DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 2

Testimony by Employees and the Production of Documents in Proceedings Where the United States Is Not a Party

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This rule amends regulations which provide that employees and former employees of the Department of Health and Human Services may not provide testimony as part of their official duties in litigation where the United States or a Federal agency is not a party, without the approval of the head of the agency. The purpose of these amendments is to modify provisions which provide that subpoenas *duces tecum* and other requests for documents from third parties shall be treated as requests for documents under the Freedom of Information Act (''FOIA''). Under these amendments, the FOIA shall not apply to a subpoena when the Department is subject to the jurisdiction of the issuing Federal court or other Federal tribunal and the subpoena is properly served. The regulation provides that where there is no jurisdiction over the Department, as in the case of subpoenas issuing out of State, local and tribal courts, the FOIA will apply to such subpoenas.

EFFECTIVE DATE: June 13, 2003.

FOR FURTHER INFORMATION CONTACT: Katherine M. Drews, Associate General Counsel, General Law Division, Office of the General Counsel, at (202) 619–0150.

SUPPLEMENTARY INFORMATION: In 1987, the Department of Health and Human Services published regulations which addressed the issue of the increasing number of requests for the testimony of Department employees in litigation involving only private parties and not the United States. The regulation addresses this matter by generally prohibiting both voluntary appearances and compliance with subpoenas for testimony as part of an employee's official duties, except where the relevant agency head or his or her designee determines that the appearance would promote the objectives of the Department. In addition, the regulation provides that subpoenas for the production of documents would be processed under the Freedom of Information Act, 5 U.S.C. 552.

These amendments are designed to address cases in which a Federal court has jurisdiction to issue a subpoena for DHHS documents. In such cases, the current regulation may infringe on the power of the court by allowing greater authority to withhold a document under the FOIA than would be the case under the rules governing disclosure of documents in court. *See FTC* versus *Grolier, Inc.,* 462 U.S. 19, 27–28 (1983). Because it is not the intention of the Department to create or broaden a Federal litigation privilege through this part, we are amending the regulation to limit the applicability of the FOIA to situations in which the issuing tribunal has no jurisdiction over the Department.

Accordingly, we are amending §§ 2.1, 2.3, and 2.5 to provide that when the Office of the General Counsel determines that a subpoena is ''legally sufficient,'' including when the issuing court has jurisdiction over the Department or its employee(s), the Department will follow the applicable procedural and substantive rules relating to the production of information and documents by a non-party. In cases of informal requests for documents, and where the tribunal issuing the subpoena does not have jurisdiction over the Department—such as is the case in most subpoenas issuing out of State, local and tribal courts, *see, e.g., Boron Oil Co.* versus *Downie,* 873 F.2d 67, 70 (4th Cir. 1989); *Environmental Enterprises, Inc.* versus *EPA,* 664 F. Supp. 585, 586 (D.D.C. 1987); *Reynolds Metals Co.* versus *Crowther,* 572 F. Supp. 288, 290–91 (D. Mass. 1982)—the regulation provides that we will continue to treat the request as a request made pursuant to the FOIA.

The amendments also include examples following the text of § 2.1 which illustrate the applicability of this regulation to situations in which the regulation may or may not apply.

The amendments also reflect changes in the organizational structure in the Department. The references in § 2.2 to the Assistant Secretary for Human Development Services and the Assistant Secretary for Family Support are deleted and replaced by references to the Assistant Secretary for Children and Families as the Agency Head for requests involving the Administration for Children and Families and by the Assistant Secretary for Aging for requests involving the Administration on Aging. In addition, reference to the Commissioner of Social Security is deleted, due to the March 31, 1995, independence of the Social Security Administration.

These amendments also modify § 2.6 to delete the reference to the Freedom of Information Act regulations, 45 CFR part 5, to reflect the policy that the Department will certify any disclosed documents upon request, not just those disclosed pursuant to part 5.

