditors.

*Response.* DHS agrees that reporting any information concerning a sexual abuse or assault incident occurring in a detention or holding facility is vital in the fight against sexual abuse and assault in DHS confinement facilities. This reporting includes whistleblowing on any corruption or wrongdoing in an agency or facility setting. DHS believes that this concern is addressed through the ICE Sexual Assault training and by the publication of this regulation in that both of these mechanisms will encourage whistleblowing by anyone with sexual abuse or assault incident information.

#### **Auditor Qualifications (§ 115.202)**

##### *Summary of Proposed Rule*

The standard in the proposed rule required an auditor to attain specific qualifications before being eligible for employment by the agency to perform the required audits.

##### *Changes in Final Rule*

DHS revised the auditor certification provision in paragraph (b), to make explicit agencies’ responsibility to certify auditors in coordination with DHS. Otherwise, DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* A commenter recommended that the auditor be given authority to transfer an alleged victimized detainee during the investigation process.

*Response.* The ICE policy on Detainee Transfers, referred to previously as governing the transfer of all aliens in ICE custody, discourages transfers unless a FOD or his or her designee deems the transfer necessary for the

reasons previously enumerated. ICE’s transfer policy is designed to limit transfers for all aliens and provides adequate protection for aliens who have sexual abuse complaints or grievances. Providing regulatory authority for outside auditors lacking direct accountability to the ICE policy in place to protect detainees would not be appropriate. All auditors will have the ability, however, to make such recommendations to the FOD or his or her designee.

*Comment.* A commenter suggested that the auditor’s standards and contact information be provided to every detainee and for the detainee to have the ability to confidentially contact the auditor for free.

*Response.* DHS agrees that detainees must have access to multiple ways to report abuse. This regulation includes multiple standards that ensure such access. In this case, however, DHS has determined that it is more appropriate to provide an auditor with discretion to conduct each investigation as it best sees fit, within the bounds of the PREA standards and consistent with other DHS policies. Additionally, paragraphs (i) and (j) of § 115.201 should provide reasonably sufficient avenues for detainee-auditor interaction by, respectively, requiring the agency and facilities to allow the auditor to conduct private interviews with detainees, and allowing detainees to send confidential information or correspondence to the auditor.

#### **Audit Contents and Findings (§ 115.203)**

##### *Summary of Proposed Rule*

The standard contained in the proposed rule mandated specific information that the auditor is required to include in its report to DHS.

##### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

##### *Comments and Responses*

*Comment.* A commenter suggested that the facility bear the burden of demonstrating compliance with the PREA standards. It was recommended that this requirement be added to paragraph (b).

*Response.* Under the regulation, covered facilities bear the burden of compliance with all relevant provisions of the regulations; the audit will be directed to determining the facility’s success or failure in that regard.

#### **Audit Corrective Action Plan (§ 115.204)**

##### *Summary of Proposed Rule*

The standard contained in the proposed rule required that when a facility “Does Not Meet Standard” after an audit, a 180-day corrective action plan is to be developed and implemented.

##### *Changes in Final Rule*

The final rule revises paragraph (b)’s description of the roles of the various entities regarding development of the corrective action plan in order to more clearly delineate responsibilities and to ensure the independence of the auditor is not compromised.

##### *Comments and Responses*

*Comment.* An advocacy group suggested the removal of the phrase “if practicable” written in paragraph (b). This change would require that in all cases the auditor, agency, and the facility jointly develop a corrective action plan to achieve compliance.

*Response.* DHS has considered the comment and agrees with the concerns expressed. By removing the notion that the facility need not be involved in development of the corrective action plan if impracticable, DHS clarifies in the final rule that the agency and the facility must develop the plan jointly. Additionally, DHS has determined that including the auditor as a party responsible for jointly developing the plan with the agency and the facility is not appropriate. Because of the auditor’s unique role as an outside, independent analyst, and because the auditor may have further involvement in ensuring the agency and facility meets the standards in the future, removing the auditor from development of the corrective action plan ensures that the auditor’s independent judgment is not compromised at any point. Under the final rule, the agency and the facility (if the facility is not operated by the agency) will develop the plan. The auditor can then effectively and independently make the determination as to whether the agency and facility have achieved compliance after the plan is implemented.

*Comment.* Several commenters suggested stating specific criteria that a facility must meet following a finding of “Does Not Meet Standard.” One group suggested creating a remediation plan for these facilities and another advocacy group suggested providing a specified period of time (suggested 180 days) for facilities to meet the requirements in the plan. One commenter suggested a similar 6-month probationary period. If

after this given period of time the facility does not meet the requirements given in the remediation plan, the facility would be terminated for an extended period of time (one commenter suggested three years) from housing any DHS detainees. One commenter suggested that this termination clause should also be listed in the agency/facility contract. An advocacy group generally suggested that DHS adopt a standard to prevent the housing of detainees in facilities that do not comply with the majority of the PREA standards and that fail to successfully implement a corrective action plan for those standards.

*Response.* The standards in the final rule and other DHS policies have been developed to ensure that noncompliance is not tolerated. Even prior to establishing these standards, ICE could withhold paying a contract facility's invoice or could remove detainees from a noncomplying facility. Facility contracts have already included and will continue to include the option to terminate or discontinue holding detainees if the facility does not meet standards after periods of remediation.

With respect to the specific proposals at issue, DHS has concerns that the suggested 180-day period of time to meet the requirements of a corrective action plan and similar 6-month probationary period may not be sufficiently long for many corrective actions, including, for example, actions that require construction or other physical renovation. Corrective action plans themselves are intended to create a process that will lead to full compliance. Therefore, DHS does not believe it is necessary to make changes to this standard.

### **Audit Appeals (§ 115.205)**

#### *Summary of Proposed Rule*

The standard contained in the proposed rule allowed facilities to appeal the findings from an audit.

#### *Changes in Final Rule*

DHS is adopting the regulation as proposed.

#### *Comments and Responses*

DHS did not receive any public comments on this provision during the public comment period.

#### *Additional Comments and Responses*

The proposed rule posed several questions specifically regarding audits. The following contains a summary of comments received regarding the questions addressing these standards and the DHS response.

### **Question 1: Would external audits of immigration detention facilities and/or holding facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of the proposed rule?**

Commenters were nearly unanimous that auditing through random sampling would not be sufficient. A collective comment of advocacy groups stated that random sampling requires some consistency among facilities in the broader sample; because of the variety of facilities at issue, sampling could not be conducted accurately. Commenters also pointed out that the degree of discretion vested in individual facility heads, the differences among the populations being held, and the differences in physical layout make use of random sampling insufficient for measuring compliance across facilities.

Former NPREC Commissioners stated that no rational basis for random sampling existed, as the only way to ensure detainees' safety from abuse is regular audits of all facilities without exception, citing DOJ final rule findings in support of a triennial cycle.

One human rights advocacy group found audits for cause acceptable, but only if in addition to regular, periodic audits, with auditing every three years being sufficient. The group stated that random audits or audits only for cause would not meet objectives such as providing oversight, transparency, accountability, and feedback in every facility. The group agreed with requiring every agency to have a full audit within the first three years after PREA's implementation, and if a facility receives an extremely high audit score, such as 90%, then the standard could allow a subsequent audit three years later to be a more streamlined version. The group expressed concerns with audits based on cause only, because it was unclear who would determine whether cause existed and when and on what basis that decision would be made.

*Response.* DHS agrees with the commenters that external audits of immigration detention facilities and holding facilities should not be conducted through random sampling. Audits selected by random sampling would not sufficiently assess the scope of compliance with PREA standards. Therefore, the agency maintains the final rule language in §§ 115.93 and 115.193 setting forth the definitive audit schedule for immigration detention facilities and holding facilities.

### **Question 2: Once a holding facility is designated as low risk, would it be a more cost effective yet still sufficient approach to furthering compliance with the standards to externally audit a random selection of such facilities instead of re-auditing each such facility once every five years?**

DHS received conflicting comments in response to this question. A collection of various advocacy groups responded negatively to the idea of auditing a random selection of low-risk holding facilities instead of re-auditing each periodically. The groups, rejecting any use of random sampling, stated that any designation of a facility as low risk would be a mistake that does not account for the scope of the culture of change necessary to end the crisis of sexual abuse in confinement facilities.

*Response.* DHS agrees with the commenters that audits of immigration detention facilities and holding facilities should not be conducted through random sampling. Audits selected by random sampling would not sufficiently assess the scope of compliance with PREA standards. Therefore, the agency maintains the final rule language in §§ 115.93 and 115.193 setting forth the definitive audit schedule for immigration detention facilities and holding facilities.

### **Question 3: Would the potential benefits associated with requiring external audits outweigh the potential costs?**

A commenter agreed that the benefits would outweigh the costs, stating that a realistic, cost-effective monitoring system is critical to the standards' overall effectiveness and impact. Commenters suggested that the external scrutiny, oversight, transparency, accountability, and credible assessment of safety that a qualified independent entity would bring are vitally important for confinement facilities, could identify systemic problems and could offer solutions. Commenters believed that thorough audits will help prevent abuse, improve facility safety, lead to more effective management, and, ultimately, lower fiscal and human costs to the community.

The groups also noted that it seemed DHS cost projections did not account for contract facilities already auditing under DOJ PREA standards, but that—as a cost-related measure—the two audits could be conducted simultaneously if the auditor were properly trained in differences between the standards and wrote separate, but related, reports for each set of standards. The group suggested that DHS consider

offering an abbreviated auditor training and certification process for auditors already certified by DOJ, focusing on the differences between the two sets of standards, the principles of civil confinement, and the unique features of DHS detainees.

*Response.* After reviewing the comments regarding Question 3, DHS decided to maintain the audit provisions set forth in Subpart C despite the fact that external auditing does incur financial costs to the agency. DHS agrees that external audits will be a valuable tool in assessing the standards' overall effectiveness and impact as well as help to prevent abuse, improve facility safety, and lead to more effective detention and custody management.

While DHS appreciates that some commenters acknowledged that external audits are required by both DOJ and DHS and that the agencies could be seen as conducting and financing redundant external audits, DHS believes that the unique detention missions of each agency warrant a separate audit process. If in the future DHS finds that an expedited certification process is preferable, DHS can implement such a process under § 115.202(b).

**Question 4: Is there a better approach to external audits other than the approaches discussed in the proposed rule?**

A commenter stated affirmatively that a better approach may exist, acknowledging it may include additional but reasonable costs. The groups expressed the following various changes that they believe would be improvements: (1) Audits could be conducted on an unannounced basis to ensure they are reviewing typical conditions; (2) facilities which have been required to take corrective action after an initial audit could be required to undergo a follow-up audit 18 months later to assess improvement; (3) auditors could be required to work in teams that include advocates and/or former detainees to increase comprehensiveness of inspection; (4) such teams could be required to meet with a certain percentage of current and former detainees and employees, contractors, and volunteers to accrue information; and (5) DHS could require that all facilities submit to expedited audits when requested by CRCL.

The collection of groups expressed that they believed DHS could amend its PREA auditing standards at a later date if, for example, after two complete three-year audit cycles under the groups' suggested standard, DHS could then better determine which facilities could appropriately be audited on a

less-frequent basis; the data from the two cycles could also allow advocates to have concrete data to comment on such a revised plan.

*Response.* DHS appreciates the constructive comments provided by advocacy groups regarding the audit process. DHS is not substantively revising the audit provision in the final rule because the agency believes that the final rule provides an effective and efficient framework for external audits.

In response to the specific comments, DHS notes that unannounced audits would be overly burdensome for the facility and for agency personnel. Section 115.204 requires facilities with a finding of "Does Not Meet Standards" with one or more standards have 180 days to develop a corrective action plan. After the 180-day corrective action period, the auditor will issue a final determination as to whether the facility has achieved compliance. The agency will use this assessment to determine what steps are necessary to bring the facility into compliance or to determine that the facility is not safe for detainees and therefore, whether detainees must be transferred to other facilities. This process is an effective safeguard and therefore, an automatic 18-month follow-up audit is not necessary. DHS does not mandate the exact composition of the audit team, but rather requires that the audit be conducted by entities or individuals outside of the agency that have relevant audit experience. Paragraph (g) of § 115.201 already requires that the auditor interview a representative sample of detainees and staff. Finally, the agency does not believe that the agency's resources would be maximized if CRCL could automatically trigger expedited audits. CRCL already has the authority to conduct reviews related to civil rights and civil liberties issues at any facility that houses detainees. However, DHS acknowledges that CRCL will play an important role in developing audit procedures and guidelines. In light of this, §§ 115.93 and 115.193 have been revised to allow CRCL to request expedited audits if it has reason to believe that such an audit is appropriate.

**Question 5: In an external auditing process, what types of entities or individuals should qualify as external auditors?**

Some commenters described specific types of individuals who would or would not qualify as external auditors, while one set of advocates described typical characteristics contributing to a quality auditor. One commenter stated that such external auditors should

consist of members of non-governmental organizations, attorneys, community members, media, and former detainees. Another organization stated that auditors should simply not be employees of DHS or the detention center, seemingly meaning the facility being audited; yet another set of groups stated that prior corrections or detention official experience alone would not suffice. Another commenter suggested that auditing requires a well-founded individual or team with prior expertise and/or training in both sexual violence dynamics and detention environments, with state certification in rape crisis counseling being a strongly-preferred qualification. Commenters wrote that requirements must include demonstrable skills in gathering information from traumatized individuals and ability to ascertain clues of possible concerns that detainees and others may not feel comfortable sharing.

*Response.* The agency in conjunction with CRCL is required by this rule to develop and issue guidance on the conduct of and contents of the audit. The agency must also certify all auditors and develop and issue procedures regarding the certification process, which must include training requirements.

Finally, DHS received a number of generalized comments relevant to the rulemaking but which did not specifically fall within any particular standard as embodied in the proposed rule.

*Comment.* Numerous comments were supportive of the standards, stating it is a good idea to promulgate a rule to prevent such assault and abuse.

*Response.* DHS agrees that this rule is an important tool for the agency to prevent, detect, and respond to sexual abuse and assault in confinement facilities.

*Comment.* Former Commissioners of NPREC suggested that DHS engage BJS to work to collect data on the prevalence of sexual abuse in DHS facilities, with the results of such surveys being available to the public. The former Commissioners believed the data to be necessary both for DHS and for the public to be able to understand the scope of abuse and to monitor the impact and success of the standards.

*Response.* DHS has considered the suggested approach in this comment; however, given the current budgetary environment, DHS does not have the resources to expend personnel and/or funds to develop and execute a separate additional survey and accompanying interagency agreement at this time. DHS



notes that BJS recently conducted a survey that included ICE facilities.<sup>16</sup>

In addition, the need for such a survey is negated by the fact that DHS itself, through ICE, has conducted surveys of the detainee population. The surveys have focused on conditions of detention, including the grievance process, staff retaliation, intake education—including regarding how to contact ICE personnel—posting of legal assistance information, and the Detainee Handbook, with space to add other information that the detainee may wish to share. DHS may consider conducting similar surveys in the future for comparison purposes.

Several commenters generally suggested that various standards should include “critical protections” for LGBTI detainees, in addition to the specific areas where LGBTI-related comments are listed above. Areas where commenters believed these protections are needed include in §§ 115.15, 115.115, Limits to cross-gender viewing and searches; § 115.42, Use of assessment information; § 115.43, Protective custody; §§ 115.62, 115.162, (Agency) Protection duties; § 115.53, Detainee access to outside confidential support services; and § 115.78, Disciplinary sanctions for detainees.

*Response.* As noted elsewhere that the issue has specifically arisen, DHS generally provides safety and security measures for all populations, including all those that may be vulnerable; DHS declines to make specific changes for the standards referred to in these

comments, as the standards are intended to be flexible enough to fit many situations.

**V. Regulatory Analysis**

We developed this rule after considering numerous statues and executive orders related to rulemaking. Below we summarize our analyses based on a number of these statues or executive orders.

