

this section may be maintained either at the facility subject to a declaration, report, or notification requirement, or at a remote location, but all records must be accessible to any authorized agent, official or employee of the U.S. Government under § 721.1.

(d) *Reproduction of original records.*

(1) You may maintain reproductions instead of the original records provided all of the requirements of paragraph (b) of this section are met.

(2) If you must maintain records under this part, you may use any photostatic, miniature photographic, micrographic, automated archival storage, or other process that completely, accurately, legibly and durably reproduces the original records (whether on paper, microfilm, or through electronic digital storage techniques). The process must meet all of the following requirements, which are applicable to all systems:

(i) The system must be capable of reproducing all records on paper.

(ii) The system must record and be able to reproduce all marks, information, and other characteristics of the original record, including both obverse and reverse sides (unless blank) of paper documents in legible form.

(iii) When displayed on a viewer, monitor, or reproduced on paper, the records must exhibit a high degree of legibility and readability. For purposes of this section, legible and legibility mean the quality of a letter or numeral that enable the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readable and readability mean the quality of a group of letters or numerals being recognized as complete words or numbers.

(iv) The system must preserve the initial image (including both obverse and reverse sides, unless blank, of paper documents) and record all changes, who made them and when they were made. This information must be stored in such a manner that none of it may be altered once it is initially recorded.

(v) You must establish written procedures to identify the individuals who are responsible for the operation, use and maintenance of the system.

(vi) You must keep a record of where, when, by whom, and on what equipment the records and other information were entered into the system.

(3) *Requirements applicable to a system based on digital images.* For systems based on the storage of digital images, the system must provide accessibility to any digital image in the system. The system must be able to locate and reproduce all records

according to the same criteria that would have been used to organize the records had they been maintained in original form.

(4) *Requirements applicable to a system based on photographic processes.* For systems based on photographic, photostatic, or miniature photographic processes, the records must be maintained according to an index of all records in the system following the same criteria that would have been used to organize the records had they been maintained in original form.

§ 721.3 Destruction or disposal of records.

If the Department of Commerce or other authorized U.S. government agency makes a formal or informal request for a certain record or records, such record or records may not be destroyed or disposed of without the written authorization of the requesting entity.

**PART 722—INTERPRETATIONS—
[RESERVED]**

Note: This part is reserved for interpretations of parts 710 through 721 and also for applicability of decisions by the Organization for the Prohibition of Chemical Weapons (OPCW).

Dated: December 16, 1999.

R. Roger Majak,

Assistant Secretary for Export Administration.

[FR Doc. 99-33149 Filed 12-30-99; 8:45 am]

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DEPARTMENT OF STATE

22 CFR Part 103

[Public Notice 3183]

RIN 1400-ZA01

Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998; Taking of Samples; Recordkeeping and Inspections

AGENCY: Bureau of Arms Control, State.

ACTION: Final rule.

SUMMARY: The Department of State is issuing this final rule to implement the provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention), and the Chemical Weapons Convention Implementation Act of 1998 (Act) on the taking of samples and on the enforcement of the

requirements concerning record keeping and inspections. The Act authorizes the United States Government to implement provisions of the Convention. These regulations will enable the United States Government to execute the relevant provisions of the Convention and the Act.

EFFECTIVE DATE: December 30, 1999.

FOR FURTHER INFORMATION CONTACT:

Michael Coffee, Office of the Legal Adviser (L/ACN), 2201 C Street, N.W., Washington, DC 20520.

SUPPLEMENTARY INFORMATION: In Part II of the July 21, 1999 **Federal Register**, the Department of State (64 Fed. Reg. 39244) and the Department of Commerce (64 Fed. Reg. 39194) published, with a thirty day public comment period, proposed rules to implement provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and the Chemical Weapons Convention Implementation Act of 1998.