Public Participation: This rule is published as a final rule. It is exempt from public comment, pursuant to 5 U.S.C. 553(b)(A) as a rule of ''agency organization, procedure, or practice.''

Paperwork Reduction Act: This regulation is not subject to the Paperwork Reduction Act because it deals solely with internal rules governing Department of Health and Human Services personnel.

Cost/Regulatory Analysis: In accordance with Executive Order 12291, the Secretary has determined that these amendments will not constitute a ''major'' rule and therefore are not subject to the regulatory impact and analysis requirements of the Order. Major rules are those which impose a cost on the economy of $100 million or more a year and have certain other economic impacts.

These amendments will not have a significant impact on small businesses; therefore, preparation of a regulatory flexibility analysis is not required.

List of Subjects in 45 CFR Part 2

Administrative practice and procedure, Freedom of Information, Government employees.

■ Accordingly, for the reasons set forth in the preamble, 45 CFR part 2 is amended as follows:

PART 2—[AMENDED]

■ 1. The authority citation continues to read as follows:

Authority: 5 U.S.C. 301, 5 U.S.C. 552.

■ 2. Section 2.1 is amended by revising paragraphs (a), (b), (c), (d)(4), (d)(6), and adding Examples (1) through (5) to paragraph (d)(7) to read as follows:

§ 2.1 Scope, purpose, and applicability.

(a) This part sets forth rules to be followed when an employee or former employee of the Department of Health and Human Services (''DHHS'' or ''Department''), other than an employee of the Food and Drug Administration, is requested or subpoenaed to provide testimony in a deposition, trial, or other similar proceeding concerning information acquired in the course of performing official duties or because of such person's official capacity with DHHS. This part also sets forth procedures for the handling of subpoenas duces tecum and other requests for any document in the

possession of DHHS, other than the Food and Drug Administration, and for the processing of requests for certification of copies of documents. Separate regulations, 21 CFR part 20, govern the Food and Drug Administration, and those regulations are not affected by this part.

(b) It is the policy of the DHHS to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they are *made* available to the general public *and*, when subject to the jurisdiction of a court or other tribunal presiding over non-federal party litigation, to follow all applicable procedural and substantive rules relating to the production of information, data, and records by a non-party. The availability of Department employees to testify in litigation not involving federal parties is governed by the Department's policy to maintain strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state, local and tribal judicial, administrative, and legislative proceedings, and to federal judicial and administrative proceedings.

(d) This part does not apply to:

* * * * *

(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities in accordance with 5 CFR 2635.805 and 5 CFR 5501.106. (In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of the DHHS.)

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(6) Any matters covered in 21 CFR part 20-,involving the Food and Drug Administration.

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(7) * * *

Example (1): While on duty, an employee of the Department witnesses an incident in which a fellow employee trips on a loose piece of carpeting and sustains an injury. The injured employee brings a private tort action against the contractor installing the carpeting and the private landlord maintaining the building. The employee/witness is served with a subpoena to appear at a deposition to testify about the incident. The person seeking the testimony would not be required to obtain Agency head approval prior to requesting the testimony, because the subject of the testimony does not ''relate to'' the Department, within the meaning of § 2.1(d)(5).

Example (2): While on duty, an employee of the Department witnesses a mugging while looking out the window to check the weather, and then notifies the local police of what she observed. She is subsequently subpoenaed to testify in a criminal proceeding. The local prosecutor would not be required to obtain Agency head approval prior to requiring the employee to testify, because the subject of the testimony does not ''relate to'' the Department, within the meaning of § 2.1(d)(5).

Example (3): A nurse on duty at an Indian Health Service hospital emergency room treats a child who is brought in following a report of domestic violence. The nurse is subsequently served with a subpoena to testify in a criminal proceeding against one of the child's parents concerning the injuries to the child which he observed. The local prosecutor would be required to obtain Agency head approval prior to requiring the nurse to testify, because the subject of the testimony involves ''information acquired in the course of performing official duties or because of the person's official capacity,'' within the meaning of § 2.1(a).