*A. Executive Orders 12866 and 13563*

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both the costs and benefits of reducing costs of harmonizing rules, and of promoting flexibility. This rule is a “significant regulatory action,” although not an economically significant regulatory action, under § 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

1. Synopsis

Sexual violence against any victim is an assault on human dignity and an affront to American values. Many victims report persistent, even lifelong

mental and physical suffering. As the National Prison Rape Elimination Commission (NPREC) explained in its 2009 report:

Until recently . . . the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff. Tolerance of sexual abuse of prisoners in the government’s custody is totally incompatible with American values.<sup>17</sup>

As discussed in the accompanying RIA, ICE keeps records of any sexual abuse allegation made by detainees at all facilities in which it holds detainees in its Joint Integrity Case Management System (JICMS). In estimating the current level of sexual abuse for purposes of this analysis, DHS relies on facility-reported data in ICE’s JICMS database. In 2010, ICE had four substantiated sexual abuse allegations in immigration detention facilities, two in 2011, and one in 2012. There were no substantiated allegations by individuals detained in a DHS holding facility.<sup>18</sup> In the RIA, DHS extrapolates the number of substantiated and unsubstantiated allegations at immigration detention facilities based on the premise that there may be additional detainees who may have experienced sexual abuse but did not report it. Table 1 below summarizes the estimated number of sexual abuse allegations at ICE confinement facilities.

TABLE 1—ESTIMATED BENCHMARK LEVEL OF ADULT SEXUAL ABUSE AT ICE CONFINEMENT FACILITIES, BY APPROACH AND TYPE OF ALLEGATION

| Class code                  | Subject              | Lower bound approach | Primary | Adjusted approach |
|-----------------------------|----------------------|----------------------|---------|-------------------|
| 1: Nonconsensual Acts—High  | Detainee-on-Detainee | 0.0                  | 4.9     | 9.9               |
|                             | Staff-on-Detainee    | 0.0                  | 3.8     | 7.7               |
|                             | Unknown              | 0.0                  | 0.0     | 0.0               |
|                             | Subtotal             | 0.0                  | 8.8     | 17.6              |
| 2: Nonconsensual Acts—Low   | Detainee-on-Detainee | 0.0                  | 4.9     | 9.9               |
|                             | Staff-on-Detainee    | 1.8                  | 5.7     | 9.6               |
|                             | Unknown              | 0.0                  | 0.8     | 1.6               |
|                             | Subtotal             | 1.8                  | 10.6    | 19.5              |
| 3: “Willing” Sex with Staff | Detainee-on-Detainee | 0.0                  | 0.0     | 0.0               |
|                             | Staff-on-Detainee    | 0.0                  | 1.0     | 1.9               |
|                             | Unknown              | 0.0                  | 0.0     | 0.0               |
|                             | Subtotal             | 0.0                  | 1.0     | 1.9               |

<sup>16</sup> BJS, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Nat’l Inmate Survey, 2011–12 (May 2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

<sup>17</sup> National Prison Rape Elimination Commission Report 1 (2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

<sup>18</sup> This does not include allegations involved in still-open investigations or allegations outside the scope of these regulations.

TABLE 1—ESTIMATED BENCHMARK LEVEL OF ADULT SEXUAL ABUSE AT ICE CONFINEMENT FACILITIES, BY APPROACH AND TYPE OF ALLEGATION—Continued

| Class code                                    | Subject                    | Lower bound approach | Primary | Adjusted approach |
|-----------------------------------------------|----------------------------|----------------------|---------|-------------------|
| 4: Abusive Sexual Contacts—High .....         | Detainee-on-Detainee ..... | 2.6                  | 5.5     | 8.4               |
|                                               | Staff-on-Detainee .....    | 0.0                  | 0.0     | 0.0               |
|                                               | Unknown .....              | 0.0                  | 0.0     | 0.0               |
|                                               | Subtotal .....             | 2.6                  | 5.5     | 8.4               |
| 5: Abusive Sexual Contacts—Low .....          | Detainee-on-Detainee ..... | 2.6                  | 18.2    | 33.8              |
|                                               | Staff-on-Detainee .....    | 0.0                  | 0.0     | 0.0               |
|                                               | Unknown .....              | 0.0                  | 0.0     | 0.0               |
|                                               | Subtotal .....             | 2.6                  | 18.2    | 33.8              |
| 6: Staff Sexual Misconduct Touching Only .... | Detainee-on-Detainee ..... | 0.0                  | 0.0     | 0.0               |
|                                               | Staff-on-Detainee .....    | 0.0                  | 20.2    | 40.4              |
|                                               | Unknown .....              | 0.0                  | 0.0     | 0.0               |
|                                               | Subtotal .....             | 0.0                  | 20.2    | 40.4              |
| Sexual Harassment Not Involving Touching ..   | Detainee-on-Detainee ..... | 0.0                  | 5.6     | 11.3              |
|                                               | Staff-on-Detainee .....    | 3.5                  | 13.3    | 23.1              |
|                                               | Unknown .....              | 0.0                  | 0.0     | 0.0               |
|                                               | Subtotal .....             | 3.5                  | 18.9    | 34.4              |
| Total .....                                   | 10.4                       | 83.2                 | 156.0   |                   |

Note: Details may not sum to total due to rounding for shown values.

In order to address the allegations of sexual abuse at DHS immigration detention and holding facilities, the final rule sets minimum requirements for the prevention, detection, and response to sexual abuse. Specifically, the rule establishes standards for prevention planning; prompt and coordinated response and intervention; training and education of staff, contractors, volunteers and detainees; proper treatment for victims; procedures for investigation, discipline and prosecution of perpetrators; data collection and review for corrective action; and audits for compliance with the standards. DHS estimates that the full cost of compliance with these standards at all covered DHS confinement facilities will be approximately \$57.4 million over the period 2013–2022, discounted at 7 percent, or \$8.2 million per year when annualized at a 7 percent discount rate.

With respect to benefits, DHS conducts what is known as a “break

even analysis,” by first estimating the monetary value of preventing various types of sexual abuse (incidents involving violence, inappropriate touching, or a range of other behaviors) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. When all facilities and costs are phased into the rulemaking, the break even point would be reached if the standards reduced the annual number of incidents of sexual abuse by 122 from the estimated benchmark levels, which is 147 percent of the total number of assumed incidents in ICE confinement facilities, including an estimated number of those who may not have reported an incident.<sup>19</sup>

There are additional benefits of the rule that DHS is unable to monetize or quantify. Not only will victims benefit from a potential reduction in sexual abuse in facilities, so too will DHS agencies and staff, other detainees, and

society as a whole. As noted by Congress, sexual abuse increases the levels of violence within facilities. Both staff and other detainees will benefit from a potential reduction in levels of violence and other negative factors. 42 U.S.C. 15601(14). This will improve the safety of the environment for other detainees and workplace for facility staff. In addition, long-term trauma from sexual abuse in confinement may diminish a victim’s ability to reenter society resulting in unstable employment. Preventing these incidents will decrease the cost of health care, spread of disease, and the amount of public assistance benefits required for victims upon reentry into society, whether such reentry is in the United States or a detainee’s home country.

Table 2, below, presents a summary of the benefits and costs of the final rule. The costs are discounted at seven percent.

TABLE 2—ESTIMATED COSTS AND BENEFITS OF FINAL RULE  
[\$millions]

|                                                   | Immigration detention facilities | Holding facilities | Total DHS PREA rulemaking |
|---------------------------------------------------|----------------------------------|--------------------|---------------------------|
| 10-Year Cost Annualized at 7% Discount Rate ..... | \$4.9                            | \$3.3              | \$8.2                     |

<sup>19</sup> As discussed in Chapter 1, and shown in Table 17, of the accompanying RIA, the benchmark level

of sexual assaults includes all types of sexual assaults.

TABLE 2—ESTIMATED COSTS AND BENEFITS OF FINAL RULE—Continued  
[\$millions]

|                                                                              | Immigration detention facilities                                                                                                                                                                                                                                                                                                                                                        | Holding facilities | Total DHS PREA rulemaking |
|------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|---------------------------|
| % Reduction of Sexual Abuse Victims to Break Even with Monetized Costs ..... | N/A                                                                                                                                                                                                                                                                                                                                                                                     | N/A                | 147%*                     |
| Non-monetized Benefits .....                                                 | An increase in the general wellbeing and morale of detainees and staff, the value of equity, human dignity, and fairness for detainees in DHS custody.<br>As explained above, we did not estimate the number of incidents or victims of sexual abuse this rule would prevent. Instead, we conducted a breakeven analysis. Therefore, we did not estimate the net benefits of this rule. |                    |                           |
| Net Benefits .....                                                           |                                                                                                                                                                                                                                                                                                                                                                                         |                    |                           |

\* For ICE confinement facilities.

2. Summary of Affected Population

This rule covers two types of confinement facilities: (1) Immigration detention facilities, and (2) holding facilities. Immigration detention facilities, which are operated or supervised by ICE, routinely hold persons for over 24 hours pending resolution or completion of immigration removal or processing. Holding facilities, used and maintained by DHS components including ICE and CBP, tend to be short-term. The analysis below presents immigration detention facilities and holding facilities separately.

This rule directly regulates the Federal Government, notably any DHS agency with immigration detention facilities or holding facilities. This rule also affects private and public entities that operate confinement facilities under contracts or agreements with DHS. The sections below describe and quantify, where possible, the number of affected immigration detention facilities and holding facilities.

a. Subpart A—Immigration Detention Facilities

ICE is the only DHS component with immigration detention facilities. ICE holds detainees during proceedings to determine whether they will be removed from the United States, and pending their removal, in ICE-owned facilities or in facilities contracting with ICE. Therefore, though this rule directly regulates the Federal Government, it requires that its standards ultimately apply to some State and local governments as well as private entities through contracts with DHS. The types

of authorized ICE immigration detention facilities are as follows:

- Service Processing Center (SPC)—full service immigration facilities owned by the government and staffed by a combination of Federal and contract staff;
- Contract Detention Facility (CDF)—owned by a private company and contracted directly with the government; and
- Intergovernmental Service Agreement Facility (IGSA)—facilities at which detention services are provided to ICE by State or local government(s) through agreements with ICE and which may fall under public or private ownership and may be fully dedicated immigration facilities (housing detained aliens only) or non-dedicated facilities (housing various detainees).

ICE enters into IGSA with States and counties across the country to use space in jails and prisons for civil immigration detention purposes. Some of these facilities are governed by IGSA that limit the length of an immigration detainee’s stay to less than 72 hours. Some of these facilities have limited bed space that precludes longer stays by detainees. Others are used primarily under special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court appearances in a different jurisdiction. In some circumstances the under-72-hour facilities house immigration detainees only occasionally.

ICE owns or has contracts with approximately 158 authorized immigration detention facilities that hold detainees for more than 72 hours.<sup>20</sup> The 158 facilities consist of 6 SPCs, 7

CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities. Sixty four of the non-dedicated IGSA facilities are covered by the DOJ PREA, not this rule, because they are USMS IGA facilities. As the USMS IGA facilities are not within the scope of this rulemaking, this analysis covers the 94 authorized SPC, CDF, dedicated IGSA, and non-dedicated IGSA immigration detention facilities that hold detainees for more than 72 hours.

ICE additionally has 91 authorized immigration detention facilities that are contracted to hold detainees for less than 72 hours.<sup>21</sup> All 91 facilities are non-dedicated IGSA facilities, but 55 of them are covered by the DOJ PREA rule, not this rule, because they are USMS IGA facilities. Again, ICE excludes the USMS IGA facilities from the scope of this rulemaking and analysis; the analysis covers the 36 authorized non-dedicated IGSA immigration detention facilities that hold detainees for under 72 hours. Facilities that are labeled by ICE as “under 72-hour” still meet the definition of immigration detention facilities, because they process detainees for detention intake. Detainees housed in these facilities are processed into the facility just as they would be in a long-term detention facility.

Furthermore, ICE also has two authorized family residential centers. These are IGSA facilities that house only ICE detainees. One of the facilities accommodates families subject to mandatory detention and the other is a dedicated female facility. ICE family residential centers are subject to the immigration detention facility standards proposed in Subpart A. The table below

<sup>20</sup> As noted above, facilities ICE used as of spring 2012, and the sexual abuse and assault standards to which facilities were held accountable or planned to be held accountable at that time, serve

as the baseline for the cost estimates for this rulemaking.

<sup>21</sup> As noted above, facilities ICE used as of spring 2012, and the sexual abuse and assault standards

to which facilities were held accountable or planned to be held accountable at that time, serve as the baseline for the cost estimates for this rulemaking.

summarizes the facilities included in this analysis.

TABLE 1—SUMMARY OF ICE AUTHORIZED IMMIGRATION DETENTION FACILITIES

| Facility                          | Over 72 hours | Under 72 hours | Family residential |
|-----------------------------------|---------------|----------------|--------------------|
| Non-Dedicated IGSA .....          | 74            | 36             | 0                  |
| SPC .....                         | 6             | 0              | 0                  |
| CDF .....                         | 7             | 0              | 0                  |
| Dedicated IGSA .....              | 7             | 0              | 2                  |
| Total Covered by Rule .....       | 94            | 36             | 2                  |
| USMS IGA <sup>a</sup> .....       | 64            | 55             | 0                  |
| Total Authorized Facilities ..... | 158           | 91             | 2                  |

<sup>a</sup>Not within the scope of the rulemaking. USMS confinement facilities are covered by DOJ's PREA regulations.

b. Subpart B—Holding Facilities

A holding facility may contain holding cells, cell blocks, or other secure locations that are: (1) under the control of the agency and (2) primarily used for the confinement of individuals who have recently been detained, or are being transferred to another agency.

i. U.S. Immigration and Customs Enforcement

Most ICE holding rooms are in ICE field offices and satellite offices. These rooms are rooms or areas that are specifically designed and built for temporarily housing detainees in ICE ERO offices. It may also include staging facilities. ICE holding facilities as presented in this analysis are exclusive of hold rooms or staging areas at immigration detention facilities, which are covered by the standards of the immigration detention facility under

Subpart A of this rule. ICE has 149 holding facilities that are covered under Subpart B of the rule.

ii. U.S. Customs and Border Protection

There is a wide range of facilities where CBP detains individuals. Some individuals are detained in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. Hold rooms in CBP facilities where case processing occurs are used to search, detain, or interview persons who are being processed. CBP operates 768 holding facilities at ports of entry and Border Patrol stations, checkpoints, and processing facilities across the country.

The number of detainees in CBP custody fluctuates. Consequently, at times CBP is unable to accommodate its short-term detention needs through its facilities. Similar to ICE, CBP has

entered into approximately 14 contracts with State, local, and/or private entity facilities on a rider to a USMS contract that provides for a consistent arrangement with particular facilities to cover instances in which CBP has insufficient space to detain individuals. Because CBP entered into these contracts via a rider to a USMS contract, the impacts to these facilities have been accounted for in the DOJ's PREA rule and to consider them again here would double count any costs and/or benefits associated with these facilities. As such, these facilities are excluded from this analysis.

3. Costs of Rule

This rule covers DHS immigration detention facilities and holding facilities. Table 3 summarizes the number of facilities covered by the rulemaking over 10 years.

TABLE 3—ESTIMATED POPULATION SUMMARY FOR RULE

| Year     | Immigration detention facilities | Holding facilities |     | Total |
|----------|----------------------------------|--------------------|-----|-------|
|          |                                  | ICE                | CBP |       |
| 1 .....  | 132                              | 149                | 768 | 1,049 |
| 2 .....  | 134                              | 149                | 768 | 1,051 |
| 3 .....  | 136                              | 149                | 768 | 1,053 |
| 4 .....  | 138                              | 149                | 768 | 1,055 |
| 5 .....  | 140                              | 149                | 768 | 1,057 |
| 6 .....  | 142                              | 149                | 768 | 1,059 |
| 7 .....  | 144                              | 149                | 768 | 1,061 |
| 8 .....  | 146                              | 149                | 768 | 1,063 |
| 9 .....  | 148                              | 149                | 768 | 1,065 |
| 10 ..... | 150                              | 149                | 768 | 1,067 |

The cost estimates set forth in this analysis represent the costs of compliance with, and implementation of, the standards in facilities within the

scope of the rulemaking.<sup>22</sup> This final

<sup>22</sup> The baseline for these cost estimates is the sexual abuse and assault standards to which facilities were held accountable or planned to be held accountable at the time of writing the NPRM. Since the NPRM, ICE has made great strides in

rule implements many of the proposed

implementing sexual abuse and assault standards in facilities. As a result, the baseline of the rule from which the costs and benefits of the rulemaking were estimated, differ from the current sexual abuse and assault standards at some facilities.

standards in the NPRM. In addition, DHS made a number of changes to provisions set forth in the NPRM based on public comments. These changes are discussed previously in the preamble. DHS received no public comments on the estimates in the economic analysis.