On April 25, 1997, the United States ratified the CWC. The Convention is both an arms control and nonproliferation treaty. As such, the Convention bans the development, production, stockpiling, and use of chemical weapons, and prohibits States Parties from assisting or encouraging anyone to engage in any activity prohibited by the Convention. States Parties to the Convention, including the United States, have agreed to a comprehensive verification regime that provides transparency and ensures that no State Party to the Convention is engaging in activity prohibited by the Convention. The verification regime includes declarations and reports by, and on-site inspection of, facilities engaged in or formerly engaged in activities involving certain chemicals. To further its nonproliferation objectives, the Convention requires restrictions on the import and export of certain chemicals. This rule implements §§ 304(f)(1) and 501 of the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. 6701 *et seq.* These regulations provide the guidelines under which the taking of a sample may be required during an on-site inspection conducted pursuant to the Convention. These regulations will also establish the civil enforcement regime for a violation of §§ 306 or 405 of the Act.

A number of responses were received by the Department of State. Following are relevant comments raised as well as the Department of State's response.

1. *Conformity with the Department of Commerce's Regulations.* One respondent indicated that the Departments of State's and Commerce's proposed regulations implementing the Convention and the Act did not always conform. The regulations have been modified to be more consistent.

2. *Definitions.* One respondent indicated that the definition of Administrative Law Judge was circular. As Administrative Law Judges are established by Title 5 of the United States Code, and are already defined in § 719.1(b) of the Department of Commerce's regulations, the term will not be defined in this rule. At the request of the same respondent, "Inspection assistant" has been defined. The same respondent requested a definition of "Site representatives." Because the term is self-explanatory, it will not be defined in this rule.

3. *Consultation with facility prior to requiring a sample.* All respondents requested that the Host Team Leader communicate with a representative of the site prior to the requirement of a sample. In practice, the site representative will be involved throughout the inspection. In § 103.3(a), the rule now explicitly gives the site representative the right to communicate reasons for which a sample should not be required.

4. *Voluntary provision of samples.* One respondent stated that a facility should be able to provide a sample without being required to do so. Although the section requiring the provision of samples had been drafted for situations in which samples are not volunteered, a new provision has been inserted in § 103.3(a) recognizing that samples may be voluntarily provided.

5. *Written notification of requirement to provide a sample.* One respondent requested that the notification of a requirement to provide a sample be in writing. This request has been approved, and is reflected in § 103.3(b).

6. *Purpose of analysis of samples.* All respondents commented on the limitation of the language concerning the reasons for analysis of samples. The provision has been deleted as it is unnecessary. Part II, paragraph 39, of the Convention's Verification Annex already provides that the Inspection Team may only engage in activities that are necessary to discharge its functions.

7. *On-site analysis of samples.* All respondents recommended that samples be analyzed on-site, where possible. This will occur pursuant to paragraph 53 of Part II of the Convention's Verification Annex, which provides that "[w]here possible, the analysis of samples shall be performed on-site."

8. *Observing the taking of a sample.* One respondent suggested that the owner or operator of a facility should be permitted to observe the taking of a sample. The owner or operator, occupant or agent in charge of the inspected premises already has the right to decide whether a representative of the premises will take the sample. The rule has been modified in § 103.3(f) to explicitly allow the owner or operator, occupant or agent in charge of the inspected premises to elect to have a representative present during the taking of a sample.

9. *United States National Authority (USNA) decision that a sample is not required.* One respondent requested clarification that a decision by the USNA not to require a sample will result in no requirement to provide a sample. The rule has been modified in § 103.3(e)(2) accordingly.

10. *Failure to comply with section 103.3 of this rule.* One respondent has questioned the text in § 103.3(i). Because a failure to provide a required sample might delay or impede an inspection, it may be determined to be a violation of § 306 of the Act.

11. *Handling of samples.* One respondent has recommended that samples should be handled in a manner consistent with facility rules. Such a provision belongs in a facility agreement between the United States and the Organization for the Prohibition of Chemical Weapons.

12. *Interpretation of Sections 306 and 405 of the Act.* All respondents sought clarity concerning actions that will be considered violations of sections 306 and 405 of the Act. Because determinations of violations are fact-specific, it would be impossible to adequately "interpret" these provisions in this rule.

13. *Recordkeeping Requirement.* One respondent stated that § 103.5(b)(3) of the proposed rule exceeded the authority of § 405(3) of the Act. That provision had been modified to provide clarity to the public. However, to avoid confusion, § 103.5(b)(3) now repeats the language of § 405(3) of the Act.

