

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 117.1031 to read as follows:

§ 117.1031 Chehalis River.

The draw of the SR 101 highway bridge, mile 0.1, at Aberdeen shall open on signal from 5 a.m. to 9 p.m., except that from 7:15 a.m. to 8:15 a.m. and 4:15 p.m. to 5:15 p.m., Monday through Friday, except federal holidays, the draw need not open for vessels of less than 5000 gross tons. At all other times, the draw shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is one prolonged blast followed by one short blast.

3. In § 117.1047 revise paragraphs (c) and (d) to read as follows:

§ 117.1047 Hoquiam River.

* * * * *

(c) The draw of the Simpson Avenue Bridge, mile 0.5, at Hoquiam, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is two prolonged blasts followed by one short blast.

(d) The draw of the Riverside Avenue Bridge, mile 0.9, at Hoquiam, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is two prolonged blasts followed by two short blasts.

4. In § 117.1065 revise paragraph (c) to read as follows:

§ 117.1065 Wishkah River.

* * * * *

(c) The draw of the Heron Street Bridge, mile 0.2 and the Wishkah Street Bridge, mile 0.4, at Aberdeen, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal for both bridges is one prolonged blast followed by two short blasts.

Dated: November 12, 2008.

J.P. Currier,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

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DEPARTMENT OF EDUCATION

34 CFR Part 5

RIN 1880–AA84

[Docket ID ED–2008–OM–0011]

Availability of Information to the Public

AGENCY: Office of Management, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Department's compliance with the Freedom of Information Act, as amended (FOIA or the Act). The proposed regulations are intended to update the Department's current regulations to reflect the changes in the FOIA over recent years.

DATES: We must receive your comments on or before December 26, 2008. Comments received after this date will not be considered.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

The Department scans all first-class and priority mail using an irradiation process, which can result in lengthy delays in mail delivery. Please keep this in mind when submitting your comments and consider using the Federal eRulemaking Portal, commercial delivery services, or hand delivery.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> to submit

your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site."

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Delores J. Barber, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4536.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at <http://www.regulations.gov>. Therefore, commenters should be careful to include, in their comments, only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Delores J. Barber, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4536. Telephone: (202) 401–8365 or via Internet: EDFOIManager@ed.gov.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the FOIA program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in the FOIA e-Reading Room, National Library of Education, 400 Maryland Avenue SW., Plaza Level (Level B, Room BE101), Washington, DC 20202-4536 between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

The regulations proposed in this Notice of proposed rulemaking (NPRM) implement changes made to the FOIA (5 U.S.C. 552) in recent years and articulate more clearly, to the public, the Department's policy for processing FOIA requests for publicly available records in the most cost-effective and efficient manner. In developing this NPRM, we have rewritten the Department's existing regulations to be consistent with the FOIA, including its amendments.¹

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory

provisions that are technical or otherwise minor in effect.

Subpart A—General Provisions

Statute: Section 552(a)(1) of title 5, United States Code provides the general framework for the disclosure of agency records to the public, and requires each agency to promulgate rules to effect such public disclosures for that agency.

Current Regulations: Current §§ 5.1 (Act), 5.2 (Department), and 5.5 (Records) define terms that are necessary to understand what Department records are covered by the FOIA. Current § 5.6 (Statutory definitions) states that the definitions in the FOIA and the Office of Management and Budget's (OMB) "Uniform FOIA Fee Schedule and Guidelines" (OMB Guidelines), 52 FR 10012 (March 27, 1987) apply to the Department's FOIA regulations. Current §§ 5.11 (Purpose and scope) and 5.12 (General policy) state the purpose and scope of the Department's FOIA regulations, as well as the Department's general policy regarding public access to agency records. Current § 5.74 (Further disclosures) addresses discretionary disclosures made by the Department.

Proposed Regulations: Proposed §§ 5.1, 5.2, and 5.3 would not substantially alter the regulations in current subpart A.

Proposed § 5.1 (Purpose) would revise and combine current §§ 5.1 and 5.11, and would state the Department's purpose in promulgating FOIA regulations—that is, to inform the public of the regulations that the Department follows for processing FOIA requests. In addition, current §§ 5.71(a) (Protection of personal privacy) and 5.73 (Records not available) would be removed because proposed § 5.1 would expressly reference the exemptions to disclosure set out in the FOIA, which cover the protection of personal privacy and records not publicly available under the FOIA.

Proposed § 5.2 (General policy) would incorporate current § 5.12 and would update current § 5.74, and would state the Department's general policy to make information publicly available, limited only by the obligations of confidentiality and the administrative necessities recognized by the Act, or unless otherwise exempted from disclosure pursuant to law.

Proposed § 5.3 (Definitions) would consolidate the definitions in current §§ 5.1, 5.2, and 5.5, except that proposed § 5.3(d)(1) and (d)(2) would clarify that *agency records* include records in electronic format and records maintained for the Department by an entity under government contract.

Proposed § 5.3 would also define the terms *component* and *FOIA request*.

Reasons: Proposed §§ 5.1 and 5.2 are intended to condense and clarify the general purpose of the Department's FOIA regulations and the Department's policy for implementation of the FOIA. Proposed § 5.1 expressly references the exemptions to disclosure listed in the FOIA to ensure public understanding of the bases on which the Department may not release information under the FOIA. With this specific reference to the FOIA's exemptions, we believe it is unnecessary to include in these regulations separate provisions on the protection of personal privacy and a description of records not available under the FOIA.

The Department proposes to consolidate the definitions applicable to this part in a single section (proposed § 5.3) following the statement of the purpose and policy of the regulations to facilitate public understanding of the Department's FOIA regulations. In addition, we would clarify, in proposed § 5.3(e)(2)(i) and (ii), that agency records include records in electronic format and records maintained for the Department by a contractor. We propose to make these changes to the Department's definition of *agency records* to ensure that the definition conforms with the statutory changes made to the definition of the term "record" under the FOIA.

Proposed § 5.2 would update the language in current § 5.74 regarding discretionary disclosures of agency records because the Department believes the proposed language would provide the public with a clearer understanding of the considerations the Department gives when determining whether to disclose agency records under the FOIA.

Finally, the proposed regulations in subpart A would not include the language from current § 5.6, which states that the definitions in the FOIA and the OMB Guidelines apply to the Department's regulations, because the Department does not believe that this statement is necessary, as the proposed regulations incorporate by reference definitions in both the FOIA and the OMB Guidelines, where appropriate.

Subpart B—Agency Records Available to the Public Statute

Section 552(a)(2) of title 5, United States Code requires each agency to ensure that certain categories of information are available for public inspection and copying. These categories of information include final opinions and orders made in the adjudication of cases; statements of policy and interpretations of policy adopted by the agency and not

¹ Numerous changes have been made to the FOIA since the Department last updated its FOIA regulations in 34 CFR Part 5. Most significantly, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments) (Pub. L. 104-231) and the OPEN Government Act of 2007 (Pub. L. 110-175), both of which amended the FOIA. Under the E-FOIA Amendments, electronic records were explicitly made subject to the FOIA and agencies were required to make all reading room records created after November 1, 1996 electronically available. The OPEN Government Act of 2007 made a number of amendments to procedural issues affecting FOIA administration, including the protection of fee status for news media, time limits for agencies to act upon FOIA requests, the availability of agency records maintained by a private entity, the establishment of a FOIA Public Liaison and FOIA Requester Service Center, and the requirement to describe the exemptions authorizing the redaction of material provided under the FOIA.

published in the **Federal Register**; administrative staff manuals; copies of all records, in any form or format, that have been disclosed and are likely to be the subject of future FOIA requests; and an index of such commonly-requested records. Moreover, the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104-231) (E-FOIA Amendments) require agencies to make reading room records created after November 1, 1996, available to the public in electronic format.

Current Regulations: The bulk of subpart B and subpart F of the current regulations address what agency records of the Department are covered by the FOIA and how the Department manages those records.