After analyzing the changes made in this final rule, DHS concludes the only cost change from the NPRM with more

than a de minimis impact results from expanding the scope of training requirements for personnel that have contact with detainees under § 115.32. This change resulted in an increase in estimated cost of approximately \$16,000 per year. DHS also fixed a mistake in estimating the year audits would begin for facilities. Thus, this analysis

estimates that compliance with the standards, in the aggregate, will be approximately \$57.4 million, discounted at 7 percent, over the period 2013–2022, or \$8.2 million per year when annualized at a 7 percent discount rate. Table 4 below, presents a 10-year summary of the estimated benefits and costs of the final rule.

TABLE 4—TOTAL COST OF FINAL RULE  
[\$millions]

| Year            | Immigration detention facilities subpart A |                | Holding facilities subpart B |       | Total  |
|-----------------|--------------------------------------------|----------------|------------------------------|-------|--------|
|                 | Over 72 hours                              | Under 72 hours | ICE                          | CBP   |        |
| 1               | \$3.9                                      | \$1.2          | \$0.0                        | \$5.6 | \$10.7 |
| 2               | 3.6                                        | 1.1            | 0.0                          | 5.5   | 10.1   |
| 3               | 3.6                                        | 1.1            | 0.0                          | 3.6   | 8.3    |
| 4               | 3.7                                        | 1.1            | 0.0                          | 2.4   | 7.1    |
| 5               | 3.7                                        | 1.1            | 0.0                          | 2.4   | 7.2    |
| 6               | 3.7                                        | 1.1            | 0.0                          | 2.3   | 7.2    |
| 7               | 3.8                                        | 1.1            | 0.0                          | 2.3   | 7.2    |
| 8               | 3.8                                        | 1.1            | 0.0                          | 2.3   | 7.2    |
| 9               | 3.8                                        | 1.1            | 0.0                          | 2.3   | 7.2    |
| 10              | 3.8                                        | 1.2            | 0.0                          | 2.3   | 7.2    |
| Total           | 37.4                                       | 11.3           | 0.0                          | 31.0  | 79.6   |
| Total (7%)      | 26.2                                       | 7.9            | 0.0                          | 23.2  | 57.4   |
| Total (3%)      | 31.9                                       | 9.6            | 0.0                          | 27.2  | 68.7   |
| Annualized (7%) | 3.7                                        | 1.1            | 0.0                          | 3.3   | 8.2    |
| Annualized (3%) | 3.7                                        | 1.1            | 0.0                          | 3.2   | 8.0    |

The total cost, discounted at 7 percent, consists of \$34.1 million for immigration detention facilities under Subpart A, and \$23.2 million for holding facilities under Subpart B. The largest costs for immigration detention facilities are for staff training, documentation of cross-gender pat downs, duties for the PSA Compliance Manager, and audit requirements. DHS estimates zero compliance costs for ICE holding facilities under this rule as the requirements of ICE’s SAAPID and other ICE policies are commensurate with the requirements of the rule. The largest costs for CBP holding facilities are staff training, audits, and facility design modifications and monitoring technology upgrades.

4. Benefits of the Rule

DHS has not estimated the anticipated monetized benefits of this rule or how many incidents or victims of sexual abuse DHS anticipates will be avoided by this rule. Instead, DHS conducts what is known as a “break even analysis,” by first estimating the monetary value of preventing victims of

various types of sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. The NPRM estimated the benefits based on sexual abuse data from 2011, the most recent full year of data at that time. DHS has included sexual abuse data from 2010, 2011, and 2012 in this final analysis. In addition, since the publication of the NPRM, ICE’s PSA Coordinator has reviewed the individual reports and data from these years and assigned a level of sexual victimization to each based on the levels used in the DOJ PREA RIA.<sup>23</sup> This has allowed DHS to provide a more comprehensive assessment of sexual abuse in ICE confinement facilities, and the estimated avoidance value of preventing such abuse. The DHS RIA concludes

<sup>23</sup> Department of Justice, Regulatory Impact Analysis for the National Standards to Prevent, Detect, and Respond to Prison Rape under PREA, Table 1.1 on page 24 of 168, available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_ria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf).

that when all facilities and costs are phased into the rulemaking, the breakeven point will be reached if the standards reduced the annual number of incidents of sexual abuse by 122 from the estimated benchmark level, which is 147 percent of the total number of assumed incidents in ICE confinement facilities, including those who may not have reported an incident.

There are additional benefits of the rule that DHS is unable to monetize or quantify. Not only will victims benefit from a potential reduction in sexual abuse in facilities, so too will DHS agencies and staff, other detainees, and society as a whole. As noted by Congress, sexual abuse increases the levels of violence within facilities. Both staff and other detainees will benefit from a potential reduction in levels of violence and other negative factors. 42 U.S.C. 15601(14). This will improve the safety of the environment for other detainees and workplace for facility staff. In addition, long-term trauma from sexual abuse in confinement may diminish a victim’s ability to reenter society resulting in unstable

employment. Preventing these incidents will decrease the cost of health care, spread of disease, and the amount of public assistance benefits required for victims upon reentry into society, whether such reentry is in the United States or a detainee's home country.

5. Alternatives

As alternatives to the regulatory regime discussed in this rule, DHS examined three other options. The first is taking no regulatory action. For over 72-hour immigration detention facilities, the 2011 PBNDS sexual abuse standards might reach all facilities over time as the new version of the standards are implemented at facilities as planned. However, in the absence of regulatory action, sexual abuse standards for ICE's

under 72-hour immigration detention facilities and DHS's holding facilities would remain largely the same.

DHS also considered requiring the ICE immigration detention facilities that are only authorized to hold detainees for under 72 hours to meet the standards for holding facilities under Subpart B, rather than the standards for immigration detention in Subpart A, as discussed in the final rule. The standards in Subpart B are somewhat less stringent than those for immigration detention facilities, as appropriate for facilities holding detainees for a much shorter time and with an augmented level of direct supervision.

Finally, DHS considered changing the audit requirements under §§ 115.93 and

115.193. Immigration detention facilities currently undergo several layers of inspections for compliance with ICE's detention standards. This alternative would allow ICE to incorporate the audit requirements for the standards into current inspection procedures. However, it would require outside auditors for all immigration detention facilities. For holding facilities that hold detainees overnight, it would require 10 internal audits, 10 external audits, and three audits by CRCL be conducted annually. The following table presents the 10-year costs of the alternatives compared to the costs of the final rule. These costs of these alternatives are discussed in detail in Chapter 2 of the Final RIA.

TABLE 5—COST COMPARISON OF REGULATORY ALTERNATIVES TO THE FINAL RULE  
[Millions]

| 10-Year total costs by alternative     | Total | Total (7%) | Total (3%) |
|----------------------------------------|-------|------------|------------|
| Alternative 1—No Action .....          | \$0   | \$0        | \$0        |
| Alternative 2—Under 72-Hour .....      | 77.4  | 55.7       | 66.7       |
| Alternative 3—Final Rule .....         | 79.6  | 57.4       | 68.7       |
| Alternative 4—Audit Requirements ..... | 70.1  | 50.5       | 60.4       |

B. Executive Order 13132—Federalism

This final rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. This rule implements the Presidential Memorandum of May 17, 2012 “Implementing the Prison Rape Elimination Act” and the requirements found in the recently enacted VAWA Reauthorization (Mar. 7, 2013) by setting forth national DHS standards for the detection, prevention, reduction, and punishment of sexual abuse in DHS immigration detention and holding facilities. In drafting the standards, DHS was mindful of its obligation to meet the President's objectives and Congress's intent while also minimizing conflicts between State law and Federal interests.

Insofar, however, as the rule sets forth standards that might apply to immigration detention facilities and holding facilities operated by State and local governments and private entities, this rule has the potential to affect the States, the relationship between the Federal government and the States, and the distribution of power and responsibilities among the various levels of government and private entities. With respect to the State and local agencies, as well as the private

entities, that own and operate these facilities across the country, the Presidential Memorandum provides DHS with no direct authority to mandate binding standards for their facilities. However, in line with Congress's and the President's statutory direction in the VAWA Reauthorization that the standards are to apply to DHS-operated detention facilities and to detention facilities operated under contract with DHS, including CDFs and detention facilities operated through an IGSA with DHS, these standards impact State, local, and private entities to the extent that such entities make voluntary decisions to contract with DHS for the confinement of immigration detainees or that such entities and DHS agree to enter into a modification or renewal of such contracts. This approach is fully consistent with DHS's historical relationship to State and local agencies in this context. Therefore, in accordance with Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, DHS welcomed consultation with representatives of State and local prisons and jails, juvenile facilities,

community corrections programs, and lockups—among other individuals and groups—during the course of this rulemaking.

C. Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988.

D. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, 109 Stat. 48, 2 U.S.C. 1532) generally requires agencies to prepare a statement before submitting any rule that may result in an annual expenditure of \$100 million or more (adjusted annually for inflation) by State, local, or tribal governments, or by the private sector. DHS has assessed the probable impact of these regulations and believes these regulations may result in an aggregate expenditure by State and local governments of approximately \$4.3 million in the first year.

However, DHS believes the requirements of the UMRA do not apply to these regulations because UMRA excludes from its definition of “Federal intergovernmental mandate” those regulations imposing an enforceable duty on other levels of government which are “a condition of Federal

assistance.” 2 U.S.C. 658(5)(A)(i)(I). Compliance with these standards would be a condition of ongoing Federal assistance through implementation of the standards in new contracts and contract renewals. While DHS does not believe that a formal statement pursuant to the UMRA is required, it has, for the convenience of the public, summarized as follows various matters discussed at greater length elsewhere in this rulemaking which would have been included in a UMRA statement should that have been required:

- These standards are being issued pursuant to the Presidential Memorandum of May 17, 2012, section 1101 of the VAWA Reauthorization, and DHS detention authorities.

- A qualitative and quantitative assessment of the anticipated costs and benefits of these standards appears below in the Regulatory Flexibility Act (RFA) section;

- DHS does not believe that these standards will have an effect on the national economy, such as an effect on productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services;

- Before it issued these final regulations DHS:

- (1) Provided notice of these requirements to potentially affected small governments by publishing the NPRM, and by other activities;

- (2) Enabled officials of affected small governments to provide meaningful and timely input, via the methods listed above; and

- (3) Worked to inform, educate, and advise small governments on compliance with the requirements.

- As discussed above in the RIA summary, DHS has identified and considered a reasonable number of regulatory alternatives and from those alternatives has attempted to select the least costly, most cost effective, or least burdensome alternative that achieves DHS's objectives.

#### *E. Small Business Regulatory Enforcement Fairness Act of 1996*

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, DHS wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact DHS via the address or phone number provided in the **FOR FURTHER INFORMATION CONTACT**

section above. DHS will not retaliate against small entities that question or complain about this rule or about any policy or action by DHS related to this rule.

#### *F. Regulatory Flexibility Act*

DHS drafted this final rule so as to minimize its impact on small entities, in accordance with the RFA, 5 U.S.C. 601–612, while meeting its intended objectives. The term “small entities” comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Based on presently available information, DHS is unable to state with certainty that the rule will not have any effect on small entities of the type described in 5 U.S.C. 601(3). Accordingly, DHS has prepared a Final Regulatory Flexibility Impact Analysis in accordance with 5 U.S.C. 604.

#### 1. A Statement of the Need for, and Objectives of, the Rule

In 2003 Congress enacted PREA, Public Law 108–79 (Sept. 4, 2003). PREA directs the Attorney General to promulgate national standards for enhancing the prevention, detection, reduction, and punishment of prison rape. On May 17, 2012, DOJ released a final rule setting national standards to prevent, detect, and respond to prison rape for facilities operated by BOP and USMS. The final rule was published in the **Federal Register** on June 20, 2012, 77 FR 37106 (June 20, 2012). In its final rule, DOJ concluded that PREA “encompass[es] any Federal confinement facility ‘whether administered by [the] government or by a private organization on behalf of such government.’” *Id.* at 37113 (quoting 42 U.S.C. 15609(7)). DOJ recognized, however, that, in general, each Federal agency is accountable for, and has statutory authority to regulate the operations of its own facilities and is best positioned to determine how to implement Federal laws and rules that govern its own operations, staff, and persons in custody. *Id.* The same day that DOJ released its final rule, President Obama issued a Presidential Memorandum directing Federal agencies with confinement facilities to issue regulations or procedures within 120 days of his Memorandum to satisfy the requirements of PREA. On March 7, 2013, Congress enacted a statutory mandate in the VAWA Reauthorization directing DHS to publish, within 180 days of enactment, a final rule adopting national standards for the detection,

prevention, reduction, and punishment of rape and sexual assault in immigration confinement settings. See Public Law 113–4 (Mar. 7, 2013). This regulation responds to and fulfills the President’s direction and the VAWA Reauthorization statutory mandate by creating comprehensive, national regulations for the detection, prevention, and reduction of prison rape at DHS confinement facilities.

DHS uses a variety of legal authorities, which are listed below in the “Authority” provision preceding the regulatory text, to detain individuals in confinement facilities. Most individuals detained by DHS are detained in the immigration removal process, and normally DHS derives its detention authority for these actions from § 236(a) of the INA, 8 U.S.C. 1226(a), which provides the authority to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States, and § 241(a)(2) of the INA, 8 U.S.C. 1231(a)(2), which provides the authority to detain an alien during the period following the issuance of an order of removal. DHS components, however, use many other legal authorities to meet their statutory mandates and to detain individuals during the course of executing DHS missions.

The objective of the rule is to create minimum requirements for DHS immigration detention and holding facilities for the prevention, detection, and response to sexual abuse. The rule will ensure prompt and coordinated response and intervention, proper treatment for victims, discipline and prosecution of perpetrators, and effective oversight and monitoring to prevent and deter sexual abuse.

#### 2. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis (IRFA), a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

DHS did not receive any public comments in response to the initial regulatory flexibility analysis.

#### 3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

DHS did not receive comments from the Chief Counsel for Advocacy of the



Small Business Administration in response to the proposed rule.

4. A Description of and an Estimate of the Number of Small Entities To Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

This rule will affect owners of DHS confinement facilities, including private owners, State and local governments, and the Federal government. DHS has two types of confinement facilities: (1) Immigration detention facilities, and (2) holding facilities. Holding facilities tend to be short-term in nature. ICE, in particular, is charged with administration of the immigration detention facilities while CBP and ICE each have many holding facilities under their detention authority. The analysis below addresses immigration detention facilities and holding facilities separately.

i. Immigration Detention Facilities

ICE divides its detention facilities into two groups: There are 158 for use over 72 hours, and 91 that typically hold detainees for more than 24 hours and less than 72 hours. These are treated separately, below. Further, there are several types of immigration detention facilities. SPC facilities are ICE-owned

facilities and staffed by a combination of Federal and contract staff. CDFs are owned by a private company and contracted directly with ICE. Detention services at IGSA facilities are provided to ICE by State or local governments(s) through agreements with ICE and may be owned by the State or local government, or by a private entity. Finally, there are two types of IGSA facilities: dedicated and non-dedicated. Dedicated IGSA facilities hold only detained aliens whereas non-dedicated facilities hold a mixture of detained aliens and inmates. ICE does not include USMS IGA facilities used by ICE under intergovernmental agreements in the scope of this rulemaking. Those facilities would be covered by the DOJ PREA standards. Any references to authorized immigration detention facilities are exclusive of these 119 USMS IGA facilities.

Of the current 158 ICE detention facilities that are for use over 72 hours, 6 are owned by the Federal government and are not subject to the RFA. An additional 64 are covered not by this rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 88 facilities subject to the RFA, there are 79 distinct entities. DHS uses ICE information and public

databases such as Manta.com and data from the U.S. Census Bureau<sup>24</sup> to search for entity type (public, private, parent, subsidiary, etc.), primary line of business, employee size, revenue, population, and any other necessary information. This information is used to determine if an entity is considered small by the SBA size standards, within its primary line of business.