14. *Requesting a hearing.* One respondent suggested that thirty (30) days should be permitted to respond to a Notice of Violation and Assessment and a proposed order. Because § 501(a)(2)(A) of the Act establishes a fifteen (15) day timeframe for a response, this rule permits only fifteen (15) days for a response.

15. *Computation of time for section 103.8 of this rule.* One respondent requested that this rule adopt rules to compute time for purposes of § 103.8. A

computation rule is included in § 103.8(c).

16. *Timing of review of initial decision.* All respondents requested more time during the review of the initial decision in § 103.8(a). Under § 501(a)(3) of the Act, an initial decision and order becomes final unless the head of the USNA modifies or vacates the decision and order within thirty (30) days. Minor changes were made to the timelines in § 103.8(a) to the extent possible, consistent with § 501(a)(3) of the Act.

17. *Introduction of new or additional evidence.* One respondent recommended that new or additional evidence be permitted during the review of an initial decision. Text has been deleted from § 103.8(a)(2); instead § 557 of the Administrative Procedure Act shall govern.

18. *Oral Argument.* Two respondents recommended that oral argument should not be explicitly precluded. Section 103.8(a)(6) no longer explicitly precludes oral argument. The Administrative Law Judge will have discretion in permitting oral argument.

Administrative Procedure Act Requirements

Because this rule involves a foreign affairs function of the United States, it is not subject to 5 U.S.C. 553 and 554. However, the Department has previously issued this rule in proposed form and comments were encouraged for the development of this final rule.

Regulatory Flexibility Analysis

Because this rule involves a foreign affairs function of the United States, the Department of State is not required to prepare a regulatory flexibility analysis.

Executive Order 12866 Determination

This rule is exempt from Executive Order 12866, but has been reviewed internally by the Department to ensure consistency with the purposes thereof.

Paperwork Reduction Act Statement

Section 103.5(b) of this rule states that no person may willfully fail or refuse: (1) to establish or maintain any record required under the Chemical Weapons Convention Implementation Act or 15 CFR Parts 710 through 722; (2) to submit any report, notice, or other information prescribed by the Act or 15 CFR Parts 710 through 722; or (3) to permit access to or copying of any record that is exempt from disclosure under the Act or 15 CFR Parts 710 through 722.

Notwithstanding any other provision of law, no person is required, nor shall any person be subject to a penalty for failure, to comply with a collection of

information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. In promulgating 15 CFR Parts 710 through 722, the Department of Commerce revised an existing collection of information requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which has been submitted for approval to the Office of Management and Budget. Accordingly, the Department of State will not seek the approval of the Office of Management and Budget. The public reporting burdens for the new collections of information are estimated to average 9 hours for Schedule 1 chemicals, 7.2 hours for Schedule 2 chemicals, 2.5 hours for Schedule 3 chemicals, 5.3 hours for unscheduled discrete organic chemicals, and .17 hours for Schedule 1 notifications. These estimates include the time required to complete the required forms.

Unfunded Mandates Reform Act Requirements

No actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Federalism Assessment

Because this rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, a Federalism Assessment is not warranted.

List of Subjects in 22 CFR Part 103

Administrative practice and procedures, Chemicals, Foreign relations, Freedom of information, International organizations, Investigations, National security information, Penalties, Reporting and recordkeeping requirements, Treaties.

For the reasons set forth in the preamble, the Department adds to subchapter K the following part 103 to Title 22 of the Code of Federal Regulations:

PART 103—REGULATIONS FOR IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION AND THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT OF 1998 ON THE TAKING OF SAMPLES AND ON ENFORCEMENT OF REQUIREMENTS CONCERNING RECORDKEEPING AND INSPECTIONS

Subpart A—General

Sec.

103.1 Purpose.

103.2 Definitions.

Subpart B—Samples

103.3 Requirement to provide a sample.

Subpart C—Recordkeeping and Inspection Requirements

103.4 General.

103.5 Violations.

103.6 Penalties.

103.7 Initiation of administrative enforcement proceedings.

103.8 Final agency decision after administrative proceedings.

103.9 Final agency decision after settlement negotiations.

103.10 Appeals.

103.11 Payment of final assessment.

103.12 Reporting a violation.

Authority: Pub. L. 105-277, 112 Stat. 2681, Div. I (22 U.S.C. 6701 *et seq.*).