Current § 5.13 (Records available) addresses what types of records at the Department are publicly available under the FOIA. Current § 5.14 (Published documents) establishes that published records of the Department are available for examination. Current § 5.15 (Creation of records) states that the Department is not required to create records by compiling requested items from files. Current § 5.16 (Deletion of identifying details) allows the Department to delete information from records made available pursuant to section 552(a)(2) of title 5, United States Code if disclosing the information would constitute a clearly unwarranted invasion of personal privacy. Current § 5.17 (Records in records centers) states that a requester may obtain records stored by the Department in the National Archives or other record centers of the General Services Administration. Current § 5.18 (Destroyed records) addresses the destruction of records pursuant to law.

Current §§ 5.70 through 5.74 address the availability and unavailability of specific types of records (current §§ 5.70, 5.72, and 5.73), and the protection of personal privacy and proprietary information (current § 5.71).

Proposed Regulations: Proposed § 5.10 (Public reading room) would replace current §§ 5.13, 5.14, 5.16, and 5.17 by consolidating much of the content from these sections and incorporating changes made to the FOIA by the E-FOIA Amendments.

Proposed § 5.11 (Business information) would replace and significantly update current § 5.71(b) consistent with Executive Order 12600, 52 FR 23781 (June 25, 1987). Executive Order 12600 directs agencies to establish procedures to notify submitters if the agency has determined that it may be required to disclose the submitter's business information under the Act.

Proposed § 5.12 (Creation of agency records not required) would be substantively the same as current § 5.15 (Creation of records) in that both sections make clear that the Department is not required to create new agency records in response to a FOIA request.

Proposed § 5.13 (Preservation of records) would, consistent with changes in the FOIA, replace current § 5.18 (Destroyed records) and clarify that the Department does not destroy records that are the subject of a pending FOIA request, appeal, or lawsuit.

Reasons: Proposed § 5.10 would condense and clarify the substance of current §§ 5.13(b) and (c), 5.14 and 5.17 by focusing on the FOIA reading room requirements. The proposed regulations would provide detailed access instructions and would identify the agency records available for public inspection and copying in the reading rooms, including information required to be made available in electronic reading rooms and previously released agency records that the Department has determined are likely to be the subject of future FOIA requests. The proposed regulations would not include the substance of current § 5.13(a) because the Department believes that the substance of current § 5.13(a) is addressed sufficiently in the FOIA at 5 U.S.C. 552(a). In addition, the proposed regulations would not specifically include the substance of current §§ 5.14 (Published documents) and 5.17 (Records in records centers) because we believe that questions about these issues are best addressed on a case-by-case basis. Finally, the proposed regulations would not include the substance of current § 5.16 (Deletion of identifying details) because we believe that this issue is more appropriately addressed through internal Departmental guidance.

Proposed § 5.11 (Business information) would significantly update and replace current § 5.71(b) to describe the process by which the Department discloses business information submitted to the Department as a result of a FOIA request, consistent with Executive Order 12600.

Whereas current § 5.71(b) only states that business information will not be disclosed if it is considered to be confidential, proposed § 5.11 would describe in detail the process by which the Department would respond to FOIA requests for agency records containing business information submitted to the Department.

Under proposed § 5.11(c), submitters would be required to use good faith efforts to designate, at the time of submission, business information it

considers to be protected from disclosure under Exemption 4 of the Act (5 U.S.C. 552(b)(4)). If the Department receives a FOIA request for agency records containing information that the submitter has designated as "business information," pursuant to proposed § 5.11(d), the Department would notify the submitter if the Department determines that it may be required to disclose this information, unless one of the exceptions in proposed § 5.11(a) applies.

Where the Department notifies a submitter that it may be required to disclose information the submitter has designated as "business information," the Department would, at that time, give the submitter an opportunity under proposed § 5.11(e) to object to the proposed disclosure. If the submitter objected to part or all of the disclosure within the requisite time period, the Department would, unless one of the exceptions in proposed § 5.11(g) applies, consider the objections and inform the submitter, in writing, of its final decision regarding disclosure under proposed § 5.11(f). Proposed § 5.11(g) describes the instances when the Department is not required to give the submitter notice that it may be required to disclose information the submitter has designated as "business information." These include the following: (a) If the Department does not disclose the information, (b) if the Department has previously lawfully published the information, (c) if the information has been made publicly available, (d) if the disclosure is required by law (other than the FOIA), or (e) if the designations made by the submitter are determined by the Department to be frivolous. Moreover, this proposed section also ensures that the Department notifies (1) submitters of any FOIA lawsuits filed by requesters (proposed § 5.11(h)), (2) requesters of submitters' opportunity to object to disclosure (proposed § 5.11(i)), and (3) requesters of any reverse FOIA lawsuits filed by submitters (proposed § 5.11(j)).

Proposed § 5.12 (Creation of agency records not required) would update, but not make any substantive changes to, current § 5.15. We have retained the substance of the current § 5.15 because we believe it is important to inform the public that the Department is not obligated to create new agency records when responding to FOIA requests. The FOIA only requires that the Department produce records that exist at the time it receives a FOIA request.

Proposed § 5.13 (Preservation of records) would replace current § 5.18 (Destroyed records), which states that the Department destroys records in

accordance with the requirements in the Records Disposal Act of 1943 (44 U.S.C. 366 through 380), the Federal Property Management Regulations (41 CFR parts 101 through 111), and the Records Control Schedules. Proposed § 5.13 more accurately states the requirements regarding the limitation on the destruction of agency records.

We have not included current §§ 5.70 (Policy) and 5.72 (Records available), which address the types of records available under the FOIA, in the proposed regulations. Because the scope of the FOIA has expanded over the years, current §§ 5.70 and 5.72 no longer accurately reflect the legal requirements governing the availability of records under the FOIA.

Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

Statute: Section 552(a) of title 5, United States Code details the basic requirements of the process by which a requester can request access to publicly available records and the process by which an agency must disclose such records.

Current Regulations: Current §§ 5.19, 5.32, 5.51, 5.52, and 5.53 address the procedures by which FOIA requests are made and procedures used by the Department to respond to FOIA requests.

Current § 5.19 (Records of other departments and agencies) states that FOIA requests for records originating in or concerning another agency may be referred to that agency for processing and that requesters in those instances will be so notified. Current § 5.51 (Procedure) addresses the procedure by which a requester should make a request. It further states that a determination whether to release or to deny access to requested records will be made within 10 working days and that the Department may only extend this deadline by an additional 10 working days. Current § 5.52 (Copies of records) states that the Department produces copies of records releasable under the FOIA promptly after receipt of fees. Current § 5.53 (Denial of requests for records) addresses the procedure by which the Department denies a FOIA request for records, specifically indicating that the denial shall be in writing and must include the reasons for the denial and notice of appeal rights. This section, along with current § 5.32 (Freedom of information officer), vests authority to deny a FOIA request in the Department's Freedom of Information Officer.

Proposed Regulations: Proposed §§ 5.20 and 5.21 would consolidate

much of the substance of current § 5.19, 5.32, 5.51, and 5.53. The proposed regulations would not only provide more explicit instructions to aid in the public's understanding of how to make a FOIA request and how the Department processes such FOIA requests, but also would update the regulations to make them consistent with changes made to the FOIA in recent years.

Proposed § 5.20 (Requirements for making FOIA requests) would replace current § 5.51(a) through (c) and would provide additional information regarding the specific requirements that must be met for the Department to deem a FOIA request sufficient for processing.