Of the 79 entities owning immigration detention facilities and subject to the RFA, the search returned 75 entities for which sufficient data are available to determine if they are small entities, as defined by the RFA. The table below shows the North American Industry Classification System (NAICS) codes corresponding with the number of facilities for which data are available. There are 27 small governmental jurisdictions, one small business, and one small not-for-profit. In order to ensure that the interests of small entities are adequately considered, DHS assumes that all entities without available ownership, NAICS, revenue, or employment data are small entities. Therefore, DHS estimates there are a total of 33 small entities to which this rule applies. The table below shows the number of small entities by type for which data are available.

TABLE 5—SMALL ENTITIES BY TYPE—IMMIGRATION DETENTION FACILITIES

| Type                                         | Entities found | SBA Size standard                                                          |
|----------------------------------------------|----------------|----------------------------------------------------------------------------|
| Small Governmental Jurisdiction .....        | 27             | Population less than 50,000.                                               |
| Small Business .....                         | 1              | \$7 million (NAICS 488999); \$30 million (NAICS 488119).                   |
| Small Organization .....                     | 1              | Independently owned and operated not-for-profit not dominant in its field. |
| Subtotal .....                               | 29             |                                                                            |
| Entities without Available Information ..... | 4              |                                                                            |
| Total Small Entities .....                   | 33             |                                                                            |

ICE also has shorter-term immigration detention facilities, for several reasons: Some of ICE’s immigration detention facilities are governed by IGSA that limit the length of an immigration detainee’s stay to less than 72 hours for various reasons. Some of these facilities have limited bed space that precludes longer stays by detainees. Others are used primarily under special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court appearances in a different jurisdiction. In some circumstances the under 72-hour facilities are located in

rural areas that only occasionally have immigration detainees.

At the time of writing, ICE has 91 immigration detention facilities which are used to detain individuals for less than 72 hours. Of those, three are owned by the Federal or State government and are not subject to the RFA. An additional 55 are covered not by this rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 33 facilities subject to the RFA, all are owned by distinct entities. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size,

revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards.

Of the 33 entities owning immigration detention facilities and subject to the RFA, all have sufficient data available to determine if they are small entities as defined by the RFA. The table below shows the NAICS codes corresponding with the number of facilities for which data are available. DHS determines there are 10 small governmental jurisdictions, 0 small businesses, and 0 small organizations. The table below shows

<sup>24</sup> U.S. Census Bureau, State and County QuickFacts, 2010 Population Data, available at <http://quickfacts.census.gov/qfd/index.html>.

the number of small entities by type for which data are available.

TABLE 6—SMALL ENTITIES BY TYPE—OTHER DHS CONFINEMENT FACILITIES

| Type                                  | Entities found | SBA Size standard            |
|---------------------------------------|----------------|------------------------------|
| Small Governmental Jurisdiction ..... | 10             | Population less than 50,000. |
| Small Business .....                  | 0              |                              |
| Small Organization .....              | 0              |                              |
| Total Small Entities .....            | 10             |                              |

At the time of writing, ICE has two immigration detention facilities that are considered family residential facilities. Both are owned by counties. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size, revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards. DHS was able to obtain sufficient data to determine if they are small entities. Based on the size of the counties, DHS determines neither are considered small governmental jurisdictions as defined by the RFA.

In summary, DHS estimates the number of small entities covered by this rulemaking is 33 over 72-hour immigration detention facilities, 10 under 72-hour facilities, and 2 family residential facilities, for a total of 45 small entities.

ii. Holding Facilities

*U.S. Customs and Border Protection.* CBP operates 768 facilities with holding facilities. Of the 768, 364 are owned by private sector entities. CBP is responsible for funding any facility modifications once CBP has begun operations at the location. As such, any modifications at these facilities as a result of this rule will have no direct impact on the facilities.

*U.S. Immigration and Customs Enforcement.* Most ICE hold rooms are in ICE field offices and satellite offices. ICE estimates it has 149 holding facilities that are covered under the rule. None of these facilities are considered small entities under the RFA.

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

With regard to non-DHS facilities, the requirements of the rule are applicable only to new detention contracts with the

Federal Government, and to contract renewals. To the extent this rule increases costs to any detention facilities, which may be small entities, it may be reflected in the cost paid by the Federal Government for the contract. Costs associated with implementing the rule paid by the Federal Government to small entities are transfer payments ultimately born by the Federal Government. However, DHS cannot say with certainty how much, if any, of these costs will be paid in the form of increased bed rates for facilities. Therefore, for the purposes of this analysis, DHS assumes all costs associated with the rule will be borne by the facility. Of the 45 small entities, 37 operate under the NDS. The following discussion addresses the standards that may create implementation costs for facilities that are currently operating under the ICE NDS.

i. Contracting With Other Non-DHS Entities for the Confinement of Detainees, § 115.12

The rule requires that any new contracts or contract renewals comply with the rule and provide for agency contract monitoring to ensure that the contractor is complying with these standards. Therefore, DHS adds a 20-hour opportunity cost of time for the contractor to read and process the modification, determine if a request for a rate increase is necessary, and have discussions with the government if needed. DHS estimates this standard may cost a facility approximately \$1,488 (20 hours × \$74.41) in the first year.<sup>25</sup>

<sup>25</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 11–1021 General and Operations Manager Median Hourly Wage, retrieved on June 29, 2012 from [http://www.bls.gov/oes/2011/may/naics4\\_999300.htm](http://www.bls.gov/oes/2011/may/naics4_999300.htm). Loaded for benefits. Bureau of Labor Statistics, Employer Cost for Employee Compensation, June 2011, Table 3: Employer Costs per hour worked for employee compensation and costs as a percent of total compensation: State and local government workers, by major occupational and industry group, Service Occupations, Salary and Compensation Percent of Total Compensation, retrieved on June 29, 2012 from [http://www.bls.gov/news.release/archives/ecec\\_09082011.pdf](http://www.bls.gov/news.release/archives/ecec_09082011.pdf). \$74.41 = \$44.42/0.597.

ii. Zero Tolerance of Sexual Abuse; Prevention of Sexual Assault Coordinator, § 115.11

The rule requires immigration detention facilities to have a written zero-tolerance policy for sexual abuse and establish a PSA Compliance Manager at each facility. ICE is not requiring facilities to hire any new staff for these responsibilities; rather ICE believes the necessary PSA Compliance Manager duties can be collateral duties for a current staff member.

For some of the standards in this rulemaking, the actual effort required to comply with the standard will presumably be undertaken by the PSA Compliance Manager. The costs of compliance with those standards are thus essentially subsumed within the cost of this standard. For this reason, and to avoid double counting, many standards are assessed as having minimal to zero cost even though they will require some resources to ensure compliance; this is because the cost of those resources is assigned to this standard to the extent DHS assumes the primary responsibility for complying with the standard will lie with the PSA Compliance Manager. The table below presents the standards and requirements DHS assumes are the responsibility of the PSA Compliance Manager, and are included in the costs estimated for this standard.

TABLE 7—ASSUMED PSA COMPLIANCE MANAGER DUTIES—IMMIGRATION DETENTION FACILITIES

| Standard                                                     |
|--------------------------------------------------------------|
| 115.11 Zero tolerance of sexual abuse.                       |
| 115.21 Evidence protocols and forensic medical examinations. |
| 115.31 Staff training.                                       |
| 115.32 Volunteer and contractor training.                    |
| 115.34 Specialized training: Investigations.                 |
| 115.63* Reporting to other confinement facilities.           |
| 115.65 Coordinated response.                                 |
| 115.67 Agency protection against retaliation.                |
| 115.86 Sexual abuse incident reviews.                        |
| 115.87 Data collection.                                      |

TABLE 7—ASSUMED PSA COMPLIANCE MANAGER DUTIES—IMMIGRATION DETENTION FACILITIES—Continued

| Standard        |
|-----------------|
| 115.93* Audits. |

\*Indicates new requirement for facilities under 2011 PBNDS or Family Residential Standards.

DHS spoke with some SPCs and CDFs who had Sexual Abuse and Assault Prevention Intervention Coordinators required under the 2008 PBNDS. Based on these discussions, DHS estimates a PSA Compliance Manager will spend, on average, 114 hours in the first year and 78 hours thereafter, which includes writing/revising policies related to sexual abuse and working with auditors. DHS estimates this standard may cost a facility approximately \$5,330 (114 hours × \$46.75) in the first year.<sup>26</sup>

iii. Limits to Cross-Gender Viewing and Searches, § 115.15

The requirement prohibits cross-gender pat-down searches unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required (for male detainees), or in exigent circumstances (for female and male detainees alike). In addition, it bans cross-gender strip or body cavity searches except in exigent circumstances; requires documentation of all strip and body cavity searches and cross-gender pat-down searches; prohibits physical examinations for the sole purpose of determining genital characteristics; requires training of law enforcement staff on proper procedures for conducting pat-down searches, including transgender and intersex detainees; and, implements policies on staff viewing of showering, performing bodily functions, and changing clothes.

The restrictions placed on cross-gender pat-down searches will be a new requirement for facilities operating under the NDS or 2008 PBNDS, and a modified requirement for facilities operating under the 2011 PBNDS.<sup>27</sup> ICE's detention population is 10 percent female, and 90 percent male. In comparison, 13 percent of correctional officers at Federal confinement

facilities<sup>28</sup> and 28 percent at jails are female.<sup>29</sup> Though there may be disproportionate gender ratios of staff to detainees at some individual facilities, the overall national statistics do not indicate that there will be a significant problem with compliance. Facilities are allowed to conduct cross-gender pat-down searches on male detainees when, after reasonable diligence by the facility, a member of the same gender is not available at the time. The pat-down restrictions for female detainees are more stringent. Female detainees only comprise 10 percent of the overall population, and one to five percent are held at ICE's dedicated female facility. The Family Residential Standards, under which the dedicated female facility operates, already prohibit cross-gender pat-downs.

DHS does not expect any facilities to hire new staff or lay off any staff specifically to meet the requirement. Instead, DHS expects that facilities which may have an unbalanced gender ratio take this requirement into consideration during hiring decisions resulting from normal attrition and staff turnover. In the IRFA, DHS requested comments from facilities on this conclusion. No comments were received in response to this request.

DHS includes a cost for facilities to examine their staff rosters, gender ratios, and staffing plans for all shifts for maximum compliance with cross-gender pat-downs. The length of time it takes for facilities to adjust staffing plans, strategies, and schedules for gender balance while ensuring there is adequate detainee supervision and monitoring pursuant to § 115.13 will vary with the size of the facility. DHS estimates this may take a supervisor 12 hours initially. DHS anticipates facilities will be able to incorporate these considerations into regular staffing decisions in the future. DHS estimates the restrictions on cross-gender pat-downs may cost a facility approximately \$561 (12 hours × \$46.75) in the first year.

The requirement for documentation of cross-gender pat-down searches is new for all facilities, regardless of the version of the detention standards under which the facility operates. Presumably, cross-gender pat-down searches of female detainees will occur rarely, as the rule

allows them in exigent circumstances only. However, cross-gender pat-down searches of male detainees may happen more frequently. DHS believes this requirement may be a notable burden on facilities both for the process of documenting the pat-down, but also keeping these records administratively. Therefore, as we discuss below, DHS estimates an opportunity cost for this provision. ICE does not currently track the number of cross-gender pat-down searches, or any pat-down searches conducted. In the IRFA DHS requested comment from facilities on the number of cross-gender pat-down searches conducted. No comments were received in response to this request.

Because DHS believes this may be a noticeable burden on facilities, DHS includes a rough estimate using assumptions. DHS also requested comment on these assumptions in the IRFA. No comments were received in response to this request. Detainees may receive a pat-down for a number of reasons. All detainees receive a pat-down upon intake at the facility, detainees may receive a pat-down after visitation, before visiting the attorney room, if visiting medical, if in segregation, etc. Therefore, DHS assumes that in any given day, approximately 50 percent of detainees may receive a pat-down. DHS uses the ratio of male guards to male detainees and female guards to female detainees as a proxy for the percentage of these pat-downs that will be cross-gender, realizing that this may not be representative of every facility, the circumstances at the time a pat-down is required, nor the results after the staff realignment previously discussed. As referenced previously, between 72 and 87 percent of guards are male and 90 percent of detainees are male. Therefore, to estimate a rough order of magnitude, DHS assumes between 3 and 18 percent of pat-downs of male detainees may be cross-gender, with a primary estimate of 10 percent.

DHS finds the total average daily population of male detainees at the 43 facilities classified as small entities and takes the average to determine an average daily population of 93 for a facility classified as a small entity (4,457 × 90% ÷ 43). Then DHS applies the methodology described above to estimate that approximately 2,000 cross-gender pat-downs may be conducted at an average small entity annually (93 male ADP × 50% receive pat-down daily × 365 days × 10% cross-gender), which is rounded to the nearest thousand due to uncertainty. DHS estimates it will require an average of five minutes of staff for documentation. DHS estimates

<sup>26</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 33-1011 First Line Supervisors of Correctional Officers Median Hourly Wage, retrieved on June 29, 2012 from <http://www.bls.gov/oes/2011/may/oes331011.htm>. Loaded for benefits. \$46.75 = \$27.91/0.597

<sup>27</sup> Specifically, the 2011 PBNDS permits cross-gender pat-down searches of women when staff of the same gender is not available at the time the pat-down search is required. Under the proposed standard, cross-gender searches of females would be allowed only in exigent circumstances.

<sup>28</sup> Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005, page 4, retrieved on August 13, 2012 from <http://www.bjs.gov/content/pub/pdf/csf05.pdf>.

<sup>29</sup> Department of Justice, Final Regulatory Impact Analysis, section 5.6.15.1 Analysis and Methodology for Adult Facilities of standards 115.15, retrieved May 24 from [www.ojp.usdoj.gov/programs/pdfs/prea\\_ria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf).

this standard may cost a facility approximately \$5,435 (5 minutes  $\times$  \$32.61 per hour), annually.

The total estimate per small entity for § 115.15 is \$5,996 (\$561 for staff realignment + \$5,435 for cross-gender pat-down documentation).

iv. Evidence Protocols and Forensic Medical Examinations, § 115.21

The rule requires ICE and any of its immigration detention facilities to establish a protocol for the investigation of allegations of sexual abuse or the referral of allegations to investigators. In addition, where appropriate, at no cost to the detainee, a forensic medical exam should be offered and an outside victim advocate shall be made available for support if requested.

DHS includes a cost for facilities to enter into a memorandum of understanding (MOU) with entities that provide victim advocate services, such as rape crisis centers. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this standard may cost a facility approximately \$1,488 (20 hours  $\times$  \$74.41).

v. Staff Training, § 115.31

Under § 115.31 the rule requires that any facility staff who may have contact with immigration detention facilities have training on specific items related to prevention, detection, and response to sexual abuse. It also requires facilities to maintain documentation that all staff have completed the training requirements. Staff includes any employees or contractors of the agency or facility, including any entity that operates within the facility. Contractor means a person who or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility.

DHS uses the National Institute of Corrections Information Center 2-hour training timeframe as an approximation for the length of the training course to fulfill the proposed requirements. DHS estimates this standard may cost a facility approximately \$18,914 (2 hours  $\times$  290 staff  $\times$  \$32.61), annually.<sup>30 31</sup>

vi. Other Training, § 115.32

In the NPRM, § 115.32 required that any volunteers and contractors who may

have contact with immigration detention facilities also receive training on specific items related to prevention, detection, and response to sexual abuse. In the final rule this was changed to volunteers and other contractors. Other contractors are those that do not have training requirements under § 115.31, but who have contact with detainees and provide services on a non-recurring basis to the facility pursuant to a contractual agreement. The standard also requires the agency or facility to maintain documentation that all volunteers and other contractors have completed the training requirements.