Subpart A—General

§ 103.1 Purpose.

This part is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention Implementation Act of 1998 (Act), 22 U.S.C. 6701 *et seq.* The Chemical Weapons Convention Regulations promulgated by the Department of Commerce, 15 CFR Parts 710 through 722, also implement sections of the Act.

§ 103.2 Definitions.

The following are definitions of terms as used in this part only.

Bureau of Export Administration (BXA). The Bureau of Export Administration of the United States Department of Commerce, including the Office of Export Administration and the Office of Export Enforcement.

Chemical Weapons Convention (CWC or Convention). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and its annexes opened for signature on January 13, 1993, and entered into force on April 29, 1997.

CWCIA. The Chemical Weapons Convention Implementation Act of 1998. (22 U.S.C. 6701 *et seq.*)

CWCR. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce. (15 CFR parts 710 through 722.)

Executive Director. The Executive Director, Office of the Legal Adviser, U.S. Department of State.

Facility agreement. A written agreement or arrangement between a State Party to the Convention and the Organization for the Prohibition of Chemical Weapons relating to a specific facility subject to on-site verification pursuant to Articles IV, V, and VI of the Convention.

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further administrative review under this part, but which may be subject to collection proceedings or judicial review in an appropriate federal court as authorized by law.

Host Team. The U.S. Government team that accompanies the Inspection Team during a CWC inspection to which this part applies.

Host Team Leader. The head of the U.S. Government team that hosts and accompanies the Inspection Team during a CWC inspection to which this part applies.

Inspection assistant. An individual designated by the Technical Secretariat to assist inspectors in an inspection, such as medical, security and administrative personnel and interpreters.

Inspection Team. The group of inspectors and inspection assistants assigned by the Director-General of the OPCW's Technical Secretariat to conduct a particular inspection.

Lead agency. The executive department or agency responsible for implementation of the CWC declaration and inspection requirements for specified facilities. The lead agencies are the Department of Defense (DOD) for facilities owned and operated by DOD (including those operated by contractors to the agency), and those facilities leased to and operated by DOD (including those operated by contractors to the agency); the Department of Energy (DOE) for facilities owned and operated by DOE (including those operated by contractors to the agency), and those facilities leased to and operated by DOE (including those operated by contractors to the agency), including the National Laboratories and components of the nuclear weapons complex; and the Department of Commerce (DOC) for all facilities that are not owned and operated by or leased to and operated by DOD, DOE or other U.S. Government agencies. Other departments and agencies that have notified the United States National Authority of their decision to be excluded from the CWCR shall also have lead agency responsibilities for facilities that are

owned or operated by (including those operated by contractors to the agency), or that are leased to or operated by, those other departments and agencies (including those operated by contractors to the agency).

Office of Chemical and Biological Weapons Conventions. The office in the Bureau of Arms Control of the United States Department of State that includes the United States National Authority Coordinating Staff.

Organization for the Prohibition of Chemical Weapons (OPCW). The entity established by the Convention to achieve the object and purpose of the Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

Party. The United States Department of State and any person named as a respondent under this part.

Perimeter. In case of a challenge inspection, the external boundary of the site, defined by either geographic coordinates or description on a map.

Person. Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

Respondent. Any person named as the subject of a letter of intent to charge, or a Notice of Violation and Assessment (NOVA) and proposed order.

Secretary. The Secretary of State.

Technical Secretariat. The Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

United States National Authority. The Department of State serving as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and States Parties to the Convention and implementing the provisions of the CWCIA in coordination with an interagency group designated by the President consisting of the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Energy, the Chairman of the Joint Chiefs of Staff and the heads of agencies considered necessary or advisable by the President, or their designees. The Secretary of State is the Director of the United States National Authority.

Subpart B—Samples

§ 103.3 Requirement to provide a sample.

(a) *Voluntary provision of a sample.* The Host Team Leader will notify appropriate site representatives of any request by an Inspection Team to take a sample. At the request of the appropriate site representative, this notification will be in writing. A site representative may volunteer to provide a sample to the Inspection Team, or may communicate to the Host Team Leader any reason for which the representative believes a sample should not be required.