Proposed § 5.21 (Procedures for processing FOIA requests) would substantially incorporate current §§ 5.19, 5.32, 5.51, and 5.53, but would also reflect a number of changes. Current § 5.51(b) states that the Department will refer FOIA requesters to the appropriate office within the Department in cases when the information sought by the requester is not located in the office where the FOIA request has been made. Proposed § 5.21 would not include the substance of current § 5.51(b); instead, it would allow for the Department to handle referrals of FOIA requests received by one component to an appropriate component (*i.e.*, the component responsible for maintaining the information sought under the FOIA request) within the Department. Further, proposed § 5.21 would not incorporate the requirement, reflected in current § 5.51(c), that envelopes containing written FOIA requests be clearly marked as such. Finally, the time limits for processing FOIA requests (in proposed § 5.21(c)) also have been updated from the time limits in current § 5.51(d) and § 5.51(e).

Reasons: We propose to amend the regulatory sections regarding FOIA requests for agency records and the Department's process for release of publicly available information to clarify the process for the public.

Proposed § 5.20 would update and expand current § 5.51(a) through (c) by stating that a FOIA request must be made in writing and must be transmitted to the Department as indicated on the Department's Web site. Proposed § 5.20 would require that the request reasonably describe the agency records sought and would explain what kinds of information about records are helpful to enable the Department to identify the requested records and respond to the FOIA request. Under proposed § 5.20(c), if a request does not reasonably describe the requested records, the Department would either

administratively close it as insufficient or request clarification from the requester. Proposed § 5.20(d) would also cross-reference Departmental regulations under the Privacy Act of 1974 that require the verification of the requester's identity where the requester seeks records pertaining to the requester, a minor, or an individual who is legally incompetent.

We believe that the changes reflected in proposed § 5.20, which provide more detail on how to make a FOIA request, would assist the public in understanding the requirements for making a FOIA request and ultimately alleviate some processing delays resulting from insufficient FOIA requests.

Proposed § 5.21 would describe the process by which the Department processes FOIA requests. Whereas current §§ 5.19, 5.32, 5.51, and 5.53 provide limited information on the processes used by the Department and do not reflect recent amendments to the Act, proposed § 5.21 describes in detail the processes used by the Department to respond to FOIA requests.

Under proposed § 5.21(a) and (b), upon receipt of a FOIA request the Department would promptly notify the requester of the Department's receipt of the request and make a determination whether to grant the request within 20 working days. While current § 5.51 states that the Department will respond within 10 working days, as was originally required by the Act, proposed § 5.21(e) would conform to a change in the Act that now provides for determinations to be made within 20 working days. See 5 U.S.C. 552(a)(6)(A)(i). The proposed section would reflect the language of the Act regarding the commencement date of this 20-day time limit. Proposed § 5.21(d) also would state, consistent with the Act, that the Department may contact the requester to seek additional information concerning the FOIA request and may toll the 20-day time limit until it receives the requested information. See 5 U.S.C. 552(a)(6)(A)(ii).

Consistent with current § 5.19, proposed § 5.21(b) provides that, if the FOIA request seeks agency records created or maintained by another agency, the Department would either respond to the request after consultation or refer the request to the other agency for processing.

Proposed § 5.21(e) would substantially incorporate current § 5.51(d) by listing examples of the unusual circumstances under which the Department could extend the time limit for processing FOIA requests and would

provide for notification to the requester of the extended time limit. Proposed § 5.21(e) would not include the language from current § 5.51(d) that limits the Department's ability to extend the time period for processing FOIA requests to "no longer than an additional 10 working days," as this limitation does not accurately reflect the requirements of the Act. See 5 U.S.C. 552(a)(6)(B)(ii). In addition, proposed § 5.21(e) would specifically explain that this notification is made to afford the requester the opportunity to modify the FOIA request or to arrange an alternate time limit for the Department to respond to the FOIA request. The Department believes that providing this information to the requester would facilitate communication with the requester about the scope of FOIA requests that constitute "unusual circumstances" and that, ultimately, this would speed the processing of those FOIA requests.

Proposed § 5.21(f) would also provide contact information for the Department's FOIA Public Liaison and FOIA Requester Service Center, as set forth in the Act. We propose to add these provisions to conform the Department's FOIA regulations with sections 552(a)(6)(B)(ii) and 552(a)(7)(B) of title 5, United States Code, which were amended on December 31, 2007, to require that agencies provide contact information for their respective FOIA Public Liaisons and FOIA Requester Service Centers.

Proposed § 5.21(h) would substantially incorporate and expand upon current §§ 5.32 and 5.53, by identifying who is authorized to deny a FOIA request on behalf of the Department, by describing the process by which the requester is given notification of the denial, and by providing examples of determinations that constitute a denial of a FOIA request. Specifically, proposed § 5.21(h) would differ from current § 5.53 in that it would state that denials of FOIA requests, in whole or in part, must not only be made in writing and include the name and title or position of the denying employee or officer, a statement of the reasons for the denial, and a statement of appeal rights, but also include an estimate of the volume of records denied and an indication of the exemption under which any deletions have been made. The Department believes that by providing additional information regarding denials of FOIA requests the Department will eliminate much of the confusion experienced by requesters whose FOIA requests are denied in whole or in part.

Finally, proposed § 5.21(i) (Timing of responses to FOIA requests) is a new

section that describes the Department's processing of FOIA requests. Specifically, proposed § 5.21(i)(1) describes the Department's use of multitrack processing of FOIA requests, pursuant to section 552(a)(6)(D) of title 5, United States Code, and proposed § 5.21(i)(2) would describe the Department's use of expedited processing, pursuant to section 552(a)(6)(E) of title 5, United States Code. Under proposed § 5.21(i)(2)(iii) and (i)(2)(iv), a request for expedited processing must contain a detailed explanation of the basis for such request, and the Department would make a determination on such request within 10 calendar days of receipt. Expedited processing would only occur if the Department determines that the FOIA request involves one or more of the following: (1) A circumstance in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) a circumstance in which an urgent need of a person primarily engaged in disseminating information exists to inform the public about an actual or alleged Federal Government activity; or (3) other circumstances that the Department determines demonstrate a compelling need for expedited processing.

These proposed regulations would not include the substance of current § 5.52, as we believe that issues regarding multiple duplications and the provision of copies of agency records published or available for sale are best addressed on a case-by-case basis.

We believe that adding specificity to the Department's current regulations regarding its process for responding to FOIA requests will result in the public having a better understanding of this process. We also believe that the requirements for requesting expedited processing of FOIA requests, reflected in proposed § 5.21(i)(2), will alleviate delays resulting from insufficient FOIA requests for expedited processing of FOIA requests.

Subpart D—Fees

Statute: Section 552(a)(4)(A) of title 5, United States Code requires agencies to promulgate regulations specifying the fee schedule and establishing the procedures and guidelines for waiver or reduction of fees. Specifically, the FOIA requires each agency's fee schedule to conform to the OMB Guidelines. The FOIA further states that agency records are provided at a reduced fee or without a fee if disclosure is in the public interest. Moreover, an agency may require advance payment of fees where

fees are determined or expected to exceed \$250 or where a requester has previously failed to timely pay fees. Lastly, the FOIA limits fees to direct costs of search, duplication, and review.

Current Regulations: Current subpart E establishes the fees and charges assessed by the Department when processing a FOIA request.

Current § 5.60 (Schedule of fees) establishes the manner in which fees are charged for agency records searches, review of agency records, duplication of agency records, certification of agency records, and other charges established for services provided in response to a FOIA request. Current § 5.61 (Notification of estimated fees) provides for notification to the requester when the estimated fees for the FOIA request exceed \$25 or the maximum amount specified in the FOIA request, whichever is greater. Current § 5.62 (Advance payment of fees) addresses the circumstances under which the Department requires advance payment of estimated fees from FOIA requesters. Current § 5.63 (Payment of fees and interest) allows the Department to assess interest on FOIA request fees that remain outstanding 30 days after the date the billing was sent, provides for the collection of FOIA request fees under the Debt Collection Act of 1982, as amended and states the form and manner in which FOIA fees must be paid. Current § 5.64 (Waiver or reduction of fees) states the circumstances under which FOIA request fees may be reduced or waived.