The provisions in this standard allow the level and type of training required of volunteers and other contractors to be based upon the services they provide and the level of contact they have with detainees, but sets a minimum level requiring notification of the zero-tolerance policy and reporting responsibilities and procedures. Because of the regular nature of volunteers and the types of duties they perform, DHS uses the same assumptions as staff for the frequency and hours of training required of volunteers. DHS estimates this standard for volunteers may cost approximately \$2,008 per facility (2 hours  $\times$  30 volunteers  $\times$  \$33.47).<sup>32 33</sup>

To provide flexibility to facilities to determine the appropriate level of training necessary, the NPRM included training for contractors under § 115.31 and § 115.32 recognizing there are different types of contractors ranging from guards to those that come weekly to service vending machines. In this final rule, DHS proposes to address this flexibility in a different manner. DHS has removed from § 115.32 contractors, as defined under § 115.5 as a “person or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility.” The final rule includes these types of recurring contractors solely under the training requirements of § 115.31. In recognition that there may be other non-recurring contractors with access to detainees, DHS has included a requirement for these other contractors to also undergo training appropriate for the services they provide and level of contact they have with detainees, under

§ 115.32. This expands the training requirements to a population that was not previously covered under the NPRM. DHS estimates this standard for other contractors may cost approximately \$121 per facility (15 minutes  $\times$  20 other contractors  $\times$  \$24.24).<sup>34</sup>

The total estimated cost per facility for volunteer and other contractor training is \$2,129 (\$2,008 for volunteers + \$121 for other contractors).

vii. Specialized Training: Investigations, §§ 115.34, 115.134

The rule requires the agency or facility to provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into alleged sexual abuse at immigration detention facilities.

DHS conducts investigations of all allegations of detainee sexual abuse in detention facilities. The 2012 ICE SAAPID mandates that ICE’s OPR provide specialized training to OPR investigators and other ICE staff. Facilities may also conduct their own investigations. However, because ICE conducts investigations into the allegations, training for facility investigators will likely be less specialized than required of ICE investigators. DHS includes a cost for the time required for training investigators. DHS estimates the training may take approximately one hour. DHS estimates this standard may cost a facility approximately \$468 (1 hour  $\times$  10 investigators  $\times$  \$46.75).<sup>35 36</sup>

<sup>34</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, National, Weighted Average Median Wage Rate for SOC 37–0000 Building Grounds Cleaning and Maintenance Occupations; 47–0000 Construction and Extraction Occupations; and 49–0000 Installation, Maintenance, and Repair Occupations, retrieved on June 13 2012 from [http://www.bls.gov/oes/2011/may/oes\\_nat.htm](http://www.bls.gov/oes/2011/may/oes_nat.htm). Loaded for benefits.

Bureau of Labor Statistics, Employer Cost for Employee Compensation, June 2011, Table 1: Employer Costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, Management, professional, and related, Salary and Compensation Percent of Total Compensation, retrieved on October 15, 2012 from [http://www.bls.gov/news.release/archives/ecec\\_09082011.pdf](http://www.bls.gov/news.release/archives/ecec_09082011.pdf). \$24.24 = \$16.86/0.694.

<sup>35</sup> ICE does not keep record of the number of investigators at contract facilities. The estimates represent the results from a small sample, stratified by facility type. ICE estimates 10 investigators per facility.

<sup>36</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Median Wage Rate for SOC 33–1011 First-Line Supervisors of Correctional Officers, retrieved on August 16, 2012 from [http://www.bls.gov/oes/2011/may/naics4\\_999300.htm](http://www.bls.gov/oes/2011/may/naics4_999300.htm). Loaded for benefits. \$46.75 = \$27.91/0.597.

<sup>30</sup> ICE does not keep record of the number of staff at contract facilities. The estimates represent the results from a small sample, stratified by facility type. ICE estimates approximately 290 staff per facility.

<sup>31</sup> Though there may be other types of staff that will require this training, such as medical practitioners or administrative staff, DHS assumes correctional officers and their supervisors comprise the majority of staff with detainee contact.

<sup>32</sup> ICE does not keep record of the number of volunteers at contract facilities. The estimates represent the results from a small sample, stratified by facility type. ICE estimates approximately 30 volunteers per facility.

<sup>33</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, SOC 00–0000 All Occupations Median Hourly Wage, retrieved on August 16, 2012 from [http://www.bls.gov/oes/2011/may/naics4\\_999300.htm](http://www.bls.gov/oes/2011/may/naics4_999300.htm). Loaded for benefits. \$33.47 = \$19.98/0.597.

viii. Specialized Training: Medical and Mental Health Care, § 115.35

The rule requires specialized training to DHS medical and mental health care staff. In addition, it requires all facilities to have policies and procedures to ensure that the facility trains or certifies all full- or part-time facility medical and mental health care staff in procedures for treating victims of sexual abuse, in facilities where medical or mental health staff may be assigned these activities.<sup>37</sup>

DHS searched for continuing medical education courses that focused on the evaluation and treatment for victims of sexual assault. Based on the results, DHS estimates an average course will be one hour in length and cost between \$10 and \$15, and can be completed online. DHS estimates this standard may cost a facility approximately \$1,957 (30 medical and mental health care practitioners × (\$50.23 × 1 hr + \$15)).<sup>38</sup>

ix. Detainee Access to Outside Confidential Support Services, § 115.53

The rule requires facilities to maintain or attempt to enter into MOUs with organizations that provide legal advocacy and confidential emotional support services for victims of sexual abuse. It also requires notices of these services be made available to detainees, as appropriate.

DHS includes a cost for facilities to enter into a MOU with entities that provide legal advocacy and confidential support services, such as services

provided by a rape crisis center. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this standard may cost a facility approximately \$1,488 (20 hours × \$74.41).

x. Audits, § 115.93

Facilities may also incur costs for re-audits. Re-audits can be requested in the event that the facility does not achieve compliance with each standard or if the facility files an appeal with the agency regarding any specific finding that it believes to be incorrect. Costs for these audits will be borne by the facility; however, the request for these re-audits is at the discretion of the facility.

xi. Additional Implementation Costs

Facilities contracting with DHS agencies may incur organizational costs related to proper planning and overall execution of the rulemaking, in addition to the specific implementation costs facilities are estimated to incur for each of the requirements. The burden resulting from the time required to read the rulemaking, research how it might impact facility operations, procedures, and budget, as well as consideration of how best to execute the rulemaking requirements or other costs of overall execution. This is exclusive of the time required under § 115.12 to determine and agree upon the new terms of the contract and the specific requirements expected to be performed by the facility

PSA Compliance Manager under § 115.11.

To account for these costs, DHS adds an additional category of implementation costs for immigration detention facilities. Implementation costs will vary by the size of the facility, a facility's current practices, and other facility-specific factors. DHS assumes the costs any additional implementation costs might occur as a result of the standards with start-up costs, such as entering into MOUs, rather than standards with action or on-going costs, such as training. DHS estimates additional implementation costs as 10 percent of the total costs of standards with a start-up cost. DHS requests comment on this assumption. The tables below present the estimates for additional implementation costs. DHS estimates this standard may cost a facility approximately \$1,579 in the first year (10% × (\$1,488 for § 115.12 + \$5,330 for § 115.11 + \$5,996 for § 115.15 + \$1,488 for § 115.21 + \$1,488 for § 115.53)).

xii. Total Cost per Facility

DHS estimates the total cost per immigration detention facility under the NDS for compliance with the standards is approximately \$40,837 for the first year. In subsequent years, DHS estimates the costs drop to approximately \$31,033. The following table summarizes the preceding discussion.

TABLE 8—ESTIMATED COST PER SMALL ENTITY UNDER NDS—IMMIGRATION DETENTION FACILITIES

| Standard                                                                       | Cost in year 1 | On-going cost |
|--------------------------------------------------------------------------------|----------------|---------------|
| 115.12 Consulting with non-DHS entities for the confinement of detainees ..... | \$1,488        | \$0           |
| 115.11 Zero tolerance of sexual abuse; PSA Coordinator* .....                  | 5,330          | 3,647         |
| 115.15 Limits to cross-gender viewing and searches* .....                      | 5,996          | 5,435         |
| 115.21 Evidence protocols and forensic medical examinations .....              | 1,488          | 0             |
| 115.31 Staff training* .....                                                   | 18,914         | 18,914        |
| 115.327 Other training* .....                                                  | 2,129          | 2,129         |
| 115.34 Specialized training: Investigations .....                              | 468            | 0             |
| 115.35 Specialized training: Medical and mental health care .....              | 1,957          | 0             |
| 115.53 Detainee access to outside confidential support Services .....          | 1,488          | 0             |
| Additional Implementation Costs* .....                                         | 1,579          | 908           |
| <b>Total .....</b>                                                             | <b>40,837</b>  | <b>31,033</b> |

\* Standards for which DHS estimates there may be on-going costs.

<sup>37</sup> ICE does not keep record of the number of medical and mental health care providers at contract facilities. The estimates represent the results from a small sample, stratified by facility type. ICE estimates 30 medical and mental health care providers per new facility.

<sup>38</sup> Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Weighted Average Median Wage Rate for SOC 29-1062 Family and General Practitioners; 29-1066 Psychiatrists; 29-1071 Physician Assistants; 29-1111 Registered Nurses; 29-2053 Psychiatric

Technicians; and 29-2061 Licensed Practical and Licensed Vocational Nurses, retrieved on August 16, 2012 from [http://www.bls.gov/oes/2011/may/naics4\\_999300.htm](http://www.bls.gov/oes/2011/may/naics4_999300.htm). Loaded for benefits. \$50.23 = \$29.99/0.597

6. A Description of the Steps the Agency Has Taken to Minimize Any Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including A Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule, and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affected the Impact on Small Entities Was Rejected

DHS considered a longer phase-in period for small entities subject to the rulemaking. A longer period would reduce immediate burden on small entities with current contracts. The current requirements require that facilities comply with the standards upon renewal of a contract or exercising a contract option. Essentially, this would phase-in all authorized immigration detention facilities within a year of the effective date of the final rule. DHS is willing to work with small facilities upon contract renewal in implementing these standards.

DHS also considered requiring lesser standards, such as those under the NDS or the 2008 PBNDS for small entities. However, DHS rejected this alternative because DHS believes in the importance of protecting detainees from, and providing treatment after, instances of sexual abuse, regardless of a facility's size. In the IRFA DHS requested comment on additional alternatives that might help reduce the impact on small entities. No comments were received in response to this request.

#### *G. Paperwork Reduction Act*

DHS is setting standards for the prevention, detection, and response to sexual abuse in its confinement facilities. For DHS facilities and as incorporated in DHS contracts, these standards require covered facilities to retain and report to the agency certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect, retain, and report to the agency certain specified information relating to allegations of sexual abuse within the covered facility. As stated in the NPRM, DHS believes that most of the information collection requirements placed on facilities are already requirements derived from existing contracts with immigration detention facilities. However, DHS included these requirements as part of an information collection request associated with the proposed rule, pursuant to the Paperwork Reduction Act of 1995

(PRA), so as to ensure clarity of requirements associated with this rulemaking.

This final rule contains a new collection of information covered by the PRA. The information collection described by DHS in the proposed rule garnered no comments from the public, and thus no changes were necessitated based upon any comments pertaining to the PRA aspects of the rule. However, changes to the PREA standards made in response to substantive comments on the NPRM and due to additional analysis resulted in the total PRA burden hours being greater than those estimated in DHS's initial information collection request.

DHS has submitted a revised information collection request to OMB for review and clearance in accordance with the review procedures of the PRA.

#### **List of Subjects in 6 CFR Part 115**

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, Part 115 of Title 6 of the Code of Federal Regulations is added to read as follows:

### **PART 115—SEXUAL ABUSE AND ASSAULT PREVENTION STANDARDS**

Sec.

- 115.5 General definitions.
- 115.6 Definitions related to sexual abuse and assault.

#### **Subpart A—Standards for Immigration Detention Facilities**

##### **Coverage**

- 115.10 Coverage of DHS immigration detention facilities.

##### **Prevention Planning**

- 115.11 Zero tolerance of sexual abuse; Prevention of Sexual Assault Coordinator.
- 115.12 Contracting with non-DHS entities for the confinement of detainees.
- 115.13 Detainee supervision and monitoring.
- 115.14 Juvenile and family detainees.
- 115.15 Limits to cross-gender viewing and searches.
- 115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.
- 115.17 Hiring and promotion decisions.
- 115.18 Upgrades to facilities and technologies.

##### **Responsive Planning**

- 115.21 Evidence protocols and forensic medical examinations.
- 115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

##### **Training and Education**

- 115.31 Staff training.

- 115.32 Other training.
- 115.33 Detainee education.
- 115.34 Specialized training: Investigations.
- 115.35 Specialized training: Medical and mental health care.

#### **Assessment for Risk of Sexual Victimization and Abusiveness**

- 115.41 Assessment for risk of victimization and abusiveness.
- 115.42 Use of assessment information.
- 115.43 Protective custody.

#### **Reporting**

- 115.51 Detainee reporting.
- 115.52 Grievances.
- 115.53 Detainee access to outside confidential support services.
- 115.54 Third-party reporting.

#### **Official Response Following a Detainee Report**

- 115.61 Staff reporting duties.
- 115.62 Protection duties.
- 115.63 Reporting to other confinement facilities.
- 115.64 Responder duties.
- 115.65 Coordinated response.
- 115.66 Protection of detainees from contact with alleged abusers.
- 115.67 Agency protection against retaliation.
- 115.68 Post-allegation protective custody.

#### **Investigations**

- 115.71 Criminal and administrative investigations.
- 115.72 Evidentiary standard for administrative investigations.
- 115.73 Reporting to detainees.

#### **Discipline**

- 115.76 Disciplinary sanctions for staff.
- 115.77 Corrective action for contractors and volunteers.
- 115.78 Disciplinary sanctions for detainees.

#### **Medical and Mental Care**

- 115.81 Medical and mental health assessments; history of sexual abuse.
- 115.82 Access to emergency medical and mental health services.
- 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

#### **Data Collection and Review**

- 115.86 Sexual abuse incident reviews.
- 115.87 Data collection.
- 115.88 Data review for corrective action.
- 115.89 Data storage, publication, and destruction.

#### **Audits and Compliance**

- 115.93 Audits of standards.

#### **Additional Provisions in Agency Policies**

- 115.95 Additional provisions in agency policies.

#### **Subpart B—Standards for DHS Holding Facilities**

##### **Coverage**

- 115.110 Coverage of DHS holding facilities.

**Prevention Planning**

- 115.111 Zero tolerance of sexual abuse; Prevention of Sexual Assault Coordinator.
- 115.112 Contracting with non-DHS entities for the confinement of detainees.
- 115.113 Detainee supervision and monitoring.
- 115.114 Juvenile and family detainees.
- 115.115 Limits to cross-gender viewing and searches.
- 115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.
- 115.117 Hiring and promotion decisions.
- 115.118 Upgrades to facilities and technologies.

**Responsive Planning**

- 115.121 Evidence protocols and forensic medical examinations.
- 115.122 Policies to ensure investigation of allegations and appropriate agency oversight.

**Training and Education**

- 115.131 Employee, contractor, and volunteer training.
- 115.132 Notification to detainees of the agency's zero-tolerance policy.
- 115.133 [Reserved]
- 115.134 Specialized training: Investigations.

**Assessment for Risk of Sexual Victimization and Abusiveness**

- 115.141 Assessment for risk of victimization and abusiveness.

**Reporting**

- 115.151 Detainee reporting.
- 115.152–115.153 [Reserved]
- 115.154 Third-party reporting.

**Official Response Following a Detainee Report**

- 115.161 Staff reporting duties.
- 115.162 Agency protection duties.
- 115.163 Reporting to other confinement facilities.
- 115.164 Responder duties.
- 115.165 Coordinated response.
- 115.166 Protection of detainees from contact with alleged abusers.
- 115.167 Agency protection against retaliation.

**Investigations**

- 115.171 Criminal and administrative investigations.
- 115.172 Evidentiary standard for administrative investigations.

**Discipline**

- 115.176 Disciplinary sanctions for staff.
- 115.177 Corrective action for contractors and volunteers.

**Medical and Mental Care**

- 115.181 [Reserved]
- 115.182 Access to emergency medical services.

**Data Collection and Review**

- 115.186 Sexual abuse incident reviews.
- 115.187 Data collection.
- 115.188 Data review for corrective action.

- 115.189 Data storage, publication, and destruction.

**Audits and Compliance**

- 115.193 Audits of standards.

**Additional Provisions in Agency Policies**

- 115.195 Additional provisions in agency policies.

**Subpart C—External Auditing and Corrective Action**

- 115.201 Scope of audits.
- 115.202 Auditor qualifications.
- 115.203 Audit contents and findings.
- 115.204 Audit corrective action plan.
- 115.205 Audit appeals.