(b) *Notification of requirement to provide a sample.* If a sample is not provided pursuant to paragraph (a) of this section, the Host Team Leader will notify, in writing, the owner or operator, occupant or agent in charge of an inspected premises of any requirement, under paragraph (c) or (e) of this section, to provide a sample pursuant to a request, made in accordance with paragraph (k) of this section, of an Inspection Team of the Technical Secretariat.

(c) *Requirement to provide a sample.* Pursuant to section 304(f)(1) of the CWCIA, unless a lead agency advises the United States National Authority pursuant to paragraph (d) of this section, the owner or operator, occupant or agent in charge of the premises to be inspected is hereby required to provide a sample pursuant to a request, made in accordance with paragraph (k) of this section, of an Inspection Team of the Technical Secretariat that a sample be taken in accordance with the applicable provisions contained in the Chemical Weapons Convention and the CWCIA.

(d) *Consultations with the United States National Authority.* After consulting with the Host Team Leader, a lead agency that finds that any of the following conditions, as modified pursuant to paragraph (j) of this section if applicable, may not have been satisfied shall promptly advise the United States National Authority, which, in coordination with the interagency group designated by the President in section 2 of Executive Order 13128, shall make a decision:

(1) The taking of a sample is consistent with the inspection aims under the Convention and with its Confidentiality Annex;

(2) The taking of a sample does not unnecessarily hamper or delay the operation of a facility or affect its safety, and is arranged so as to ensure the timely and effective discharge of the Inspection Team's functions with the least possible inconvenience and disturbance to the facility;

(3) The taking of a sample is consistent with the applicable facility agreement. In particular:

(i) Any sample will be taken at sampling points agreed to in the relevant facility agreement; and

(ii) Any sample will be taken according to procedures agreed to in the relevant facility agreement;

(4) In the absence of a facility agreement, due consideration is given to existing sampling points used by the owner or operator, occupant or agent in charge of the premises, consistent with any procedures developed pursuant to the CWCIA (15 CFR parts 710 through 722);

(5) The taking of a sample does not affect the safety of the premises and will be consistent with safety regulations established at the premises, including those for protection of controlled environments within a facility and for personal safety;

(6) The taking of a sample does not pose a threat to the national security interests of the United States; and

(7) The taking of a sample is consistent with any conditions negotiated pursuant to paragraph (j) of this section, if applicable.

(e) *Determination by United States National Authority.* (1) If, after being advised by the lead agency pursuant to paragraph (d) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that all of the conditions of paragraph (d) are satisfied and that a sample shall be required, then the owner or the operator, occupant or agent in charge of the premises shall provide a sample pursuant to a request of the Inspection Team of the Technical Secretariat.

(2) If, however, after being advised by the lead agency pursuant to paragraph (d) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that any of the conditions of paragraph (d) are not satisfied and that a sample shall not be required, then the owner or the operator, occupant or agent in charge of the premises shall not be required to provide a sample pursuant to a request of the Inspection Team of the Technical Secretariat.

(f) *Person to take a sample.* If a sample is required, the owner or the operator, occupant or agent in charge of the inspected premises will determine whether the sample will be taken by a representative of the premises, the Inspection Team, or any other

individual present. The owner or the operator, occupant or agent in charge of the inspected premises may elect to have a representative present during the taking of a sample.

(g) *Requirement that samples remain in the United States.* No sample collected in the United States pursuant to an inspection permitted by the CWCIA may be transferred for analysis to any laboratory outside the territory of the United States.

(h) *Handling of samples.* Samples will be handled in accordance with the Convention, the CWCIA, other applicable law, and the provisions of any applicable facility agreement.

(i) *Failure to comply with this section.* Failure by any person to comply with this section may be treated as a violation of section 306 of the Act and section 103.5(a).

(j) *Conditions that restrict sampling activities during challenge inspections.* During challenge inspections within the inspected premises the Host Team may negotiate conditions that restrict activities regarding sampling, e.g., conditions that restrict where, when, and how samples are taken, whether samples are removed from the site, and how samples are analyzed.