Proposed Regulations: Proposed § 5.30 (Fees generally) would provide the general basis by which the Department will assess fees, and would partially incorporate the substance of current § 5.63(b), establishing the form of payment required but omitting the address to which fee payments must be sent and the requirement that payment made by personal check or bank draft be drawn on a bank in the United States.

Proposed § 5.31 (Fee definitions) is new and would define various activities applicable to the Department's processing of FOIA requests (*i.e.*, "duplication" (proposed § 5.31(c)), "review" (proposed § 5.31(g)), and "search" (proposed § 5.31(h))). This section would also define the terms "commercial use request" (proposed § 5.31(a)), "direct costs" (proposed § 5.31(b)), "educational institution" (proposed § 5.31(d)), "noncommercial scientific institution" (proposed § 5.31(e)), and "representative of the news media" or "news media requester" (proposed § 5.31(f)).

Proposed § 5.32 (Assessment of fees) would incorporate language from

current §§ 5.60, 5.61, 5.62, and 5.63. First, the proposed regulations would outline the types of fees and the process by which they are assessed. Current § 5.60 (Schedule of fees) distinguishes between manual and computer search fees, which are calculated using the basic rate of pay of the employee(s) doing the search plus 16 percent, with an additional charge of \$287 per hour for computer searches. Proposed § 5.32 would specify that search fees include only the time spent searching for the requested responsive agency records and consist of the direct costs of the search. Thus, the proposed regulations do not include the additional \$287 fee per hour for computer searches, but rather establishes that FOIA requesters are charged the direct costs of the computer search. Proposed § 5.32(a)(2) would incorporate the substance of § 5.60(a)(2), which states that review fees include the actual costs of the initial review of the responsive records and that review fees are charged only for commercial use FOIA requests. However, proposed § 5.32 would clarify that review costs are assessed at the administrative appeal level unless the review includes records not reviewed, or exemptions not asserted, initially.

Second, under proposed § 5.32(a)(3), once the search and review are completed, duplication costs would be assessed at \$0.20 per page, an increase from the \$0.10 per page fee reflected in current § 5.60(a)(3). Proposed § 5.32(a)(3) would also include a fee of \$3.00 per CD for documents recorded on CD, which would provide requesters with an additional FOIA request processing option that is not available under the current regulations.

Third, proposed § 5.32(b) would describe certain limitations on the fees charged by the Department for responding to FOIA requests. Specifically, proposed § 5.32(b)(1) would incorporate current § 5.60(a)(1), which states that fees assessed for non-commercial use FOIA requests made by an educational or noncommercial scientific institution or the news media are limited to duplication costs only. Moreover, consistent with current § 5.60(a)(1), proposed § 5.32(b)(2) would establish that the Department would not assess fees for the first two hours of search time and the first 100 pages of copying for any FOIA request other than commercial use requests. Proposed § 5.32(b)(3) would update current § 5.60(c) by increasing from \$5 to \$25 the threshold amount of fees a FOIA request must accumulate before the Department charges a FOIA requester for those fees.

Fourth, proposed § 5.32(c) would state that if the Department anticipates the fees for a request to be in excess of \$25 and the requester has not stated a willingness to pay such fees, the Department would notify the requester of the fees before processing. Proposed § 5.32(c) substantially incorporates current § 5.61 and would clarify that such FOIA requests would not be deemed received by the Department until the requester agrees to the payment of fees or pays such fees.

Fifth, proposed § 5.32(d) would update current § 5.60(a)(4) by reserving to the Department the right to provide special services (e.g., certification of records) to a requester at the direct cost of such services.

Sixth, proposed § 5.32(e) would incorporate the substance of current § 5.63(a), but would indicate that interest is charged on unpaid fees, pursuant to the Debt Collection Act of 1982, as amended (Pub. L. 97-365), beginning on the 31st day after the billing date.

Seventh, proposed § 5.32(f) would incorporate without substantial alteration current § 5.60(d) by stating that the Department may aggregate FOIA requests for purposes of assessing fees when the FOIA requests are related in purpose and the Department reasonably believes that FOIA requests were submitted separately to avoid or reduce applicable fees.

Eighth, proposed § 5.32(g) would describe when and how the Department requests advance payment before processing a FOIA request. Proposed § 5.32(g)(2) would incorporate current § 5.62(a), which states that if a fee is more than \$250, the Department notifies the requester of the cost and obtains payment assurance from requesters with a history of prompt payment or requires advance payment of fees if the requester has no history of payment. Proposed § 5.32(g)(3) would substantially incorporate current § 5.62(b), which provides that when a requester has previously failed to timely pay a fee, the Department does not process the request until the payment is received in full. Consistent with current § 5.62(c), proposed § 5.32(g)(4) clarifies that when the Department requires advance payment of fees for a FOIA request, the request is not considered received until payment is received by the Department.

Ninth, proposed § 5.32(h) would add, consistent with section 552(a)(6)(A)(iii)(II) of title 5, United States Code, a provision that the time limit for responding to a FOIA request would be tolled where it is necessary for the Department to clarify issues

regarding fee assessment with the requester.

Lastly, proposed § 5.32(i) would state that the fee schedule described in this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

Proposed § 5.33 (Requirements for waiver or reduction of fees) would update current § 5.64 (Waiver or reduction of fees) by providing more detail as to what factors the Department considers to determine whether a waiver or reduction of fees is warranted and whether applicable fee waiver criteria have been met. First, proposed § 5.33(a) would state the two requirements for a reduction or waiver of fees, *i.e.* when disclosure is (1) in the public interest and (2) not primarily in the commercial interest of the requester. Second, proposed § 5.33(b) would detail the factors taken into account to determine if the disclosure is in the public interest and proposed § 5.33(c) would detail the factors taken into account to determine whether disclosure is primarily in the commercial interest of the requester. Third, proposed § 5.33(d) would clarify that if a fee waiver requirement is met only for a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request. Fourth, proposed § 5.33(e) would clarify that a requester seeking a fee waiver or reduction must submit evidence demonstrating that the FOIA request meets the criteria set forth in current § 5.33(a) through (c). Finally, proposed § 5.33(f) would clarify that the Department does not grant standing fee waivers, but rather considers each waiver request on a case by case basis.

Reasons: The amended fee provisions are intended to update the fee assessment and waiver processes to be consistent with the current law and government practice, as well as the OMB Guidelines, and to clarify them for the public. We believe that clarifying the Department's current regulations and providing additional information are necessary to ensure public understanding of the processes by which fees are assessed and by which the Department may waive or reduce these fees.

Proposed § 5.30, which partially incorporates current § 5.63(b), would omit the address to which fee payments must be sent. Proposed § 5.30 would no longer require that payments made by personal check or bank draft be drawn on a bank in the United States. We removed these requirements in current § 5.63(b) in order to permit the

Department to adapt to technological changes that would enable us to collect fees via other methods.

Proposed § 5.31 (Fee definitions) is a new section and is intended to promote transparency and public understanding by defining key terms that are used to assess fees for different types of FOIA requests (e.g., commercial use FOIA requests, FOIA requests made by educational institutions, FOIA requests made by noncommercial scientific institutions, and FOIA requests made by a representative of a news media). The amount of fees charged, if any, depends on the type of request (commercial or non-commercial), whether the request is made by an educational institution, noncommercial scientific institution or representative of the news media, and the nature of the request (e.g., FOIA requests requiring one or more of the following: the search, review and duplication of copies of agency records). The proposed regulations would define terms (e.g., “commercial use request,” “direct costs,” “duplication,” “educational institution,” “representative of the news media,” “review” and “search”) that are essential to understanding when fees are assessed for a FOIA request and what those fees will be.