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

**§ 115.5 General definitions.**

For purposes of this part, the term—  
*Agency* means the unit or component of DHS responsible for operating or supervising any facility, or part of a facility, that confines detainees.

*Agency head* means the principal official of an agency.

*Contractor* means a person who or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility.

*Detainee* means any person detained in an immigration detention facility or holding facility.

*Employee* means a person who works directly for the agency.

*Exigent circumstances* means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person.

*Facility* means a place, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that was built or retrofitted for the purpose of detaining individuals and is routinely used by the agency to detain individuals in its custody. References to requirements placed on facilities extend to the entity responsible for the direct operation of the facility.

*Facility head* means the principal official responsible for a facility.

*Family unit* means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), whom the agency will evaluate for safety purposes to protect juveniles from sexual abuse and violence.

*Gender nonconforming* means having an appearance or manner that does not

conform to traditional societal gender expectations.

*Holding facility* means a facility that contains holding cells, cell blocks, or other secure enclosures that are:

(1) Under the control of the agency; and

(2) Primarily used for the short-term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, other agency, or other unit of the facility or agency.

*Immigration detention facility* means a confinement facility operated by or pursuant to contract with U.S. Immigration and Customs Enforcement (ICE) that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, and facilities used by ICE pursuant to an Intergovernmental Service Agreement.

*Intersex* means having sexual or reproductive anatomy or chromosomal pattern that does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

*Juvenile* means any person under the age of 18.

*Law enforcement staff* means officers or agents of the agency or facility that are responsible for the supervision and control of detainees in a holding facility.

*Medical practitioner* means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A “qualified medical practitioner” refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

*Mental health practitioner* means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A “qualified mental health practitioner” refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

*Pat-down search* means a sliding or patting of the hands over the clothed body of a detainee by staff to determine whether the individual possesses contraband.

*Security staff* means employees primarily responsible for the supervision and control of detainees in housing units, recreational areas, dining



areas, and other program areas of an immigration detention facility.

*Staff* means employees or contractors of the agency or facility, including any entity that operates within the facility.

*Strip search* means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.

*Substantiated allegation* means an allegation that was investigated and determined to have occurred.

*Transgender* means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth.

*Unfounded allegation* means an allegation that was investigated and determined not to have occurred.

*Unsubstantiated allegation* means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

*Volunteer* means an individual who donates time and effort on a recurring basis to enhance the activities and programs of the agency or facility.

#### **§ 115.6 Definitions related to sexual abuse and assault.**

For purposes of this part, the term—  
*Sexual abuse* includes—

- (1) Sexual abuse and assault of a detainee by another detainee; and
- (2) Sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

*Sexual abuse of a detainee by another detainee* includes any of the following acts by one or more detainees, prisoners, inmates, or residents of the facility in which the detainee is housed who, by force, coercion, or intimidation, or if the victim did not consent or was unable to consent or refuse, engages in or attempts to engage in:

- (1) Contact between the penis and the vulva or anus and, for purposes of this paragraph (1), contact involving the penis upon penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object;
- (4) Touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person; or
- (5) Threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.

*Sexual abuse of a detainee by a staff member, contractor, or volunteer* includes any of the following acts, if engaged in by one or more staff members, volunteers, or contract personnel who, with or without the consent of the detainee, engages in or attempts to engage in:

- (1) Contact between the penis and the vulva or anus and, for purposes of this paragraph (1), contact involving the penis upon penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Intentional touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Threats, intimidation, harassment, indecent, profane or abusive language, or other actions or communications, aimed at coercing or pressuring a detainee to engage in a sexual act;
- (6) Repeated verbal statements or comments of a sexual nature to a detainee;
- (7) Any display of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, or
- (8) Voyeurism, which is defined as the inappropriate visual surveillance of a detainee for reasons unrelated to official duties. Where not conducted for reasons relating to official duties, the following are examples of voyeurism: staring at a detainee who is using a toilet in his or her cell to perform bodily functions; requiring an inmate detainee to expose his or her buttocks, genitals, or breasts; or taking images of all or part of a detainee's naked body or of a detainee performing bodily functions.

#### **Subpart A—Standards for Immigration Detention Facilities Coverage**

##### **§ 115.10 Coverage of DHS immigration detention facilities.**

This subpart covers ICE immigration detention facilities. Standards set forth in this subpart A are not applicable to Department of Homeland Security (DHS) holding facilities.

#### **Prevention Planning**

##### **§ 115.11 Zero tolerance of sexual abuse; Prevention of Sexual Assault Coordinator.**

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide Prevention of Sexual Assault Coordinator (PSA Coordinator) with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its immigration detention facilities.

(c) Each facility shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the facility's approach to preventing, detecting, and responding to such conduct. The agency shall review and approve each facility's written policy.

(d) Each facility shall employ or designate a Prevention of Sexual Assault Compliance Manager (PSA Compliance Manager) who shall serve as the facility point of contact for the agency PSA Coordinator and who has sufficient time and authority to oversee facility efforts to comply with facility sexual abuse prevention and intervention policies and procedures.

##### **§ 115.12 Contracting with non-DHS entities for the confinement of detainees.**

(a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall include in any new contracts, contract renewals, or substantive contract modifications the entity's obligation to adopt and comply with these standards.

(b) Any new contracts, contract renewals, or substantive contract modifications shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

##### **§ 115.13 Detainee supervision and monitoring.**

(a) Each facility shall ensure that it maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

(b) Each facility shall develop and document comprehensive detainee supervision guidelines to determine and meet the facility's detainee supervision needs, and shall review those guidelines at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, the facility shall take into consideration generally accepted detention and correctional practices, any judicial findings of inadequacy, the physical layout of each facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

(d) Each facility shall conduct frequent unannounced security inspections to identify and deter sexual abuse of detainees. Such inspections shall be implemented for night as well as day shifts. Each facility shall prohibit staff from alerting others that these security inspections are occurring, unless such announcement is related to the legitimate operational functions of the facility.

#### **§ 115.14 Juvenile and family detainees.**

(a) Juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

(b) The facility shall hold juveniles apart from adult detainees, minimizing sight, sound, and physical contact, unless the juvenile is in the presence of an adult member of the family unit, and provided there are no safety or security concerns with the arrangement.

(c) In determining the existence of a family unit for detention purposes, the agency shall seek to obtain reliable evidence of a family relationship.

(d) The agency and facility shall provide priority attention to unaccompanied alien children as defined by 6 U.S.C. 279(g)(2), including transfer to a Department of Health and Human Services Office of Refugee Resettlement facility within 72 hours, except in exceptional circumstances, in accordance with 8 U.S.C. 1232(b)(3).

(e) If a juvenile who is an unaccompanied alien child has been convicted as an adult of a crime related to sexual abuse, the agency shall provide the facility and the Department of Health and Human Services Office of Refugee Resettlement with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in a Department

of Health and Human Services Office of Refugee Resettlement facility.

#### **§ 115.15 Limits to cross-gender viewing and searches.**

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at immigration detention facilities.

(b) Cross-gender pat-down searches of male detainees shall not be conducted unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances.

(c) Cross-gender pat-down searches of female detainees shall not be conducted unless in exigent circumstances.

(d) All cross-gender pat-down searches shall be documented.

(e) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. Facility staff shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(f) All strip searches and visual body cavity searches shall be documented.

(g) Each facility shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(h) The facility shall permit detainees in Family Residential Facilities to shower, perform bodily functions, and change clothing without being viewed by staff, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement.

(i) The facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's genital characteristics. If the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical

records, or, if necessary, learning that information as part of a standard medical examination that all detainees must undergo as part of intake or other processing procedure conducted in private, by a medical practitioner.

(j) The agency shall train security staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and agency policy, including consideration of officer safety.

#### **§ 115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.**

(a) The agency and each facility shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency and facility shall ensure that any written materials related to sexual abuse are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency or facility is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency and each facility shall take steps to ensure meaningful access to all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial

interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency and each facility shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for another detainee to provide interpretation and the agency determines that such interpretation is appropriate and consistent with DHS policy. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse.

#### **§ 115.17 Hiring and promotion decisions.**

(a) An agency or facility shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) An agency or facility considering hiring or promoting staff shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. Agencies and facilities shall also impose upon employees a continuing affirmative duty to disclose any such misconduct. The agency, consistent with law, shall make its best efforts to contact all prior institutional employers of an applicant for employment, to obtain information on substantiated allegations of sexual abuse or any resignation during a pending investigation of alleged sexual abuse.

(c) Before hiring new staff who may have contact with detainees, the agency or facility shall conduct a background investigation to determine whether the candidate for hire is suitable for employment with the facility or agency,

including a criminal background records check. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each staff member and the facility's conclusions. The agency shall conduct an updated background investigation every five years for agency employees who may have contact with detainees. The facility shall require an updated background investigation every five years for those facility staff who may have contact with detainees and who work in immigration-only detention facilities.

(d) The agency or facility shall also perform a background investigation before enlisting the services of any contractor who may have contact with detainees. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each contractor and the facility's conclusions.

(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility and its staff.

#### **§ 115.18 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the facility or agency, as appropriate, shall consider the effect of the design, acquisition, expansion, or modification upon their ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in an immigration detention facility, the facility or agency, as appropriate, shall consider how such technology may enhance their ability to protect detainees from sexual abuse.

### **Responsive Planning**

#### **§ 115.21 Evidence protocols and forensic medical examinations.**

(a) To the extent that the agency or facility is responsible for investigating allegations of sexual abuse involving detainees, it shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally appropriate for juveniles, where applicable.

(b) The agency and each facility developing an evidence protocol referred to in paragraph (a) of this section, shall consider how best to utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs. Each facility shall establish procedures to make available, to the full extent possible, outside victim services following incidents of sexual abuse; the facility shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall provide these services by making available a qualified staff member from a community-based organization, or a qualified agency staff member. A qualified agency staff member or a qualified community-based staff member means an individual who has received education concerning sexual assault and forensic examination issues in general. The outside or internal victim advocate shall provide emotional support, crisis intervention, information, and referrals.

(c) Where evidentiarily or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the facility shall arrange for an alleged victim detainee to undergo a forensic medical examination by qualified health care personnel, including a Sexual Assault Forensic Examiner (SAFE) or Sexual Assault Nurse Examiner (SANE) where practicable. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified health care personnel.

(d) As requested by a victim, the presence of his or her outside or internal victim advocate, including any available victim advocacy services offered by a hospital conducting a forensic exam, shall be allowed for support during a forensic exam and investigatory interviews.

(e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency or the facility shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

**§ 115.22 Policies to ensure investigation of allegations and appropriate agency oversight.**

(a) The agency shall establish an agency protocol, and shall require each facility to establish a facility protocol, to ensure that each allegation of sexual abuse is investigated by the agency or facility, or referred to an appropriate investigative authority. The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse.

(b) The agency shall ensure that the agency and facility protocols required by paragraph (a) of this section, include a description of responsibilities of the agency, the facility, and any other investigating entities; and require the documentation and maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse.

(c) The agency shall post its protocols on its Web site; each facility shall also post its protocols on its Web site, if it has one, or otherwise make the protocol available to the public.

(d) Each facility protocol shall ensure that all allegations are promptly reported to the agency as described in paragraphs (e) and (f) of this section, and, unless the allegation does not involve potentially criminal behavior, are promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. A facility may separately, and in addition to the above reports and referrals, conduct its own investigation.

(e) When a detainee, prisoner, inmate, or resident of the facility in which an alleged detainee victim is housed is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as the appropriate ICE Field Office Director, and, if it is potentially criminal, referred to an appropriate law enforcement agency having jurisdiction for investigation.

(f) When a staff member, contractor, or volunteer is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of

Inspector General, as well as to the appropriate ICE Field Office Director, and to the local government entity or contractor that owns or operates the facility. If the incident is potentially criminal, the facility shall ensure that it is promptly referred to an appropriate law enforcement agency having jurisdiction for investigation.

(g) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(h) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided timely access to U nonimmigrant status information.

**Training and Education**

**§ 115.31 Staff training.**

(a) The agency shall train, or require the training of, all employees who may have contact with immigration detainees, and all facility staff, to be able to fulfill their responsibilities under this part, including training on:

(1) The agency's and the facility's zero-tolerance policies for all forms of sexual abuse;

(2) The right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse;

(3) Definitions and examples of prohibited and illegal sexual behavior;

(4) Recognition of situations where sexual abuse may occur;

(5) Recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing and responding to such occurrences;

(6) How to avoid inappropriate relationships with detainees;

(7) How to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees;

(8) Procedures for reporting knowledge or suspicion of sexual abuse; and

(9) The requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current facility staff, and all agency employees who may have contact with immigration detention facility detainees, shall be trained within one year of May 6, 2014, and the agency or facility shall provide refresher information every two years.

(c) The agency and each facility shall document that staff that may have contact with immigration facility detainees have completed the training.

**§ 115.32 Other training.**

(a) The facility shall ensure that all volunteers and other contractors (as defined in paragraph (d) of this section) who have contact with detainees have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures.

(b) The level and type of training provided to volunteers and other contractors shall be based on the services they provide and level of contact they have with detainees, but all volunteers and other contractors who have contact with detainees shall be notified of the agency's and the facility's zero-tolerance policies regarding sexual abuse and informed how to report such incidents.

(c) Each facility shall receive and maintain written confirmation that volunteers and other contractors who have contact with immigration facility detainees have completed the training.

(d) In this section, the term *other contractor* means a person who provides services on a non-recurring basis to the facility pursuant to a contractual agreement with the agency or facility.

**§ 115.33 Detainee education.**

(a) During the intake process, each facility shall ensure that the detainee orientation program notifies and informs detainees about the agency's and the facility's zero-tolerance policies for all forms of sexual abuse and includes (at a minimum) instruction on:

(1) Prevention and intervention strategies;

(2) Definitions and examples of detainee-on-detainee sexual abuse, staff-on-detainee sexual abuse and coercive sexual activity;

(3) Explanation of methods for reporting sexual abuse, including to any staff member, including a staff member other than an immediate point-of-contact line officer (e.g., the compliance manager or a mental health specialist), the DHS Office of Inspector General, and the Joint Intake Center;

(4) Information about self-protection and indicators of sexual abuse;

(5) Prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings; and

(6) The right of a detainee who has been subjected to sexual abuse to receive treatment and counseling.

(b) Each facility shall provide the detainee notification, orientation, and instruction in formats accessible to all detainees, including those who are limited English proficient, deaf, visually impaired or otherwise disabled, as well as to detainees who have limited reading skills.

(c) The facility shall maintain documentation of detainee participation in the intake process orientation.

(d) Each facility shall post on all housing unit bulletin boards the following notices:

(1) The DHS-prescribed sexual assault awareness notice;

(2) The name of the Prevention of Sexual Abuse Compliance Manager; and

(3) The name of local organizations that can assist detainees who have been victims of sexual abuse.

(e) The facility shall make available and distribute the DHS-prescribed "Sexual Assault Awareness Information" pamphlet.

(f) Information about reporting sexual abuse shall be included in the agency Detainee Handbook made available to all immigration detention facility detainees.

#### **§ 115.34 Specialized training: Investigations.**

(a) In addition to the general training provided to all facility staff and employees pursuant to § 115.31, the agency or facility shall provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into allegations of sexual abuse at immigration detention facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency and facility must maintain written documentation verifying specialized training provided to investigators pursuant to this section.

#### **§ 115.35 Specialized training: Medical and mental health care.**

(a) The agency shall provide specialized training to DHS or agency employees who serve as full- and part-time medical practitioners or full- and part-time mental health practitioners in immigration detention facilities where medical and mental health care is provided.

(b) The training required by this section shall cover, at a minimum, the following topics:

(1) How to detect and assess signs of sexual abuse;

(2) How to respond effectively and professionally to victims of sexual abuse,

(3) How and to whom to report allegations or suspicions of sexual abuse, and

(4) How to preserve physical evidence of sexual abuse. If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse, in facilities where medical staff may be assigned these activities.