(k) *Format of Inspection Team request.* It is the policy of the United States Government that Inspection Team requests for samples should be in written form from the head of the Inspection Team. When necessary, before a sample is required to be provided, the Host Team Leader should seek a written request from the head of the Inspection Team.

(l) *Requirement to provide a sample in the band around the outside of the perimeter during a challenge inspection.* In a band, not to exceed a width of 50 meters, around the outside of the perimeter of the inspected site, the Inspection Team, during a challenge inspection, may take wipes, air, soil or effluent samples where either:

(1) There is consent; or

(2) Such activity is authorized by a search warrant obtained pursuant to section 305(b)(4) of the CWCIA.

Subpart C—Recordkeeping and Inspection Requirements

§ 103.4 General.

This subpart implements the enforcement of the civil penalty provisions of section 501 of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), and sets forth relevant administrative proceedings by which such violations are adjudicated. Both the Department of State (in this subpart), and the

Department of Commerce (in part 719 of the CWCIA at 15 CFR parts 710 through 722) are involved in the implementation and enforcement of section 501.

§ 103.5 Violations.

(a) *Refusal to permit entry or inspection.* No person may willfully fail or refuse to permit entry or inspection, or disrupt, delay or otherwise impede an inspection, authorized by the CWCIA.

(b) *Failure to establish or maintain records.* No person may willfully fail or refuse:

(1) To establish or maintain any record required by the CWCIA or the Chemical Weapons Convention Regulations (CWCIA, 15 CFR parts 710 through 722) of the Department of Commerce; or

(2) To submit any report, notice, or other information to the United States Government in accordance with the CWCIA or CWCIA; or

(3) To permit access to or copying of any record that is exempt from disclosure under the CWCIA or the CWCIA.

§ 103.6 Penalties.

(a) *Civil penalties.* (1) *Civil penalty for refusal to permit entry or inspection.* Any person that is determined to have willfully failed or refused to permit entry or inspection, or to have willfully disrupted, delayed or otherwise impeded an authorized inspection, as set forth in § 103.5(a), shall pay a civil penalty in an amount not to exceed \$25,000 for each violation. Each day the violation continues constitutes a separate violation.

(2) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain any record, or to submit any report, notice, or other information required by the CWCIA or the CWCIA, or to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCIA as set forth in § 103.5(b), shall pay a civil penalty in an amount not to exceed \$5,000 for each violation.

(b) *Criminal penalties.* Any person that knowingly violates the CWCIA by willfully failing or refusing to permit entry or inspection; or by disrupting, delaying or otherwise impeding an inspection authorized by the CWCIA; or by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information; or by willfully failing or refusing to permit access to or copying of any record exempt from disclosure under the

CWCIA or CWCIA, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, or be imprisoned for not more than one year, or both.

(c) *Other remedial action.* (1)

Injunction. The United States may, in a civil action, obtain an injunction against:

(i) The conduct prohibited under 18 U.S.C. 229 or 229C; or

(ii) The preparation or solicitation to engage in conduct prohibited under 18 U.S.C. 229 or 229D.

(2) In addition, the United States may, in a civil action, restrain any violation of section 306 or section 405 of the CWCIA, or compel the taking of any action required by or under the CWCIA or the Convention.

§ 103.7 Initiation of administrative enforcement proceedings.

(a) *Issuance of Notice of Violation and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, Department of Commerce, may request that the Secretary initiate an administrative enforcement proceeding under this section and 15 CFR 719.5. If the request is in accordance with applicable law, the Secretary will initiate an administrative enforcement proceeding by issuing a Notice of Violation and Assessment (NOVA). The Office of Chief Counsel for Export Administration, Department of Commerce shall serve the NOVA as directed by the Secretary.

(b) *Content of NOVA.* The NOVA shall constitute a formal complaint, and will set forth the basis for the issuance of the proposed order. It will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the amount of the civil penalty to be assessed. The NOVA will inform the respondent of the right to request a hearing pursuant to paragraph (e) of this section and the CWCIA (15 CFR parts 710 through 722) at 15 CFR 719.6, inform the respondent that failure to request such a hearing shall result in the proposed order becoming final and unappealable on signature of the Secretary of State, and provide payment instructions. A copy of the regulations that govern the administrative proceedings will accompany the NOVA.