Proposed § 5.32 (Assessment of fees) would provide to the public a comprehensive breakdown of fees charged when the Department responds to a FOIA request, consistent with the OMB Guidelines. Proposed § 5.32(a)(1) establishes that FOIA requesters will be charged the direct costs of the computer search and eliminates the specified \$287 hourly search charge in current § 5.60(a)(1)(iii) to account for changes in technology that have occurred since the current regulations were drafted. Proposed § 5.32(a)(1) also would clarify that, for purposes of calculating fees, time spent searching for agency records in response to a FOIA request includes time spent searching for the records, regardless of whether the search results in finding the requested records and regardless of whether the Department releases the records under the Act. We believe this language is necessary to assist the public in better understanding the costs associated with a search in response to a FOIA request.

Proposed § 5.32(a)(2) largely tracks current § 5.60(a)(2), which states that review fees include the actual costs of the initial review of the responsive records and that review fees are charged only for commercial use FOIA requests. However, proposed § 5.32 would clarify that review costs are assessed at the administrative appeal level where the review includes records not reviewed,

or exemptions not asserted, initially. We propose to make this clarification to assist the public in better understanding the costs associated with an administrative appeal of an initial FOIA request decision.

Proposed § 5.32(a)(3) would increase the fees for duplication from \$0.10 per page to \$0.20 per page, and proposed § 5.32(b)(3) would increase the threshold amount of total fees a FOIA request must accumulate from \$5 to \$25 before the Department charges a FOIA requester for those fees. Proposed § 5.32(a)(3) also would establish a \$3.00 fee per CD for documents recorded on CD, and at the direct cost for duplication for electronic copies and other forms of duplication. The Department proposes to make these changes in the regulations to address inflation in the years since the current regulations were issued and to account for new technology in the reproduction of copies in electronic formats, including CD.

Proposed § 5.32(c) would also establish that if the Department estimates or determines that the fees for a FOIA request exceed \$25, the FOIA requester must agree in writing to pay these fees before the Department will consider the FOIA request received. We believe this provision is necessary to allow the Department to avoid spending time and resources processing FOIA requests that will not be completed due to the requester's refusal to pay the assessed fees. In addition, proposed § 5.32(d) (Charges for other services) would update current § 5.60(a)(4), which specifies that the cost of certification of records is \$5, and consolidate it with current § 5.60(a)(5) by establishing that the Department will charge the FOIA requester the direct costs of other services, including the certification of agency records. We believe this expansion is necessary to allow for flexibility in pricing in accordance with standard rates.

Proposed § 5.32(e) (Charging interest) would incorporate current § 5.63, with no substantive changes.

Proposed § 5.32(g) substantially tracks § 5.62, but with one minor clarification. Current § 5.62(b) states that if a requester has previously failed to pay a fee in a timely fashion, the Department does not process the FOIA request until the requester pays the arrears in full and makes an advance payment of the estimated fees for the new request. Proposed § 5.32(g)(3) would clarify what is meant by paying a fee in a “timely fashion.” Specifically, it would provide the Department with the ability to require a requester who has previously failed to pay a properly assessed FOIA

fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

Proposed § 5.32(h) would establish that the time limit for responding to a FOIA request is tolled where it is necessary for the Department to clarify issues regarding fee assessment with the requester. We propose to add this provision because we believe it is necessary to comply with section 552(a)(6)(A)(iii)(II) of title 5, United States Code.

We have included proposed § 5.32(i) to clarify for the public that the fee schedule in this part would not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records, consistent with the Act. See 5 U.S.C. 552(a)(4)(A)(vi).

Proposed § 5.33 would incorporate the requirements of current § 5.64, but would provide additional information regarding the factors considered by the Department to determine whether applicable fee waiver criteria have been met. We believe this information is necessary to provide requesters with a clear understanding of the criteria they must meet to qualify for a fee waiver and reduction.

Subpart E—Administrative Review

Statute: Section 552(a)(6)(A) through (C) of title 5, United States Code require agencies to make determinations on appeal within 20 working days, although this deadline may be extended under “unusual circumstances.” These provisions of the FOIA also provide a right to judicial review after the exhaustion of administrative remedies.

Current Regulations: Current subpart G establishes the procedure used by the Department to conduct administrative reviews of FOIA requests.

Current § 5.80 (Review of denial of a record) provides for the review of a denial of a written FOIA request.

Current §§ 5.81 (Time for initiation of request for review) and 5.82 (By whom review is made) state that a requester whose FOIA request has been denied may initiate an administrative review of the denial by filing a written request addressed to the Secretary within 30 days of receipt of the full or partial denial.

Current § 5.83 (Contents of request for review) states that requests for review must include a copy of the written FOIA request and the denial. Current § 5.84 (Consideration on review) provides that administrative reviews will be limited to the written record, including any

written argument submitted by the requester.

Current § 5.85 (Decisions on review) details the process by which the Department makes a decision on review, providing for the Department's issuance of a written determination within 20 working days from receipt of the appeal, with a 10-day extension of the deadline permitted where no extension was granted during the initial review. Under this provision, the Department's decision must state the reasons for the decision and, where an appeal is denied in whole or in part, it must also notify the requester of the right to judicial review of the decision. Failure to comply with the applicable time limits constitutes exhaustion of the FOIA requester's administrative remedies.

Proposed Regulations: The proposed regulation for § 5.40 would provide a more condensed and user-friendly version of the regulations reflected in current subpart G. Proposed § 5.40(b) would change the time period within which an administrative review of a denial of a FOIA request must be made from 30 days of receipt of the determination to deny (as stated in current § 5.81) to 35 calendar days of the date on the determination letter to deny the FOIA request. No other substantive changes have been made to this section.

Reasons: We believe that establishing a 35-day time period from the date of the determination letter to deny a FOIA request will allow both the Department and the FOIA requester to determine more clearly the deadline by which an appeal must be filed. The Department proposes to establish a 35-day time period from the date on the determination letter because we believe that a period of 35 days from the date of the letter is consistent with the time afforded under the current regulations (*i.e.*, 30 days from the date of receipt of the determination letter). We have added 5 more days to the time period to allow adequate time for delivery of the determination letter.

Executive Order 12866

1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for implementing the FOIA effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action,

we have determined that the benefits would justify the costs.

Elsewhere in the preamble, under the heading SIGNIFICANT PROPOSED REGULATIONS, we discuss the potential costs and benefits of these proposed regulations.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 5.1 Purpose.)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The proposed regulations would reduce the burden on FOIA requesters, including small entities as defined by the Regulatory Flexibility Act of 1980, as amended, by providing detailed information and instruction on obtaining access to publicly available Department records and by ensuring that the Department's regulations conform to the current FOIA.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Category of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 5

Freedom of information.

Dated: November 17, 2008.

Margaret Spellings,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations by revising part 5 to read as follows:

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC

Subpart A—General Provisions

SEC.

- 5.1 Purpose.
- 5.2 General policy.
- 5.3 Definitions.

Subpart B—Agency Records Available to the Public

- 5.10 Public reading room.
- 5.11 Business information.
- 5.12 Creation of agency records not required.
- 5.13 Preservation of agency records.

Subpart C—Procedures for Requesting Access to Records and Disclosure of Records

- 5.20 Requirements for making FOIA requests.
- 5.21 Procedure for processing FOIA requests.

Subpart D—Fees

- 5.30 Fees generally.
- 5.31 Fee definitions.
- 5.32 Assessment of fees.
- 5.33 Requirements for waiver or reduction of fees.

Subpart E—Administrative Review

- 5.40 Appeals of adverse determinations.

Authority: 5 U.S.C. 552.

Subpart A—General Provisions**§ 5.1 Purpose.**

This part contains the regulations that the United States Department of Education follows in processing requests for records under the Freedom of Information Act, as amended, 5 U.S.C. 552. These regulations must be read in conjunction with the FOIA, including its exemptions to disclosure, and, when appropriate, in conjunction with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and its implementing regulations in 34 CFR part 5b.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.2 General policy.