#### **Assessment for Risk of Sexual Victimization and Abusiveness**

##### **§ 115.41 Assessment for risk of victimization and abusiveness.**

(a) The facility shall assess all detainees on intake to identify those likely to be sexual aggressors or sexual abuse victims and shall house detainees to prevent sexual abuse, taking necessary steps to mitigate any such danger. Each new arrival shall be kept separate from the general population until he/she is classified and may be housed accordingly.

(b) The initial classification process and initial housing assignment should be completed within twelve hours of admission to the facility.

(c) The facility shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

(1) Whether the detainee has a mental, physical, or developmental disability;

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated or detained;

(5) The nature of the detainee's criminal history;

(6) Whether the detainee has any convictions for sex offenses against an adult or child;

(7) Whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the detainee has self-identified as having previously experienced sexual victimization; and

(9) The detainee's own concerns about his or her physical safety.

(d) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the facility, in assessing detainees for risk of being sexually abusive.

(e) The facility shall reassess each detainee's risk of victimization or abusiveness between 60 and 90 days from the date of initial assessment, and at any other time when warranted based upon the receipt of additional, relevant information or following an incident of abuse or victimization.

(f) Detainees shall not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (c)(1), (c)(7), (c)(8), or (c)(9) of this section.

(g) The facility shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the detainee's detriment by staff or other detainees or inmates.

##### **§ 115.42 Use of assessment information.**

(a) The facility shall use the information from the risk assessment under § 115.41 of this part to inform assignment of detainees to housing, recreation and other activities, and voluntary work. The agency shall make individualized determinations about how to ensure the safety of each detainee.

(b) When making assessment and housing decisions for a transgender or intersex detainee, the facility shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's health and safety. The facility shall consult a medical or mental health professional as soon as practicable on this assessment. The facility should not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee; a detainee's self-identification of his/her gender and self-assessment of safety needs shall always be taken into consideration as well. The facility's placement of a transgender or intersex detainee shall be consistent with the safety and security considerations of the facility, and placement and programming assignments for each transgender or intersex detainee shall be reassessed at least twice each year to review any threats to safety experienced by the detainee.

(c) When operationally feasible, transgender and intersex detainees shall be given the opportunity to shower separately from other detainees.

##### **§ 115.43 Protective custody.**

(a) The facility shall develop and follow written procedures consistent with the standards in this subpart for

each facility governing the management of its administrative segregation unit. These procedures, which should be developed in consultation with the ICE Enforcement and Removal Operations Field Office Director having jurisdiction for the facility, must document detailed reasons for placement of an individual in administrative segregation on the basis of a vulnerability to sexual abuse or assault.

(b) Use of administrative segregation by facilities to protect detainees vulnerable to sexual abuse or assault shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, as a last resort. The facility should assign detainees vulnerable to sexual abuse or assault to administrative segregation for their protection until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(c) Facilities that place vulnerable detainees in administrative segregation for protective custody shall provide those detainees access to programs, visitation, counsel and other services available to the general population to the maximum extent practicable.

(d) Facilities shall implement written procedures for the regular review of all vulnerable detainees placed in administrative segregation for their protection, as follows:

(1) A supervisory staff member shall conduct a review within 72 hours of the detainee's placement in administrative segregation to determine whether segregation is still warranted; and

(2) A supervisory staff member shall conduct, at a minimum, an identical review after the detainee has spent seven days in administrative segregation, and every week thereafter for the first 30 days, and every 10 days thereafter.

(e) Facilities shall notify the appropriate ICE Field Office Director no later than 72 hours after the initial placement into segregation, whenever a detainee has been placed in administrative segregation on the basis of a vulnerability to sexual abuse or assault.

(f) Upon receiving notification pursuant to paragraph (e) of this section, the ICE Field Office Director shall review the placement and consider:

(1) Whether continued placement in administrative segregation is warranted;

(2) Whether any alternatives are available and appropriate, such as placing the detainee in a less restrictive

housing option at another facility or other appropriate custodial options; and

(3) Whether the placement is only as a last resort and when no other viable housing options exist.

### Reporting

#### § 115.51 Detainee reporting.

(a) The agency and each facility shall develop policies and procedures to ensure that detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents. The agency and each facility shall also provide instructions on how detainees may contact their consular official, the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and the facility shall inform the detainees of, at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Facility policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

#### § 115.52 Grievances.

(a) The facility shall permit a detainee to file a formal grievance related to sexual abuse at any time during, after, or in lieu of lodging an informal grievance or complaint.

(b) The facility shall not impose a time limit on when a detainee may submit a grievance regarding an allegation of sexual abuse.

(c) The facility shall implement written procedures for identifying and handling time-sensitive grievances that involve an immediate threat to detainee health, safety, or welfare related to sexual abuse.

(d) Facility staff shall bring medical emergencies to the immediate attention of proper medical personnel for further assessment.

(e) The facility shall issue a decision on the grievance within five days of receipt and shall respond to an appeal of the grievance decision within 30 days. Facilities shall send all grievances related to sexual abuse and the facility's decisions with respect to such grievances to the appropriate ICE Field

Office Director at the end of the grievance process.

(f) To prepare a grievance, a detainee may obtain assistance from another detainee, the housing officer or other facility staff, family members, or legal representatives. Staff shall take reasonable steps to expedite requests for assistance from these other parties.

#### § 115.53 Detainee access to outside confidential support services.

(a) Each facility shall utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention, counseling, investigation and the prosecution of sexual abuse perpetrators to most appropriately address victims' needs. The facility shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers or, if local providers are not available, with national organizations that provide legal advocacy and confidential emotional support services for immigrant victims of crime.

(b) Each facility's written policies shall establish procedures to include outside agencies in the facility's sexual abuse prevention and intervention protocols, if such resources are available.

(c) Each facility shall make available to detainees information about local organizations that can assist detainees who have been victims of sexual abuse, including mailing addresses and telephone numbers (including toll-free hotline numbers where available). If no such local organizations exist, the facility shall make available the same information about national organizations. The facility shall enable reasonable communication between detainees and these organizations and agencies, in as confidential a manner as possible.

(d) Each facility shall inform detainees, prior to giving them access to outside resources, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

#### § 115.54 Third-party reporting.

Each facility shall establish a method to receive third-party reports of sexual abuse in its immigration detention facilities and shall make available to the public information on how to report sexual abuse on behalf of a detainee.

## Official Response Following a Detainee Report

### § 115.61 Staff reporting duties.

(a) The agency and each facility shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in a facility; retaliation against detainees or staff who reported or participated in an investigation about such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The agency shall review and approve facility policies and procedures and shall ensure that the facility specifies appropriate reporting procedures, including a method by which staff can report outside of the chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's and facility's written policies and procedures.

(c) Apart from such reporting, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to help protect the safety of the victim or prevent further victimization of other detainees or staff in the facility, or to make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

### § 115.62 Protection duties.

If an agency employee or facility staff member has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

### § 115.63 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency or facility whose staff received the allegation shall notify the appropriate office of the agency or the administrator of the facility where the alleged abuse occurred.

(b) The notification provided in paragraph (a) of this section shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency or facility shall document that it has provided such notification.

(d) The agency or facility office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards and reported to the appropriate ICE Field Office Director.

### § 115.64 Responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first security staff member to respond to the report, or his or her supervisor, shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the sexual abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify security staff.

### § 115.65 Coordinated response.

(a) Each facility shall develop a written institutional plan to coordinate actions taken by staff first responders, medical and mental health practitioners, investigators, and facility leadership in response to an incident of sexual abuse.

(b) Each facility shall use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(c) If a victim of sexual abuse is transferred between facilities covered by subpart A or B of this part, the sending facility shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(d) If a victim is transferred from a DHS immigration detention facility to a facility not covered by paragraph (c) of this section, the sending facility shall, as permitted by law, inform the receiving

facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

### § 115.66 Protection of detainees from contact with alleged abusers.

Staff, contractors, and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

### § 115.67 Agency protection against retaliation.

(a) Staff, contractors, and volunteers, and immigration detention facility detainees, shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force.

(b) The agency shall employ multiple protection measures, such as housing changes, removal of alleged staff or detainee abusers from contact with victims, and emotional support services for detainees or staff who fear retaliation for reporting sexual abuse or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency and facility shall monitor to see if there are facts that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any detainee disciplinary reports, housing or program changes, or negative performance reviews or reassignments of staff. DHS shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

### § 115.68 Post-allegation protective custody.

(a) The facility shall take care to place detainee victims of sexual abuse in a supportive environment that represents the least restrictive housing option possible (e.g., protective custody), subject to the requirements of § 115.43.

(b) Detainee victims shall not be held for longer than five days in any type of administrative segregation, except in highly unusual circumstances or at the request of the detainee.

(c) A detainee victim who is in protective custody after having been subjected to sexual abuse shall not be returned to the general population until completion of a proper re-assessment, taking into consideration any increased vulnerability of the detainee as a result of the sexual abuse.

(d) Facilities shall notify the appropriate ICE Field Office Director



whenever a detainee victim has been held in administrative segregation for 72 hours.

(e) Upon receiving notification that a detainee victim has been held in administrative segregation, the ICE Field Office Director shall review the placement and consider:

(1) Whether the placement is only as a last resort and when no other viable housing options exist; and

(2) In cases where the detainee has been held in administrative segregation for longer than 5 days, whether the placement is justified by highly unusual circumstances or at the detainee's request.

### Investigations

#### § 115.71 Criminal and administrative investigations.

(a) If the facility has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the facility shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS, and the assigned criminal investigative entity.

(c)(1) The facility shall develop written procedures for administrative investigations, including provisions requiring:

(i) Preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(ii) Interviewing alleged victims, suspected perpetrators, and witnesses;

(iii) Reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

(iv) Assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

(v) An effort to determine whether actions or failures to act at the facility contributed to the abuse; and

(vi) Documentation of each investigation by written report, which

shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(vii) Retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years.

(2) Such procedures shall govern the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The agency shall review and approve the facility policy and procedures for coordination and conduct of internal administrative investigations with the assigned criminal investigative entity to ensure non-interference with criminal investigations.

(e) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(f) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

#### § 115.72 Evidentiary standard for administrative investigations.

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

#### § 115.73 Reporting to detainees.

The agency shall, when the detainee is still in immigration detention, or where otherwise feasible, following an investigation into a detainee's allegation of sexual abuse, notify the detainee as to the result of the investigation and any responsive action taken.

### Discipline

#### § 115.76 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or for violating agency or facility sexual abuse policies.

(b) The agency shall review and approve facility policies and procedures regarding disciplinary or adverse actions for staff and shall ensure that the facility policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their

position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1)–(4) and (7)–(8) of the definition of “sexual abuse of a detainee by a staff member, contractor, or volunteer” in § 115.6.

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each facility shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

#### § 115.77 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who has engaged in sexual abuse shall be prohibited from contact with detainees. Each facility shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer. Such incidents shall also be reported to law enforcement agencies, unless the activity was clearly not criminal.

(b) Contractors and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

(c) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in sexual abuse, but have violated other provisions within these standards.

#### § 115.78 Disciplinary sanctions for detainees.

(a) Each facility shall subject a detainee to disciplinary sanctions pursuant to a formal disciplinary process following an administrative or criminal finding that the detainee engaged in sexual abuse.

(b) At all steps in the disciplinary process provided in paragraph (a), any sanctions imposed shall be commensurate with the severity of the committed prohibited act and intended

to encourage the detainee to conform with rules and regulations in the future.

(c) Each facility holding detainees in custody shall have a detainee disciplinary system with progressive levels of reviews, appeals, procedures, and documentation procedure.

(d) The disciplinary process shall consider whether a detainee's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(e) The facility shall not discipline a detainee for sexual contact with staff unless there is a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

#### Medical and Mental Care

##### § 115.81 Medical and mental health assessments; history of sexual abuse.

(a) If the assessment pursuant to § 115.41 indicates that a detainee has experienced prior sexual victimization or perpetrated sexual abuse, staff shall, as appropriate, ensure that the detainee is immediately referred to a qualified medical or mental health practitioner for medical and/or mental health follow-up as appropriate.

(b) When a referral for medical follow-up is initiated, the detainee shall receive a health evaluation no later than two working days from the date of assessment.

(c) When a referral for mental health follow-up is initiated, the detainee shall receive a mental health evaluation no later than 72 hours after the referral.

##### § 115.82 Access to emergency medical and mental health services.

(a) Detainee victims of sexual abuse shall have timely, unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

##### § 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) Each facility shall offer medical and mental health evaluation and, as appropriate, treatment to all detainees who have been victimized by sexual abuse while in immigration detention.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Detainee victims of sexually abusive vaginal penetration by a male abuser while incarcerated shall be offered pregnancy tests. If pregnancy results from an instance of sexual abuse, the victim shall receive timely and comprehensive information about lawful pregnancy-related medical services and timely access to all lawful pregnancy-related medical services.

(e) Detainee victims of sexual abuse while detained shall be offered tests for sexually transmitted infections as medically appropriate.

(f) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(g) The facility shall attempt to conduct a mental health evaluation of all known detainee-on-detainee abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

#### Data Collection and Review

##### § 115.86 Sexual abuse incident reviews.

(a) Each facility shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report within 30 days of the conclusion of the investigation recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) The review team shall consider whether the incident or allegation was

motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility.

(c) Each facility shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts. If the facility has not had any reports of sexual abuse during the annual reporting period, then the facility shall prepare a negative report. The results and findings of the annual review shall be provided to the facility administrator, Field Office Director or his or her designee, and the agency PSA Coordinator.

##### § 115.87 Data collection.

(a) Each facility shall maintain in a secure area all case records associated with claims of sexual abuse, including incident reports, investigative reports, offender information, case disposition, medical and counseling evaluation findings, and recommendations for post-release treatment, if necessary, and/or counseling in accordance with these standards and applicable agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an ongoing basis, the PSA Coordinator shall work with relevant facility PSA Compliance Managers and DHS entities to share data regarding effective agency response methods to sexual abuse.

(c) On a regular basis, the PSA Coordinator shall prepare a report for ICE leadership compiling information received about all incidents or allegations of sexual abuse of detainees in immigration detention during the period covered by the report, as well as ongoing investigations and other pending cases.

(d) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing, and for each incident found to be substantiated, information concerning:

(1) The date, time, location, and nature of the incident;

(2) The demographic background of the victim and perpetrator (including citizenship, age, gender, and whether either has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming);

(3) The reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);

(4) Any injuries sustained by the victim;

(5) Post-report follow up responses and action taken by the facility (e.g., housing placement/custody classification, medical examination, mental health counseling, etc.); and

(6) Any sanctions imposed on the perpetrator.

(e) Upon request, the agency shall provide all data described in this section from the previous calendar year to the Office for Civil Rights and Civil Liberties no later than June 30.

#### **§ 115.88 Data review for corrective action.**

(a) The agency shall review data collected and aggregated pursuant to § 115.87 of this part in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each immigration detention facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

#### **§ 115.89 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.87 are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from immigration detention facilities under

its direct control and from any private agencies with which it contracts available to the public at least annually on its Web site consistent with existing agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.87 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

#### **Audits and Compliance**

##### **§ 115.93 Audits of standards.**

(a) During the three-year period starting on July 6, 2015, and during each three-year period thereafter, the agency shall ensure that each immigration detention facility that has adopted these standards is audited at least once.

(b) The agency may require an expedited audit if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The agency may also include referrals to resources that may assist the facility with PREA-related issues.

(c) Audits under this section shall be conducted pursuant to §§ 115.201 through 115.205.

(d) Audits under this section shall be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties, which may request an expedited audit if it has reason to believe that an expedited audit is appropriate.

#### **Additional Provisions in Agency Policies**

##### **§ 115.95 Additional provisions in agency policies.**

The regulations in this subpart A establish minimum requirements for agencies and facilities. Agency and facility policies may include additional requirements.

#### **Subpart B—Standards for DHS Holding Facilities Coverage**

##### **§ 115.110 Coverage of DHS holding facilities.**

This subpart B covers all DHS holding facilities. Standards found in subpart A of this part are not applicable to DHS facilities except ICE immigration detention facilities.

#### **Prevention Planning**

##### **§ 115.111 Zero tolerance of sexual abuse; Prevention of Sexual Assault Coordinator.**

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide PSA Coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its holding facilities.

