

DEPARTMENT OF STATE**22 CFR Part 9**

[Public Notice 5658]

RIN 1400-AB91

National Security Information Regulations**AGENCY:** Department of State.**ACTION:** Proposed rule with request for comment.

SUMMARY: The Department of State proposes to revise its regulations governing the classification of national security information that is under the control of the Department in order to reflect the provisions of a new executive order on national security information and consequent changes in the Department's procedures since the last revision of the Department's regulations on this subject.

COMMENT DATES: The Department will consider any comments from the public that are received by April 3, 2007.

ADDRESSES: You may submit comments to Margaret P. Grafeld, Director, Office of Information Programs and Services, (202) 261-8300, U.S. Department of State, SA-2, 515 22nd St. NW., Washington, DC 20522-6001; FAX: 202-261-8590. E-mail GrafeldMP@state.gov. If submitting comments by e-mail, you must include the RIN in the subject line of your message. You may view this rule online at <http://www.regulations.gov/index.cfm>.

FOR FURTHER INFORMATION, CONTACT: Margaret P. Grafeld, Director, Office of Information Programs and Services, (202) 261-8300, U.S. Department of State, SA-2, 515 22nd St. NW., Washington, DC 20522-6001; FAX: 202-261-8590.

SUPPLEMENTARY INFORMATION: Since the last version of Part 9 of 22 CFR was published, the executive order governing classification of national security information has been superseded by E.O. 12958, effective October 14, 1995. Since its promulgation, E.O. 12958 has been amended several times, most recently and most substantially by Executive Order 13292 dated March 28, 2003, which effected changes in classification categories, provisions regarding the duration of classification, provisions regarding reclassification of previously declassified and released information, and the disclosure of classified information in an emergency. In addition, in contrast to the indefinite classification provisions of E.O. 12356, the new executive order provides for

classification for up to 25 years under certain criteria and, in certain circumstances, classification beyond 25 years under more stringent criteria.

Regulatory Findings

Administrative Procedure Act. The Department is publishing this rule as a proposed rule. Public comments are invited for a period of 90 days following this document's publication in the **Federal Register**.

Regulatory Flexibility Act. The Department, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule and, by approving it, certifies that this rule will not have significant economic impact on a substantial number of small entities.

Unfunded Mandates Act of 1995. This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996. This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

Executive Order 12866. The Department does not consider this rule to be a "significant regulatory action" under Executive Order (E.O.) 12866, section 3(f), Regulatory Planning and Review. In addition, the Department is exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The Department has nevertheless reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in that Executive Order.

Executive Order 13132. This regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various

levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act. This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 9

Original classification, original classification authorities, derivative classification, classification challenges, declassification and downgrading, mandatory declassification review, systematic declassification review, safeguarding.

For the reasons set forth in the preamble, Title 22, Part 9 of the Code of Federal Regulations is proposed to be revised as follows:

PART 9—SECURITY INFORMATION REGULATIONS

Sec.

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Authority: E.O. 12958 (60 FR 19825, April 20, 1995) as amended; Information Security Oversight Office Directive No. 1, 32 CFR 2001 (68 FR 55168, Sept. 22, 2003)

§ 9.1 Basis.

These regulations, taken together with the Information Security Oversight Office Directive No. 1 dated September 22, 2003, and Volume 5 of the Department's Foreign Affairs Manual, provide the basis for the security classification program of the U.S. Department of State ("the Department") implementing Executive Order 12958, "Classified National Security Information", as amended ("the Executive Order").

§ 9.2 Objective.

The objective of the Department's classification program is to ensure that national security information is protected from unauthorized disclosure, but only to the extent and for such a period as is necessary.

§ 9.3 Senior agency official.

The Executive Order requires that each agency that originates or handles classified information designate a senior agency official to direct and administer its information security program. The Department's senior agency official is the Under Secretary of State for Management. The senior agency official is assisted in carrying out the provisions of the Executive Order and the Department's information security program by the Assistant Secretary for Diplomatic Security, the Assistant Secretary for Administration, and the Deputy Assistant Secretary for Information Sharing Services.

§ 9.4 Original classification.