The Department's policy is to make information publicly available, limited only by the obligations of confidentiality and the administrative necessities recognized by the Act, as defined in § 5.3(a), or unless otherwise exempted from disclosure pursuant to law. As a matter of policy, the Department makes discretionary disclosures of agency records or information exempt under the Act only after full and deliberate consideration of the institutional, commercial, law enforcement, and personal privacy interests that could be implicated by disclosure of the information. This policy does not, however, create any right or benefit, substantive or procedural, enforceable by any person against the Department. Information routinely provided to the public in the ordinary course of the Department's official business (*e.g.*, press releases) is not subject to the requirements in this part.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.3 Definitions.

As used in this part:

(a) *Act* or *FOIA* means the Freedom of Information Act, as amended, 5 U.S.C. 552.

(b) *Department* means the United States Department of Education.

(c) *Component* means each separate bureau, office, board, division, commission, service, administration, or other organizational entity of the Department.

(d) *FOIA request* means a written request for agency records that reasonably describes the agency records sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), partnership, corporation, association, and foreign or domestic governments (excluding Federal agencies).

(e)(1) *Agency records* are documentary materials regardless of physical form or characteristics that—

(i) Are either created or obtained by the Department; and

(ii) Are under the Department's control at the time it receives a FOIA request.

(2) *Agency records* include—

(i) Records created, stored, and retrievable in electronic format;

(ii) Records maintained for the Department by a private entity under a records management contract with the Federal Government; and

(iii) Documentary materials preserved by the Department as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of data contained therein.

(3) *Agency records* do not include tangible, evidentiary objects or equipment; library or museum materials made or acquired and preserved solely for reference or exhibition purposes; extra copies of documents preserved only for convenience of reference; stocks of publications; and personal records created for the convenience of an individual and not used to conduct Department business or incorporated into the Department's recordkeeping system or files.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart B—Agency Records Available to the Public**§ 5.10 Public reading room.**

(a) *General.* Pursuant to 5 U.S.C. 552(a)(2), the Department maintains a public reading room containing agency records that the FOIA requires to be made regularly available for public inspection and copying. Published records of the Department, whether or not available for purchase, are made available for examination. The Department's public reading room is located at the National Library of Education, 400 Maryland Avenue, SW., Plaza Level (Level B), Washington, DC 20202-0008. The hours of operation are

9:00 a.m. to 5:00 p.m., Monday through Friday (except Federal holidays).

(b) *Reading room records.* Agency records maintained in the public reading room include final opinions and orders in adjudications, statements of policy and interpretations adopted by the Department and not published in the **Federal Register**, administrative staff manuals and instructions affecting the public, and copies of all agency records regardless of form or format released to the public pursuant to a FOIA request that the Department determines are likely to be the subject of future FOIA requests.

(c) *Electronic access.* The Department makes reading room records created on or after November 1, 1996, available through its electronic reading room, located on the Department's FOIA Web site at <http://www.ed.gov/policy/gen/leg/foia/foiatoc.html>.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(2), 20 U.S.C. 3474)

§ 5.11 Business information.

(a) *General.* The Department discloses business information it obtains from a submitter under the Act in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under 5 U.S.C. 552(b)(4) (Exemption 4 of the Act).

(2) *Submitter* means any person or entity (including corporations; State, local, and tribal governments; and foreign governments) from whom the Department obtains business information.

(c) *Designation of business information.* (1) A submitter must use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be business information protected from disclosure under Exemption 4 of the Act.

(2) A submitter's designations are not binding on the Department and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(3) A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.

(d) *Notice to submitters.* Except as provided in paragraph (g) of this section, the Department promptly

notifies a submitter whenever a FOIA request or administrative appeal is made under the Act seeking disclosure of the information the submitter has designated in good faith as business information protected from disclosure under paragraph (c) of this section, or the Department otherwise has reason to believe that it may be required to disclose information sought to be designated by the submitter as business information protected from disclosure under Exemption 4 of the Act. This notice includes either a description of the business information requested or copies of the requested agency records or portions of agency records containing the requested business information as well as a time period, consistent with § 5.21(c), within which the submitter can object to the disclosure pursuant to paragraph (e) of this section.

(e) *Opportunity to object to disclosure.* (1) If a submitter objects to disclosure, it must submit to the Department a detailed written statement specifying all grounds under Exemption 4 of the Act for denying access to the information, or a portion of the information sought.

(2) A submitter's failure to object to the disclosure by the deadline established by the Department in the notice provided under paragraph (d) of this section constitutes a waiver of the submitter's right to object to disclosure under paragraph (e) of this section.

(3) A submitter's response to a notice from the Department under paragraph (d) of this section may itself be subject to disclosure under the Act.

(f) *Notice of intent to disclose.* The Department considers a submitter's objections and submissions made in support thereof in deciding whether to disclose business information sought to be protected by the submitter. Whenever the Department decides to disclose information over a submitter's objection, the Department gives the submitter written notice, which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained.

(2) A description of the information to be disclosed.

(3) A specified disclosure date that is a reasonable time subsequent to the notice.

(g) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section do not apply if—

(1) The Department does not disclose the business information of the submitter;

(2) The Department has previously lawfully published the information;

(3) The information has been made available to the public by the requester or by third parties;

(4) Disclosure of the information is required by statute (other than the Act) or regulation issued in accordance with the requirements of Executive Order 12600 (52 FR 23781, 3 CFR, 1987 Comp., p. 235); or

(5) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that, in such case, the Department must provide the submitter with written notice of any final administrative disclosure determination in accordance with paragraph (f) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of a submitter's business information, the Department promptly notifies the submitter.

(i) *Corresponding notice to requester.* The Department notifies the requester whenever it notifies a submitter of its opportunity to object to disclosure, of the Department's intent to disclose requested information designated as business information by the submitter, or of the filing of a lawsuit.

(j) *Notice of reverse FOIA lawsuit.* Whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, the Department promptly notifies the requester, and advises the requester that its request will be held in abeyance until the lawsuit initiated by the submitter is resolved.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.12 Creation of agency records not required.

In response to a FOIA request, the Department produces only those agency records that are not already publicly available and that are in existence at the time it receives a request. The Department does not create new agency records in response to a FOIA request by, for example, extrapolating information from existing agency records, reformatting available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.13 Preservation of agency records.

The Department does not destroy agency records that are the subject of a pending FOIA request, appeal, or lawsuit.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

§ 5.20 Requirements for making FOIA requests.

(a) *Making a FOIA request.* Any FOIA request for an agency record must be in writing (via paper, facsimile, or electronic mail) and transmitted to the Department as indicated on the Department's Web site. See http://www.ed.gov/policy/gen/leg/foia/request_foia.html.

(b) *Description of agency records sought.* A FOIA request must reasonably describe the agency record sought, to enable Department personnel to locate the agency record or records with a reasonable amount of effort. Whenever possible, a FOIA request should describe the type of agency record requested, the subject matter of the agency record, the date, if known, or general time period when it was created, and the person or office that created it. Requesters who have detailed information that would assist in identifying and locating the agency records sought are urged to provide this information to the Department to expedite the handling of a FOIA request.

(c) *FOIA request deemed insufficient.* If the Department determines that a FOIA request does not reasonably describe the agency record or records sought, the FOIA request will be deemed insufficient under the Act. In that case, the Department informs the requester of the reason the FOIA request is insufficient and, at the Department's option, either administratively closes the FOIA request as insufficient without determining whether to grant the FOIA request or provides the requester an opportunity to modify the FOIA request to meet the requirements of this section.

(d) *Verification of identity.* In compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, FOIA requests for agency records pertaining to the requester, a minor, or an individual who is legally incompetent must include verification of the requester's identity pursuant to 34 CFR 5b.5.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.21 Procedures for processing FOIA requests.

(a) *Acknowledgements of FOIA requests.* The Department promptly notifies the requester when it receives a FOIA request.