(c) *Proposed order.* A proposed order shall accompany every NOVA. It will briefly set forth the substance of the alleged violation(s) and the statutory, regulatory or other provisions violated. It will state the amount of the civil penalty to be assessed.

(d) *Notice.* The Secretary shall notify, via the Department of Commerce, the respondent (or respondent's agent for service of process or attorney) of the initiation of administrative proceedings by sending, via first class mail, facsimile, or by personal delivery, the relevant documents.

(e) *Time to answer.* If the respondent wishes to contest the NOVA and proposed order issued by the Secretary, the respondent must request a hearing in writing within 15 days from the date of the NOVA. If the respondent requests a hearing, the respondent must answer the NOVA within 30 days from the date of the request for hearing. The request for hearing and answer must be filed with the Administrative Law Judge (ALJ), along with a copy of the NOVA and proposed order, and served on the Office of Chief Counsel for Export Administration, Department of Commerce, and any other address(es) specified in the NOVA, in accordance with 15 CFR 719.8.

(f) *Content of answer.* The respondent's answer must be responsive to the NOVA and proposed order, and must fully set forth the nature of the respondent's defense(s). The answer must specifically admit or deny each separate allegation in the NOVA; if the respondent is without knowledge, the answer will so state and will operate as a denial. Failure to deny or controvert a particular allegation will be deemed an admission of that allegation. The answer must also set forth any additional or new matter the respondent believes supports a defense or claim of mitigation. Any defense or partial defense not specifically set forth in the answer shall be deemed waived, and evidence thereon may be refused, except for good cause shown.

(g) *English required.* The request for hearing, answer, and all other papers and documentary evidence must be submitted in English.

(h) *Waiver.* The failure of the respondent to file a request for a hearing and an answer within the times provided constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA and proposed order. If no hearing is requested and no answer is provided, the Secretary will sign the proposed order, which shall, upon signature, become final and unappealable.

(i) *Administrative procedures.* The regulations that govern the administrative procedures that apply when a hearing is requested are set forth in the CWC at 15 CFR part 719.

§ 103.8 Final agency decision after administrative proceedings.

(a) Review of initial decision.

(1) *Petition for review.* Any party may, within 7 days of the Administrative Law Judge's (ALJ) certification of the initial decision and order, petition the Secretary for review of the initial decision. A petition for review shall be addressed to and served on the Executive Director of the Office of the Legal Adviser, U.S. Department of State, 2201 C Street, N.W., Room 5519, Washington D.C. 20520, and shall also be served on the Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H-3839, Washington, D.C. 20230, and on the respondent. Petitions for review may be filed only on one or more of the following grounds:

- (i) That a necessary finding of fact is omitted, erroneous or not supported by substantial evidence of record;
- (ii) That a necessary legal conclusion or finding is contrary to law;
- (iii) That a prejudicial procedural error has occurred; or
- (iv) That the decision or the extent of sanctions is arbitrary, capricious or an abuse of discretion.

(2) *Content of petition for review.* The petition must specifically set forth the grounds on which review is requested and be supported by citations to the record, statutes, regulations, and principal authorities.

(3) *Decision to review.* Review of the initial decision by the Secretary is discretionary, and is not a matter of right. The Secretary shall accept or decline review of the initial decision and order within 3 days after a petition for review is filed. If no such petition is filed, the Secretary may, on his or her own initiative, notify the parties within 10 days after the ALJ's certification of the initial decision and order that he or she intends to exercise his or her discretion to review the initial decision.

(4) *Effect of decision to review.* The initial decision is stayed until further order of the Secretary upon a timely petition for review, or upon action to review taken by the Secretary on his or her own initiative.

(5) *Review declined.* If the Secretary declines to exercise discretionary review, such order, and the resulting final agency decision, will be served on all parties personally, by overnight mail, or by registered or certified mail, return receipt requested. The Secretary need not give reasons for declining review.