(a) *Definition.* Original classification is the initial determination that certain information requires protection against unauthorized disclosure in the interest of national security (i.e., national defense or foreign relations of the United States), together with a designation of the level of classification.

(b) Classification levels.

(1) *Top Secret* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) *Secret* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) *Confidential* shall be applied to information the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(c) Classification requirements and limitations.

(1) Information may not be considered for classification unless it concerns:

- (i) Military plans, weapons systems, or operations;
- (ii) Foreign government information;
- (iii) Intelligence activities (including special activities), intelligence sources or methods, or cryptology;
- (iv) Foreign relations or foreign activities of the United States, including confidential sources;
- (v) Scientific, technological, or economic matters relating to the national security; which includes defense against transnational terrorism;
- (vi) United States Government programs for safeguarding nuclear materials or facilities;
- (vii) Vulnerabilities or capabilities of systems, installations, infrastructures,

projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or

(viii) Weapons of mass destruction.

(2) In classifying information, the public's interest in access to government information must be balanced against the need to protect national security information.

(3) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment to a person, organization, or agency, to restrain competition, or to prevent or delay the release of information that does not require protection in the interest of the national security.

(4) A reference to classified documents that does not directly or indirectly disclose classified information may not be classified or used as a basis for classification.

(5) Only information owned by, produced by or for, or under the control of the U.S. Government may be classified.

(6) The unauthorized disclosure of foreign government information is presumed to cause damage to national security.

(d) Duration of classification.

(1) Information shall be classified for as long as is required by national security considerations, subject to the limitations set forth in section 1.5 of the Executive Order. When it can be determined, a specific date or event for declassification in less than 10 years shall be set by the original classification authority at the time the information is originally classified. If a specific date or event for declassification cannot be determined, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years.

(2) An original classification authority may extend the duration of classification, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under the Executive Order are met.

(3) Information marked for an indefinite duration of classification under predecessor orders, such as "Originating Agency's Determination Required" (OADR) or containing no declassification instructions shall be subject to the declassification provisions of Part 3 of the Order, including the provisions of section 3.3 regarding

automatic declassification of records older than 25 years.

§ 9.5 Original classification authority.

(a) Authority for original classification of information as *Top Secret* may be exercised by the Secretary and those officials delegated this authority in writing by the Secretary. Such authority has been delegated to the Deputy Secretary, the Under Secretaries, Assistant Secretaries and other Executive Level IV officials and their deputies; Chiefs of Mission, Charge d'Affaires, and Principal Officers at autonomous posts abroad; and to other officers within the Department as set forth in Department Notice dated May 26, 2000.

(b) Authority for original classification of information as *Secret* or *Confidential* may be exercised only by the Secretary, the Senior Agency Official, and those officials delegated this authority in writing by the Secretary or the Senior Agency Official. Such authority has been delegated to Office Directors and Division Chiefs in the Department, Section Heads in Embassies and Consulates abroad, and other officers within the Department as set forth in Department Notice dated May 26, 2000. In the absence of the Secret or Confidential classification authority, the person designated to act for that official may exercise that authority.

§ 9.6 Derivative classification.

(a) *Definition.* Derivative classification is the incorporating, paraphrasing, restating or generating in new form information that is already classified and the marking of the new material consistent with the classification of the source material. Duplication or reproduction of existing classified information is not derivative classification.

(b) *Responsibility.* Information classified derivatively from other classified information shall be classified and marked in accordance with instructions from an authorized classifier or in accordance with an authorized classification guide and shall comply with the standards set forth in sections 2.1–2.2 of the Executive Order and the ISOO implementing directives in 32 CFR 2001.22.

(c) *Department of State Classification Guide.* The Department of State Classification Guide (DSCG) is the primary authority for the classification of information in documents created by Department of State personnel. The Guide is classified "Confidential" and is found on the Department of State's classified Web site.

§ 9.7 Identification and marking.

(a) Classified information shall be marked pursuant to the standards set forth in section 1.6 of the Executive Order; ISOO implementing directives in 32 CFR 2001, Subpart B; and internal Department guidance in 12 Foreign Affairs Manual (FAM).