Example (4): A personnel specialist working for the Department is subpoenaed to testify concerning the meaning of entries on time and attendance records of an employee, which the requesting party received from the employee pursuant to discovery in a personal injury action brought by the employee. The party requesting the personnel specialist to appear would be required to obtain Agency head approval prior to compelling the personnel specialist to testify, because the testimony sought involves ''information acquired in the course of performing official duties or because of the person's official capacity,'' within the meaning of § 2.1(a).

Example (5): A National Institutes of Health physician is subpoenaed in a private medical malpractice action to provide expert testimony in her specialty. The party requesting her testimony would be required to obtain Agency head approval prior to her testifying in response to the subpoena, because the expert testimony sought involves ''information acquired in the course of performing official duties or because of the person's official capacity,'' within the meaning of § 2.1(a).

■ 3. Section 2.2 is revised to read as follows:

§ 2.2 Definitions.

Agency head refers to the head of the relevant operating division or other major component of the DHHS, or his or her delegatee. *Agency head* for the purposes of this part means the following officials for the components indicated:

(1) Office of the Secretary—Assistant Secretary for Administration and Management;

(2) Administration on Aging—Assistant Secretary for Aging;

(3) Administration for Children and Families—Assistant Secretary for Children and Families;

(4) Agency for Healthcare Research and Quality—Administrator;

(5) Agency for Toxic Substances and Disease Registry—Administrator;

(6) Centers for Disease Control and Prevention—Director;

(7) Centers for Medicare and Medicaid Services—Administrator;

(8) Health Resources and Services Administration—Administrator;

(9) Indian Health Service—Director;

(10) National Institutes of Health—Director;

(11) Substance Abuse and Mental Health Services Administration—Administrator;

(12) Office of Inspector General—Inspector General.

Employee includes:

(1) Commissioned officers in the Public Health Service Commissioned Corps, as well as regular and special DHHS employees (except employees of the Food and Drug Administration), when they are performing the duties of their regular positions, as well as when they are performing duties in a temporary assignment at DHHS or another organization.

(2) Any employees of health insurance intermediaries and carriers performing functions under agreements entered into pursuant to sections 1816 and 1842 of the Social Security Act, 42 U.S.C. 1395h, 1395u; *and*

(3) Current and former employees and contractors of entities covered under the Federally Supported Health Centers Assistance Act of 1992, as amended, 42 U.S.C § 233 (FSHCAA), provided that the requested testimony or information relates to the performance of medical, surgical, dental or related functions which were performed at a time when the DHHS deemed the entity to be covered by the FSHCAA.

Certify means to authenticate under seal, pursuant to 42 U.S.C 3505, official documents of the Department.

Testify and testimony includes both in-person, oral statements before a court, legislative or administrative body and statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

■ 4. Section 2.3 is revised to read as follows:

§ 2.3 Policy on Presentation of testimony and production of documents.

No employee or former employee of the DHHS may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the person's official relationship with the Department unless authorized by the Agency head pursuant to this part based on a determination by the Agency head, after consultation with the Office of the General Counsel, that compliance with

the request would promote the objectives of the Department.

■ 5. Section 2.4 is revised to read as follows:

§ 2.4 Procedures when voluntary testimony is requested or when an employee is subpoenaed.

(a) All requests for testimony by an employee or former employee of the DHHS in his or her official capacity and not subject to the exceptions set forth in § 2.1(d) of this part must be addressed to the Agency head in writing and must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interest of the DHHS or the federal government.

(b) If the Agency head denies approval to comply with a subpoena for testimony, or if the Agency head has not acted by the return date, the employee will be directed to appear at the stated time and place, unless advised by the Office of the General Counsel that responding to the subpoena would be inappropriate (in such circumstances as, for example, an instance where the subpoena was not validly issued or served, where the subpoena has been withdrawn, or where discovery has been stayed), produce a copy of these regulations, and respectfully decline to testify or produce any documents on the basis of these regulations.

■ 6. Section 2.5 is revised to read as follows:

§ 2.5 Subpoenas duces tecum.