(b) *Consultation and referrals.* When the Department receives a FOIA request for a record or records created by or otherwise received from another agency of the Federal Government, it either responds to the FOIA request after

consultation with the other agency, or refers the FOIA request to the other agency for processing. When the Department refers a FOIA request to another agency for processing, the Department will so notify the requester.

(c) *Decisions on FOIA requests.* The Department determines whether to comply with a FOIA request within 20 working days after the appropriate component of the Department first receives the request. This time period commences on the date that the request is received by the appropriate component of the Department, but commences no later than 10 calendar days after the request is received by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records. The Department's failure to comply with these times limits constitutes exhaustion of the requester's administrative remedies for the purposes of judicial action to compel disclosure.

(d) *Requests for additional information.* The Department may make one request for additional information from the requester and toll the 20-day period while awaiting receipt of the additional information.

(e) *Extension of time period for processing a FOIA request.* The Department may extend the time period for processing a FOIA request only in unusual circumstances, as described in paragraphs (e)(1) through (e)(3) of this section, in which case the Department notifies the requester of the extension in writing. A notice of extension affords the requester the opportunity either to modify its FOIA request so that it may be processed within the 20-day time limit, or to arrange with the Department an alternative time period within which the FOIA request will be processed. For the purposes of this section, unusual circumstances include:

(1) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and review and process voluminous agency records responsive to the FOIA request.

(3) The need to consult with other agencies or agency components having a substantial interest in the determination on the FOIA request.

(f) *FOIA Public Liaison and FOIA Requester Service Center.* The Department's FOIA Public Liaison assists in the resolution of disputes between the requester and the Department. The Department provides information about the status of a FOIA request to the requester through the

Department's FOIA Requester Service Center. Contact information for the Department's FOIA Public Liaison and FOIA Requester Service Center may be found at <http://www.ed.gov/policy/gen/leg/foia/contacts.html>.

(g) *Notification of determination.* Once the Department makes a determination to grant a FOIA request in whole or in part, it notifies the requester in writing of its decision.

(h) *Denials of FOIA requests.* (1) Only Departmental officers or employees delegated the authority to deny a FOIA request may deny a FOIA request on behalf of the Department.

(2)(i) The Department notifies the requester in writing of any decision to deny a FOIA request in whole or in part. Denials under this paragraph can include the following: A determination to deny access in whole or in part to any agency record responsive to a request; a determination that a requested agency record does not exist or cannot be located in the Department's records; a determination that a requested agency record is not readily retrievable or reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.

(ii) All determinations denying a FOIA request in whole or in part are signed by an officer or employee designated under paragraph (h)(1) of this section, and include:

(A) The name and title or position of the denying officer or employee.

(B) A brief statement of the reason or reasons for the denial, including any exemptions applicable under the Act.

(C) An estimate of the volume of agency records or information denied, by number of pages or other reasonable estimate (except where the volume of agency records or information denied is apparent from deletions made on agency records disclosed in part, or providing an estimate would harm an interest protected by an applicable exemption under the Act).

(D) Where an agency record has been disclosed only in part, an indication of the exemption under the Act justifying the redaction in the agency record (unless providing this information would harm an interest protected by an applicable exemption under the Act).

(E) A statement of appeal rights and a list of requirements for filing an appeal under § 5.40.

(i) *Timing of responses to FOIA requests—(1) Multitrack processing.* The Department may use two or more

processing tracks to distinguish between simple and more complex FOIA requests based on one or more of the following: The time and work necessary to process the FOIA request, the volume of agency records responsive to the FOIA request, and whether the FOIA request qualifies for expedited processing as described in paragraph (i)(2) of this section.

(2) *Expedited processing.* (i) The Department gives expedited treatment to FOIA requests and appeals whenever the Department determines that a FOIA request involves one or more of the following:

(A) A circumstance in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(B) The urgent need of a person primarily engaged in disseminating information to inform the public about an actual or alleged Federal Government activity; or

(C) Other circumstances that the Department determines demonstrate a compelling need for expedited processing.

(ii) A requester may ask for expedited processing at the time of the initial FOIA request or at any time thereafter.

(iii) A request for expedited processing must contain a detailed explanation of the basis for the request, and must be accompanied by a statement certifying the truth of the circumstances alleged or other evidence of the requester's compelling need acceptable to the Department.

(iv) The Department makes a determination whether to grant or deny a request for expedited processing within 10 calendar days of its receipt by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records, and processes FOIA requests accepted for expedited processing as soon as practicable and on a priority basis.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart D—Fees

§ 5.30 Fees generally.

The Department assesses fees for processing FOIA requests in accordance with § 5.32(a), except where fees are limited under § 5.32(b) or where a waiver or reduction of fees is granted under § 5.33. Requesters must pay fees by check or money order made payable to the U.S. Department of Education, and must include the FOIA request number on the check or money order. The Department retains full discretion to limit or adjust fees.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.31 Fee definitions.

(a) *Commercial use request* means a request from or on behalf of a FOIA requester seeking information for a use or purpose that furthers the requester's commercial, trade, or profit interests, which can include furthering those interests through litigation. For the purpose of assessing fees under the Act, the Department determines, whenever reasonably possible, the use to which a requester will put the requested agency records.

(b) *Direct costs* mean those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use FOIA requests, reviewing) agency records to respond to a FOIA request. Direct costs include, for example, the pro rata salary of the employee(s) performing the work (*i.e.*, basic rate of pay plus 16 percent) and the cost of operating duplication machinery. The Department's other overhead expenses are not included in direct costs.

(c) *Duplication* means making a copy of the agency record, or of the information in it, as necessary to respond to a FOIA request. Copies can be made in several forms and formats, including paper and electronic records. The Department honors a requester's specified preference as to form or format of disclosure, provided that the agency record is readily reproducible with reasonable effort in the requested form or format.

(d) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To qualify as an educational institution under this part, a requester must demonstrate that an educational institution authorized the request and that the agency records are not sought for individual or commercial use, but are instead sought to further scholarly research. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(e) *Noncommercial scientific institution* means an institution that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or

industry. A noncommercial scientific institution does not operate for a "commercial use", as the term is defined in paragraph (a) of this section. To qualify as a noncommercial scientific institution under this part, a requester must demonstrate that a noncommercial scientific institution authorized the request and that the agency records are sought to further scientific research and not for a commercial use. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(f) *Representative of the news media, or news media requester*, means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For the purposes of this section, the term "news" means information about current events or information that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that qualify as disseminators of news and make their products available for purchase by, subscription by, or free distribution to the general public. To be regarded as a representative of the news media, a "freelance" journalist must demonstrate a solid basis for expecting publication, such as a publication contract or a past publication record. For inclusion in this category, a requester must not be seeking the requested agency records for a commercial use.

(g) *Review* means the examination of an agency record located in response to a FOIA request to determine whether any portion of the record is exempt from disclosure under the Act. Reviewing the record includes processing the agency record for disclosure and making redactions and other preparations for disclosure. Review costs are recoverable even if an agency record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure but does not include time spent resolving general legal or policy issues regarding the application of exemptions under the Act.

(h) *Search* means the process of looking for and retrieving agency records or information responsive to a FOIA request. Searching includes page-by-page or line-by-line identification of information within agency records and reasonable efforts to locate and retrieve

information from agency records maintained in electronic form or format, provided that such efforts do not significantly interfere with the operation of the Department's automated information systems.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.32 Assessment of fees.

(a) *Fees*. In responding to FOIA requests, the Department charges the following fees (in accordance with the Office of Management and Budget's "Uniform FOIA Fee Schedule and Guidelines," 52 FR 10012 (March 27, 1987)), unless it has granted a waiver or reduction of fees under § 5.33 and subject to the limitations set forth in paragraph (b) of this section:

(1) *Search*. The Department charges search fees, subject to the limitations of paragraph (b) of this section. Search time includes time spent searching, regardless of whether the search results in the location of responsive agency records and, if so, whether such agency records are released to the requester under the Act. The requester will be charged the direct costs, as defined in § 5.31(b), of the search. In the case of computer searches for agency records, the Department charges the requester for the direct cost of conducting the search, subject to the limitations set forth in paragraph (b) of this section.