(6) *Review accepted.* If the Secretary grants a petition for review or decides to review the initial decision on his or her own initiative, he or she will issue

an order confirming that acceptance and specifying any issues to be briefed by all parties within 10 days after the order. Briefing shall be limited to the issues specified in the order. Only those issues specified in the order will be considered by the Secretary. The parties may, within 5 days after the filing of any brief of the issues, file and serve a reply to that brief. The Department of Commerce shall review all written submissions, and, based on the record, make a recommendation to the Secretary as to whether the ALJ's initial decision should be modified or vacated. The Secretary will make a final decision within 30 days after the ALJ's certification of the initial decision and order.

(b) *Final decision.* Unless the Secretary, within 30 days after the date of the ALJ's certification of the initial decision and order, modifies or vacates the decision and order, with or without conditions, the ALJ's initial decision and order shall become effective as the final decision and order of the United States Government. If the Secretary does modify or vacate the initial decision and order, that decision and order of the Secretary shall become the final decision and order of the United States Government. The final decision and order shall be served on the parties and will be made available to the public.

(c) *Computation of time for the purposes of this section.* In computing any period of time prescribed or allowed by this section, the day of the act, event, or default from which the designated period of time begins to run is not included. The last day of the period is computed to be included unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 6(a) of the Federal Rules of Civil Procedure), in which case the period runs until the end of the next day that is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of time prescribed or allowed is 7 days or less.

§ 103.9 Final agency decision after settlement negotiations.

(a) *Settlements based on letter of intent to charge.*—(1) *Approval of settlement.* Pursuant to § 719.5(b) of the CWC (15 CFR parts 710 through 722), the Department of Commerce may notify a respondent by letter of the intent to charge. If, following the issuance of such a letter of intent to charge, the Department of Commerce and respondent reach an agreement to settle a case, the Department of Commerce will recommend the proposed settlement to the Secretary. If the

recommended settlement is in accordance with applicable law the Secretary will approve and sign it. No action is required by the ALJ in cases where the Secretary approves and signs such a settlement agreement and order.

(2) *Refusal to approve settlement.* If the Secretary refuses to approve the recommended settlement, the Secretary will notify the parties and the case will proceed as though no settlement proposal had been made.

(b) *Settlements following issuance of a NOVA.*—(1) *Approval of settlement.* When the Department of Commerce and respondent reach an agreement to settle a case after administrative proceedings have been initiated before an ALJ, the Department of Commerce will recommend the settlement to the Secretary of State. If the recommended settlement is in accordance with applicable law, the Secretary will approve and sign it. If the Secretary approves the settlement, the Secretary shall notify the ALJ that the case is withdrawn from adjudication.

(2) *Refusal to approve settlement.* If the Secretary of State refuses to approve the recommended settlement, the Secretary will notify the parties of the disapproval, and the case will proceed as though no settlement proposal had been made.

(c) *Scope of settlement.* Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought pursuant to this part. This reflects the fact that the Government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility is vested in the Attorney General and the Department of Justice.

(d) *Finality.* Cases that are settled may not be reopened or appealed.

§ 103.10 Appeals.

Any person adversely affected by a final order respecting an assessment may, within 30 days after the final order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit or for any other circuit in which the person resides or transacts business, to appeal the order.

§ 103.11 Payment of final assessment.

(a) *Time for payment.* Full payment of the civil penalty must be made within 30 days of the date upon which the final order becomes effective, or within the time specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order.* The Secretary, through the Attorney General, may file suit in an appropriate district court if necessary to enforce compliance with a final order issued pursuant to this part. This suit will include a claim for interest at current prevailing rates from the date payment was due or ordered or, if an appeal was filed pursuant to § 103.10, from the date of final judgment.

(c) *Offsets.* The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 103.12 Reporting a violation.

If a person learns that a violation of the Convention, the CWCIA, this part, or the CWC (15 CFR parts 710 through 722) has occurred or may occur, that person may notify: United States National Authority, Office of Chemical and Biological Weapons Conventions, Bureau of Arms Control, U.S. Department of State, Washington, DC 20520, Telephone: (703) 235-1204 or toll-free (877) CWC-NACS ((877) 292-6227), Facsimile: (703) 235-1065.

Avis Bohlen,

Assistant Secretary of State, Bureau of Arms Control.

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