(b) Foreign government information shall retain its original classification markings or be marked and classified at a U.S. classification level that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(c) Information assigned a level of classification under predecessor executive orders shall be considered as classified at that level of classification.

§ 9.8 Classification challenges.

(a) *Challenges.* Holders of information pertaining to the Department of State who believe that its classification status is improper are expected and encouraged to challenge the classification status of the information. Holders of information making challenges to the classification status of information shall not be subject to retribution for such action. Informal, usually oral, challenges are encouraged. Formal challenges to classification actions shall be in writing to an original classification authority (OCA) with jurisdiction over the information and a copy of the challenge shall be sent to the Office of Information Programs and Services (IPS) of the Department of State, SA-2, 515 22nd St. NW., Washington, DC 20522-6001. The Department (either the OCA or IPS) shall provide an initial response in writing within 60 days.

(b) *Appeal procedures and time limits.* A negative response may be appealed to the Department's Appeals Review Panel (ARP) and should be sent to: Chairman, Appeals Review Panel, c/o Information and Privacy Coordinator/Appeals Officer, at the IPS address given above. The appeal shall include a copy of the original challenge, the response, and any additional information the appellant believes would assist the ARP in reaching its decision. The ARP shall respond within 90 days of receipt of the appeal. A negative decision by the ARP may be appealed to the Interagency Security Classification Appeals Panel (ISCAP)

referenced in section 5.3 of Executive Order 12958. If the Department fails to respond to a formal challenge within 120 days or if the ARP fails to respond to an appeal within 90 days, the challenge may be sent to the ISCAP.

§ 9.9 Declassification and downgrading.

(a) *Declassification processes.*

Declassification of classified information may occur:

(1) After review of material in response to a Freedom of Information Act (FOIA) request, mandatory declassification review request, discovery request, subpoena, classification challenge, or other information access or declassification request;

(2) After review as part of the Department's systematic declassification review program;

(3) As a result of the elapse of the time or the occurrence of the event specified at the time of classification;

(4) By operation of the automatic declassification provisions of section 3.3 of the Executive Order with respect to material more than 25 years old.

(b) *Downgrading.* When material classified at the Top Secret level is reviewed for declassification and it is determined that classification continues to be warranted, a determination shall be made whether downgrading to a lower level of classification is appropriate. If downgrading is determined to be warranted, the classification level of the material shall be changed to the appropriate lower level.

(c) *Authority to downgrade and declassify.*

(1) Classified information may be downgraded or declassified by the official who originally classified the information if that official is still serving in the same position, by a successor in that capacity, by a supervisory official of either, or by any other official specifically designated by the Secretary or the senior agency official.

(2) The Department shall maintain a record of Department officials specifically designated as declassification and downgrading authorities.

(d) *Declassification in the public interest.* Although information that continues to meet the classification criteria of the Executive Order or a predecessor order normally requires continued protection, in some exceptional cases the need to protect information may be outweighed by the public interest in disclosure of the information. When such a question arises, it shall be referred to the Secretary or the Senior Agency Official

for decision on whether, as an exercise of discretion, the information should be declassified and disclosed. This provision does not amplify or modify the substantive criteria or procedures for classification or create any substantive or procedural right subject to judicial review.

(e) *Public dissemination of declassified information.*

Declassification of information is not authorization for its public disclosure. Previously classified information that is declassified may be subject to withholding from public disclosure under the FOIA, the Privacy Act, and various statutory confidentiality provisions.

§ 9.10 Mandatory declassification review.

All requests to the Department by a member of the public, a government employee, or an agency to declassify and release information shall result in a prompt declassification review of the information in accordance with procedures set forth in 22 CFR 171.20-25. Mandatory declassification review requests should be directed to the Information and Privacy Coordinator, U.S. Department of State, SA-2, 515 22nd St., NW., Washington, DC 20522-6001.

§ 9.11 Systematic declassification review.

The Information and Privacy Coordinator shall be responsible for conducting a program for systematic declassification review of historically valuable records that were exempted from the automatic declassification provisions of section 3.3 of the Executive Order. The Information and Privacy Coordinator shall prioritize such review on the basis of researcher interest and the likelihood of declassification upon review.