(2) *Review*. (i) The Department charges fees for initial agency record review at the same rate as for searches, subject to the limitations set forth in paragraph (b) of this section.

(ii) No fees are charged for review at the administrative appeal level except in connection with—

(A) The review of agency records other than agency records identified as responsive to the FOIA request in the initial decision; and

(B) The Department's decision regarding whether to assert that an exemption exists under the Act that was not cited in the decision on the initial FOIA request.

(iii) Review fees are not assessed for FOIA requests other than those made for a "commercial use," as the term is defined in § 5.31(a).

(3) *Duplication*. The Department charges duplication fees at the rate of \$0.20 per page for paper photocopies of agency records, \$3.00 per CD for documents recorded on CD, and at the direct cost for duplication for electronic copies and other forms of duplication, subject to the limitations of paragraph (b) of this section.

(b) *Limitations on fees*.

(1) Fees are limited to charges for document duplication when agency

records are not sought for commercial use and the request is made by—

(i) An educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or

(ii) A representative of the news media.

(2) For FOIA requests other than commercial use FOIA requests, the Department provides the first 100 pages of agency records released (or the cost equivalent) and the first two hours of search (or the cost equivalent) without charge, pursuant to 5 U.S.C. 552(a)(4)(A)(iv)(II).

(3) Whenever the Department calculates that the fees assessable for a FOIA request under paragraph (a) of this section total \$25.00 or less, the Department processes the FOIA request without charge to the requester.

(c) *Notice of anticipated fees in excess of \$25.* When the Department estimates or determines that the fees for processing a FOIA request will total more than \$25 and the requester has not stated a willingness to pay such fees, the Department notifies the requester of the anticipated amount of fees before processing the FOIA request. If the Department can readily anticipate fees for processing only a portion of a request, the Department advises the requester that the anticipated fee is for processing only a portion of the request. When the Department has notified a requester of anticipated fees greater than \$25, the Department does not further process the request until the requester agrees in writing to pay the anticipated total fee.

(d) *Charges for other services.* When the Department chooses as a matter of administrative discretion to provide a special service, such as certification of agency records, it charges the requester the direct cost of providing the service.

(e) *Charging interest.* The Department charges interest on any unpaid bill assessed at the rate provided in 31 U.S.C. 3717. In charging interest, the Department follows the provisions of the Debt Collection Act of 1982, as amended (Pub. L. 97–365, 96 Stat. 1749), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) *Aggregating FOIA requests.* When the Department reasonably believes that a requester, or a group of requesters acting together, is attempting to divide a FOIA request into a series of FOIA requests for the purpose of avoiding or reducing otherwise applicable fees, the Department may aggregate such FOIA requests for the purpose of assessing fees. The Department does not aggregate

multiple FOIA requests involving unrelated matters.

(g) *Advance payments.* (1) For FOIA requests other than those described in paragraphs (g)(2) and (g)(3) of this section, the Department does not require the requester to pay fees in advance.

(2) Where the Department estimates or determines that fees for processing a FOIA request will total more than \$250, it may require the requester to pay the fees in advance, except where the Department receives a satisfactory assurance of full payment from a requester with a history of prompt payment of FOIA fees.

(3) The Department may require a requester who has previously failed to pay a properly assessed FOIA fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

(4) When the Department requires advance payment of estimated or assessed fees, it does not consider the FOIA request received and does not further process the FOIA request until payment is received.

(h) *Tolling.* When necessary for the Department to clarify issues regarding fee assessment with the FOIA requester, the time limit for responding to the FOIA request is tolled until the Department resolves such issues with the requester.

(i) *Other statutory requirements.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.33 Requirements for waiver or reduction of fees.

(a) The Department processes a FOIA request for agency records without charge or at a charge less than that established under § 5.32(a) when the Department determines that—

(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

(b) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(1) of this section, the Department considers the following factors:

(1) Whether the subject of the request specifically concerns identifiable

operations or activities of the government.

(2) Whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request.

(3) The disclosure's contribution to public understanding of government operations, *i.e.*, the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

(4) The significance of the disclosure's contribution to public understanding of government operations or activities, *i.e.*, the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

(c) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(2) of this section, the Department considers the following factors:

(1) The existence of the requester's commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) When the fee waiver requirements are met only with respect to a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request.

(e) A requester seeking a waiver or reduction of fees must submit evidence demonstrating that the FOIA request meets all the criteria listed in paragraphs (a) through (c) of this section.

(f) A requester must seek a fee waiver for each FOIA request for which a waiver is sought. The Department does not grant standing fee waivers but considers each fee waiver request independently on its merits.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

Subpart E—Administrative Review

§ 5.40 Appeals of adverse determinations.

(a) *In general.* A requester may seek an administrative review of an adverse determination on the FOIA request made by the requester by submitting an

appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; "no agency records" responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 35 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900-AM82

Community Residential Care Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its Community Residential Care regulations to update the standards for VA approval of facilities, including standards that would be adopted for fire safety and heating and cooling systems. This rule would also establish a single 12-month duration for VA approvals and would authorize provisional approval of certain facilities. Finally, this rule would eliminate the VA statement of needed care requirement in current regulations and clarify that it is the care providers at the facility that determine the services needed by a particular veteran. VA intends that the proposed amendments would help ensure that veterans are provided appropriate care at facilities that receive VA referrals.

DATES: *Comment Date:* Comments on the proposed rule must be received on or before January 26, 2009.

ADDRESSES: Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM82—Community Residential Care Program." Copies of comments received will be available for public inspection in the Office of Regulations Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Daniel Schoeps, Office of Geriatrics and Extended Care (114), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-6763. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document proposes to amend the Community Residential Care regulations (referred to below as the regulations), which are set forth at 38 CFR 17.61 through 17.72. The regulations implement 38 U.S.C. 1730.

Under the provisions of 38 U.S.C. 1730, VA health care personnel may assist a veteran by referring such veteran for placement in a privately or publicly-

owned community residential care facility if:

- At the time of initiating the assistance, the veteran is receiving VA medical services on an outpatient basis or receiving care at a VA medical center, domiciliary, or nursing home; or such services or care were furnished to the veteran within the preceding 12 months;
- Placement of the veteran in a community residential care facility is appropriate; and
- The facility has been approved in accordance with the regulations.

This program has evolved through the years to encompass: Medical Foster Homes, Assisted Living facilities, Personal Care Homes, Family Care Homes, and Psychiatric Community Residential Care Homes. Care must consist of room, board, assistance with activities of daily living, and supervision as determined on an individual basis. The cost of residential care is financed by the veteran's own resources. Placement is made in residential settings inspected and approved by the appropriate VA facility, but chosen by the veteran.

Approval of Community Residential Care Facilities

As a condition of approval in the community residential care program, current 38 CFR 17.63 requires that a facility meet the requirements of chapters 1-7, 22-23, 31, and Appendix A of the National Fire Protection Association (NFPA) 101, NFPA's Life Safety Code (1994 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (1995 edition). The Office of the Federal Register approved our incorporation by reference of the NFPA Code and Guide in current § 17.63 under 5 U.S.C. 552(a) and 1 CFR part 51. We propose to amend § 17.63 to require community residential care facilities seeking VA approval to meet the requirements of chapters 1-11, 32-33, and 43 and Appendix A of the NFPA 101, the NFPA's Life Safety Code (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). These changes reflect updates regarding the same subject matter that is currently incorporated by reference. This action is necessary to ensure that facilities meet current industry-wide standards regarding fire safety. We will request that the Office of the Federal Register approve our incorporation by reference of the updated NFPA Code and Guide in proposed § 17.63.

These materials for which we are seeking incorporation by reference are available for inspection at the Department of Veterans Affairs, Office