(a) Whenever a subpoena duces tecum has been served upon a DHHS employee or former employee commanding the production of any record, such person shall refer the subpoena to the Office of the General Counsel (including regional chief counsels) for a determination of the legal sufficiency of the subpoena, whether the subpoena was properly served, and whether the issuing court or other tribunal has jurisdiction over the Department.) If the General Counsel or his designee determines that the subpoena is legally sufficient, the subpoena was properly served, and the tribunal has jurisdiction, the terms of the subpoena shall be complied with unless affirmative action is taken by the Department to modify or quash the subpoena in accordance with Fed. R. Civ. P. 45 (c).

(b) If a subpoena duces tecum served upon a DHHS employee or former employee commanding the production of any record is determined by the Office of the General Counsel to be legally insufficient, improperly served, or from a tribunal not having jurisdiction, such subpoena shall be deemed a request for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure established in 45 CFR part 5.

■ 7. Section 2.6 is revised to read as follows:

§ 2.6 Certification and authentication of records.

Upon request, DHHS agencies will certify, pursuant to 42 U.S.C. 3505, the authenticity of copies of records that are to be disclosed. Fees for copying and certification are set forth in 45 CFR 5.43.

Dated: May 6, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–11818 Filed 5–13–03; 8:45 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Ch. I

[IB Docket No. 02–18, FCC 03–63]

Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-back Service

AGENCY: Federal Communications Commission.

ACTION: Policy Statement.

SUMMARY: This document is a summary of the Commission's decision to eliminate the comity-based prohibitions on call-back and the policy that allowed a foreign government or entity to make use of the enforcement mechanisms of the FCC to enforce foreign government prohibitions against U.S. carriers from offering call0singaling abroad. The FCC determined that the policy is no longer necessary in today's pro-competitive environment.

DATES: Effective March 24, 2003.

FOR FURTHER INFORMATION CONTACT: David Krech, International Bureau, (202) 418–1460.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order (Order), FCC 03–63, adopted on March 24, 2003, and released on March 28, 2003. The full text of this document is available for inspection and copying during normal business hours in the Consumer and Government Affairs Bureau's Reference Information Center, (Room CY–A257) of the Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. The document is also available for download over the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–03–63A1.pdf.* The complete text of this document also may be purchased from the Commission's copy contractor, Qualex, Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20054, telephone (202) 863–2893.

Summary of Order

1. On January 30, 2002, the Commission released a Notice of Proposed Rulemaking (67 FR 10656, March 9, 2002) to review the Commission's international call-back enforcement policy. International call-back arrangements allow foreign callers to take advantage of low U.S. international services rates, many of which are significantly lower than the rates available in their home countries. Specifically, the Commission's international call-back policy extends to the uncompleted call signaling configuration of call-back. Uncompleted call signaling involves a foreign caller who dials the call-back provider's switch in the United States, waits a predetermined number of rings, and hangs up before the switch answers. The switch then automatically returns the call, and upon completion, provides the caller in the foreign country with a U.S. dialtone.

2. In a 1994 order, the Commission authorized U.S. carriers to provide call-back service. The Commission concluded that the provision of call-back does not violate U.S. law or international law or regulations. In 1995, the Commission reconsidered its decision in light of international comity. The Commission adopted a policy prohibiting U.S. carriers from offering international call-back using the completed call signaling configuration to countries where it has been expressly prohibited. Foreign governments were invited to notify the Commission of the legality of call-back within their territory, and the Commission maintains a public file containing the submitted material from foreign governments.

3. Since adopting its call-back policy in 1995, the Commission has taken significant steps to open the U.S. international market to competition and to enhance consumer benefits on U.S. international routes. In this Order, the Commission concluded that the policy is no longer necessary in today's pro-competitive environment. Thus, the Commission decided to eliminate its comity-based call-back policy and discontinue the policy that allows a foreign government or entity to make use of the enforcement mechanisms of the Commission to prohibit the U.S.