##### **§ 115.112 Contracting with non-DHS entities for the confinement of detainees.**

(a) An agency that contracts for the confinement of detainees in holding facilities operated by non-DHS private or public agencies or other entities, including other government agencies, shall include in any new contracts, contract renewals, or substantive contract modifications the entity's obligation to adopt and comply with these standards.

(b) Any new contracts, contract renewals, or substantive contract modifications shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

(c) To the extent an agency contracts for confinement of holding facility detainees, all rules in this subpart that apply to the agency shall apply to the contractor, and all rules that apply to staff or employees shall apply to contractor staff.

##### **§ 115.113 Detainee supervision and monitoring.**

(a) The agency shall ensure that each facility maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

(b) The agency shall develop and document comprehensive detainee supervision guidelines to determine and meet each facility's detainee supervision needs, and shall review those supervision guidelines and their application at each facility at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, agencies shall take into consideration the physical layout of each holding facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse

incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

**§ 115.114 Juvenile and family detainees.**

(a) Juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

(b) Unaccompanied juveniles shall generally be held separately from adult detainees. The juvenile may temporarily remain with a non-parental adult family member where:

(1) The family relationship has been vetted to the extent feasible, and

(2) The agency determines that remaining with the non-parental adult family member is appropriate, under the totality of the circumstances.

**§ 115.115 Limits to cross-gender viewing and searches.**

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at DHS holding facilities.

(b) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. An agency shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(c) All strip searches and visual body cavity searches shall be documented.

(d) The agency shall implement policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement under medical supervision. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(e) The agency and facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's gender. If the detainee's

gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records (if available), or, if necessary, learning that information as part of a broader medical examination conducted in private, by a medical practitioner.

(f) The agency shall train law enforcement staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and agency policy, including consideration of officer safety.

**§ 115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.**

(a) The agency shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that any written materials related to sexual abuse are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable

effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for another detainee to provide interpretation, and the agency determines that such interpretation is appropriate and consistent with DHS policy. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse.

**§ 115.117 Hiring and promotion decisions.**

(a) The agency shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) When the agency is considering hiring or promoting staff, it shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(c) Before hiring new employees who may have contact with detainees, the agency shall require a background investigation to determine whether the candidate for hire is suitable for employment with the agency. The agency shall conduct an updated background investigation for agency employees every five years.

(d) The agency shall also perform a background investigation before

enlisting the services of any contractor who may have contact with detainees.

(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility.

#### **§ 115.118 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new holding facility and in planning any substantial expansion or modification of existing holding facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in a holding facility, the agency shall consider how such technology may enhance the agency's ability to protect detainees from sexual abuse.

#### **Responsive Planning**

##### **§ 115.121 Evidence protocols and forensic medical examinations.**

(a) To the extent that the agency is responsible for investigating allegations of sexual abuse in its holding facilities, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally appropriate for juveniles, where applicable.

(b) In developing the protocol referred to in paragraph (a) of this section, the agency shall consider how best to utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs.

(c) Where evidentially or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the agency shall arrange for or refer the alleged victim detainee to a medical

facility to undergo a forensic medical examination, including a Sexual Assault Forensic Examiner (SAFE) or Sexual Assault Nurse Examiner (SANE) where practicable. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified health care personnel.

(d) If, in connection with an allegation of sexual abuse, the detainee is transported for a forensic examination to an outside hospital that offers victim advocacy services, the detainee shall be permitted to use such services to the extent available, consistent with security needs.

(e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

##### **§ 115.122 Policies to ensure investigation of allegations and appropriate agency oversight.**

(a) The agency shall establish a protocol to ensure that each allegation of sexual abuse is investigated by the agency, or referred to an appropriate investigative authority.

(b) The agency protocol shall be developed in coordination with DHS investigative entities; shall include a description of the responsibilities of both the agency and the investigative entities; and shall require the documentation and maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse. The agency shall post its protocol on its Web site, redacted if appropriate.

(c) The agency protocol shall ensure that each allegation is promptly reported to the Joint Intake Center and, unless the allegation does not involve potentially criminal behavior, promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. The agency may separately, and in addition to the above reports and referrals, conduct its own investigation.

(d) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(e) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided timely access to U nonimmigrant status information.

#### **Training and Education**

##### **§ 115.131 Employee, contractor, and volunteer training.**

(a) The agency shall train, or require the training of all employees, contractors, and volunteers who may have contact with holding facility detainees, to be able to fulfill their responsibilities under these standards, including training on:

- (1) The agency's zero-tolerance policies for all forms of sexual abuse;
- (2) The right of detainees and employees to be free from sexual abuse, and from retaliation for reporting sexual abuse;
- (3) Definitions and examples of prohibited and illegal sexual behavior;
- (4) Recognition of situations where sexual abuse may occur;
- (5) Recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences;
- (6) Procedures for reporting knowledge or suspicion of sexual abuse;

(7) How to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees; and

(8) The requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current employees, contractors and volunteers who may have contact with holding facility detainees shall be trained within two years of the effective date of these standards, and the agency shall provide refresher information, as appropriate.

(c) The agency shall document those employees who may have contact with detainees have completed the training and receive and maintain for at least five years confirmation that contractors and volunteers have completed the training.

##### **§ 115.132 Notification to detainees of the agency's zero-tolerance policy.**

The agency shall make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.

##### **§ 115.133 [Reserved]**

##### **§ 115.134 Specialized training: Investigations.**

(a) In addition to the training provided to employees, DHS agencies

with responsibility for holding facilities shall provide specialized training on sexual abuse and effective cross-agency coordination to agency investigators who conduct investigations into allegations of sexual abuse at holding facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency must maintain written documentation verifying specialized training provided to agency investigators pursuant to this section.

### **Assessment for Risk of Sexual Victimization and Abusiveness**

#### **§ 115.141 Assessment for risk of victimization and abusiveness.**

(a) Before placing any detainees together in a holding facility, agency staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) All detainees who may be held overnight with other detainees shall be assessed to determine their risk of being sexually abused by other detainees or sexually abusive toward other detainees; staff shall ask each such detainee about his or her own concerns about his or her physical safety.

(c) The agency shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

- (1) Whether the detainee has a mental, physical, or developmental disability;
- (2) The age of the detainee;
- (3) The physical build and appearance of the detainee;
- (4) Whether the detainee has previously been incarcerated or detained;
- (5) The nature of the detainee's criminal history; and
- (6) Whether the detainee has any convictions for sex offenses against an adult or child;

(7) Whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the detainee has self-identified as having previously experienced sexual victimization; and

(9) The detainee's own concerns about his or her physical safety.

(d) If detainees are identified pursuant to the assessment under this section to be at high risk of victimization, staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or

placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

(e) The facility shall implement appropriate controls on the dissemination of sensitive information provided by detainees under this section.

### **Reporting**

#### **§ 115.151 Detainee reporting.**

(a) The agency shall develop policies and procedures to ensure that the detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents, and shall provide instructions on how detainees may contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and shall inform the detainees of, at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Agency policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

#### **§ 115.152–115.153 [Reserved]**

#### **§ 115.154 Third-party reporting.**

The agency shall establish a method to receive third-party reports of sexual abuse in its holding facilities. The agency shall make available to the public information on how to report sexual abuse on behalf of a detainee.

### **Official Response Following a Detainee Report**

#### **§ 115.161 Staff reporting duties.**

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred to any detainee; retaliation against detainees or staff who reported or participated in an investigation about such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. Agency policy shall include methods by which staff can report

misconduct outside of their chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's written policies and procedures.

(c) Apart from such reporting, the agency and staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to help protect the safety of the victim or prevent further victimization of other detainees or staff in the facility, or to make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

#### **§ 115.162 Agency protection duties.**

When an agency employee has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

#### **§ 115.163 Reporting to other confinement facilities.**

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency that received the allegation shall notify the appropriate office of the agency or the administrator of the facility where the alleged abuse occurred.

(b) The notification provided in paragraph (a) of this section shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The agency office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards.

#### **§ 115.164 Responder duties.**

(a) Upon learning of an allegation that a detainee was sexually abused, the first law enforcement staff member to respond to the report, or his or her supervisor, shall be required to:

- (1) Separate the alleged victim and abuser;
- (2) Preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the sexual abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a law enforcement staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify law enforcement staff.

**§ 115.165 Coordinated response.**

(a) The agency shall develop a written institutional plan and use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(b) If a victim of sexual abuse is transferred between facilities covered by subpart A or B of this part, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(c) If a victim is transferred from a DHS holding facility to a facility not covered by paragraph (b) of this section, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

**§ 115.166 Protection of detainees from contact with alleged abusers.**

Agency management shall consider whether any staff, contractor, or volunteer alleged to have perpetrated sexual abuse should be removed from duties requiring detainee contact pending the outcome of an investigation, and shall do so if the seriousness and plausibility of the allegation make removal appropriate.

**§ 115.167 Agency protection against retaliation.**

Agency employees shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force.

**Investigations**

**§ 115.171 Criminal and administrative investigations.**

(a) If the agency has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the agency shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS and the assigned criminal investigative entity.

(c) The agency shall develop written procedures for administrative investigations, including provisions requiring:

(1) Preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(2) Interviewing alleged victims, suspected perpetrators, and witnesses;

(3) Reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

(4) Assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

(5) Documentation of each investigation by written report, which shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(6) Retention of such reports for as long as the alleged abuser is detained or employed by the agency, plus five years. Such procedures shall establish the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The departure of the alleged abuser or victim from the employment or control of the agency shall not provide a basis for terminating an investigation.

(e) When outside agencies investigate sexual abuse, the agency shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

**§ 115.172 Evidentiary standard for administrative investigations.**

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

**Discipline**

**§ 115.176 Disciplinary sanctions for staff.**

(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or violating agency sexual abuse policies.

(b) The agency shall review and approve policy and procedures regarding disciplinary or adverse action for staff and shall ensure that the policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1)–(4) and (7)–(8) of the definition of “sexual abuse of a detainee by a staff member, contractor, or volunteer” in § 115.6.

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each agency shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

**§ 115.177 Corrective action for contractors and volunteers.**

(a) Any contractor or volunteer suspected of perpetrating sexual abuse shall be prohibited from contact with detainees. The agency shall also consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in



sexual abuse, but have violated other provisions within these standards. The agency shall be responsible for promptly reporting sexual abuse allegations and incidents involving alleged contractor or volunteer perpetrators to an appropriate law enforcement agency as well as to the Joint Intake Center or another appropriate DHS investigative office in accordance with DHS policies and procedures. The agency shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

(b) Contractors and volunteers suspected of perpetrating sexual abuse may be removed from all duties requiring detainee contact pending the outcome of an investigation, as appropriate.

### Medical and Mental Care

#### § 115.181 [Reserved]

#### § 115.182 Access to emergency medical services.

(a) Detainee victims of sexual abuse shall have timely, unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

### Data Collection and Review

#### § 115.186 Sexual abuse incident reviews.

(a) The agency shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. Such review shall ordinarily occur within 30 days of the agency receiving the investigation results from the investigative authority. The agency shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) The agency shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual

abuse intervention, prevention and response efforts.

#### § 115.187 Data collection.

(a) The agency shall maintain in a secure area all agency case records associated with claims of sexual abuse, in accordance with these standards and applicable agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data available, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing, and for each incident found to be substantiated, such information as is available to the PSA Coordinator concerning:

(1) The date, time, location, and nature of the incident;

(2) The demographic background of the victim and perpetrator (including citizenship, age, gender, and whether either has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming);

(3) The reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);

(4) Any injuries sustained by the victim;

(5) Post-report follow up responses and action taken by the agency (e.g., supervision, referral for medical or mental health services, etc.); and

(6) Any sanctions imposed on the perpetrator.

(c) The agency shall maintain, review, and collect data as needed from all available agency records.

(d) Upon request, the agency shall provide all such data from the previous calendar year to the Office for Civil Rights and Civil Liberties no later than June 30.

#### § 115.188 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

#### § 115.189 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.187 are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from holding facilities under its direct control and from any private agencies with which it contracts available to the public at least annually on its Web site consistent with agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.187 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

### Audits and Compliance

#### § 115.193 Audits of standards.

(a) Within three years of July 6, 2015, the agency shall ensure that each of its immigration holding facilities that houses detainees overnight and has adopted these standards is audited. For any such holding facility established after July 6, 2015, the agency shall ensure that the facility is audited within three years. Audits of new holding facilities as well as holding facilities that have previously failed to meet the standards shall occur as soon as practicable within the three-year cycle; however, where it is necessary to prioritize, priority shall be given to facilities that have previously failed to meet the standards.

(1) Audits required under this paragraph (a) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (a)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties, which may request an expedited audit if it has reason to believe that an expedited audit is appropriate.

(2) [Reserved]

(b) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to be low-risk, based on its physical characteristics and passing its most recent audit, is audited at least once every five years.

(1) Audits required under this paragraph (b) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (b)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties, which may request an expedited audit if it has reason to believe that an expedited audit is appropriate.

(2) [Reserved]

(c) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to not be low-risk, based on its physical characteristics or not passing its most recent audit, is audited at least once every three years.

(1) Audits required under this paragraph (c) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted by paragraph (c)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties, which may request an expedited audit if it has reason to believe that an expedited audit is appropriate.

(2) [Reserved]

### Additional Provisions in Agency Policies

#### § 115.195 Additional provisions in agency policies.

The regulations in this subpart B establish minimum requirements for agencies. Agency policies may include additional requirements.

### Subpart C—External Auditing and Corrective Action

#### § 115.201 Scope of audits.

(a) The agency shall develop and issue an instrument that is coordinated with the DHS Office for Civil Rights and Civil Liberties, which will provide guidance on the conduct of and contents of the audit;

(b) The auditor shall review all relevant agency policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(c) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(d) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(e) The agency shall provide the auditor with relevant documentation to complete a thorough audit of the facility.

(f) The auditor shall retain and preserve all documentation (including, e.g., videotapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the agency upon request.

(g) The auditor shall interview a representative sample of detainees and of staff, and the facility shall make space available suitable for such interviews.

(h) The auditor shall review a sampling of any available videotapes and other electronically available data that may be relevant to the provisions being audited.

(i) The auditor shall be permitted to conduct private interviews with detainees.

(j) Detainees shall be permitted to send confidential information or correspondence to the auditor.

(k) Auditors shall attempt to solicit input from community-based or victim advocates who may have insight into relevant conditions in the facility.

(l) All sensitive but unclassified information provided to auditors will include appropriate designations and limitations on further dissemination. Auditors will be required to follow all appropriate procedures for handling and safeguarding such information.

#### § 115.202 Auditor qualifications.

(a) An audit shall be conducted by entities or individuals outside of the agency and outside of DHS that have relevant audit experience.

(b) All auditors shall be certified by the agency, in coordination with DHS. The agency, in coordination with DHS, shall develop and issue procedures regarding the certification process, which shall include training requirements.

(c) No audit may be conducted by an auditor who has received financial compensation from the agency being audited (except for compensation received for conducting other audits, or other consulting related to detention reform) within the three years prior to the agency's retention of the auditor.

(d) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits or other consulting related to detention reform.

#### § 115.203 Audit contents and findings.

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the facility under review.

(b) Audit reports shall state whether facility policies and procedures comply with relevant standards.

(c) For each of these standards, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable detainee or staff information from their reports, but shall provide such information to the agency upon request.

(f) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one, or is otherwise made readily available to the public. The agency shall redact any sensitive but unclassified information

(including law enforcement sensitive information) prior to providing such reports publicly.

**§ 115.204 Audit corrective action plan.**

(a) A finding of “Does Not Meet Standard” with one or more standards shall trigger a 180-day corrective action period.

(b) The agency and the facility shall develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the facility does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance.

**§ 115.205 Audit appeals.**

(a) A facility may lodge an appeal with the agency regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged

within 90 days of the auditor’s final determination.

(b) If the agency determines that the facility has stated good cause for a re-evaluation, the facility may commission a re-audit by an auditor mutually agreed upon by the agency and the facility. The facility shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

**Jeh Charles Johnson,**

*Secretary.*

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