§ 9.12 Access to classified information by historical researchers and certain former government personnel.

For Department procedures regarding the access to classified information by historical researchers and certain former government personnel, see Sec. 171.24 of this Title.

§ 9.13 Safeguarding.

Specific controls on the use, processing, storage, reproduction, and transmittal of classified information within the Department to provide protection for such information and to prevent access by unauthorized persons are contained in Volume 12 of the Department's Foreign Affairs Manual.

Dated: December 27, 2006.

Lee Lohman,

*Deputy Assistant Secretary for
Administration, Department of State.*

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. FR-5013-P-01]

[RIN 2506-AC19]

Community Development Block Grant Program; Small Cities Program; Proposed Rule

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend HUD's regulations governing the Community Development Block Grant (CDBG) program for non-entitlement areas in the state of Hawaii. Pursuant to statutory authority, the state of Hawaii has elected not to administer funds to units of general local governments located in non-entitlement areas within the state. The statute provides that if Hawaii opts to not assume responsibility for the program, then the Secretary of HUD will make grants to the units of general local government located in Hawaii's non-entitlement areas, employing the same distribution formula as was used under prior regulations. This proposed rule would modify HUD's regulations to clarify how the CDBG program will be implemented in the non-entitlement areas of Hawaii. HUD has also taken the opportunity afforded by this proposed rule to update and streamline the subpart F regulations, particularly with regard to the HUD-administered Small Cities program in New York, which awarded its last competitive grant in Fiscal Year (FY) 1999.

DATES: *Comments Due Date:* March 5, 2007.

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

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

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

Public Inspection of Public Comments. All comments and communications submitted to HUD will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Individuals with hearing or speech impairments may access this telephone number via TTY by calling the Federal Information Relay Service at (800) 877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Stephen Rhodeside, Senior Program Officer, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7184, Washington, DC 20410-7000; telephone (202) 708-1322 (this is not a toll-free number). Individuals with speech or hearing impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The CDBG program is authorized under the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) (HCD Act). Under the CDBG program, HUD allocates funds by formula among eligible state and local

governments for activities that principally benefit low- and moderate-income persons, aid in the elimination of slums or blighting conditions, or meet other community development needs having a particular urgency.

Section 106 of Title I of the HCD Act permits states to elect to assume administrative responsibility for the CDBG program for non-entitlement areas within their jurisdiction. The HCD Act defines a non-entitlement area as an area that is not a metropolitan city or part of an urban county and does not include federally or state-recognized Indian tribes. In the event that a state elects not to administer the CDBG program, Section 106 provides that HUD will administer the CDBG program for non-entitlement areas within the state. HUD's regulations at 24 CFR part 570, subpart F describe the policies and procedures for HUD's administration of the CDBG program in non-entitlement areas.

Section 218 of the Consolidated Appropriations Act, 2004, (Pub. L. 108-199, approved January 23, 2003) required that, by July 31, 2004, the state of Hawaii had to elect if it would distribute funds under section 106(d)(2) of the HCD Act to units of general local government located in its non-entitlement areas. On August 5, 2004, the Governor of Hawaii notified HUD that the state had elected not to take over the CDBG program in the non-entitlement areas within its jurisdiction. In accordance with the Consolidated Appropriations Act, 2004, the Secretary of HUD permanently assumed administrative responsibility for making grants to the units of general local government located in Hawaii's non-entitlement areas (Hawaii, Kauai, and Maui counties) for all future fiscal years, beginning in 2005.

Section 218 of the Consolidated Appropriations Act, 2004, requires the Secretary of HUD to allocate CDBG funds to the units of local government located in Hawaii's non-entitlement areas based upon the same distribution formula currently used to compute their grant funds. The formula takes into consideration population, poverty, and housing overcrowding in these areas. HUD uses the factors to compute a weighted ratio (the extent of poverty is accorded twice as much significance as the population and housing overcrowding factors), which then determines the allocation of funds.

II. This Proposed Rule

This proposed rule would implement section 218 of the Consolidated Appropriations Act, 2004, by amending HUD's regulations at 24 CFR part 570 to