

that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 28, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality

of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: September 19, 2017.

**Catherine R. McCabe,**

*Acting Regional Administrator, Region 2.*

Part 52 chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart HH—New York**

■ 2. In § 52.1670(e) the table titled “EPA APPROVED NEW YORK NONREGULATORY AND QUASI-REGULATORY PROVISIONS” is amended by adding the entry “Regional Haze Five-Year Progress Report” at the end of the table to read as follows:

**§ 52.1670 Identification of plan.**

\* \* \* \* \*  
(e) \* \* \*

**EPA-APPROVED NEW YORK NONREGULATORY AND QUASI-REGULATORY PROVISIONS**

SIP element	Applicable geographic or nonattainment area	New York submittal date	EPA approval date	Explanation
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Regional Haze Five-Year Progress Report.	State-wide .....	June 16, 2015 .....	September 29, 2017; [Insert <b>Federal Register</b> page citation].	

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BILLING CODE 6560–50–P

**CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD**

**40 CFR Part 1601**

[Agency Docket Number CSB 17–1]

**Freedom of Information Act Program**

**AGENCY:** Chemical Safety and Hazard Investigation Board.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule revises the Chemical Safety and Hazard Investigation Board’s (CSB) Freedom of Information Act (FOIA) rule. The purpose of this revision is to ensure consistency with the FOIA Improvement Act of 2016 and to update certain other provisions of the CSB’s current rule. This interim final rule supersedes all previous CSB rules and guidance that supplement and implement the CSB FOIA Program.

**DATES:**

*Effective date:* This rule is effective September 29, 2017.

*Comment date:* Comments must be received by October 30, 2017.

**ADDRESSES:** You may send comments by any of the following methods:

(a) *Email to:* [kara.wenzel@csb.gov](mailto:kara.wenzel@csb.gov). In the subject line of the message include “Comment—Interim Final FOIA Rule.”

(b) *Fax:* 202–261–7650, attention: Kara Wenzel, Acting General Counsel, Chemical Safety and Hazard Investigation Board.

(c) *Mail to:* Kara Wenzel, Acting General Counsel, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(d) *Hand Delivery/Courier:* Kara Wenzel, Acting General Counsel, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

*Instructions:* All submissions must include the title “Interim Final FOIA Rule” and the agency docket number for this rulemaking, CSB 17–1. The CSB will post all comments received by the due date to the CSB’s Web site, <http://www.csb.gov/>, including any personal information provided. For additional details on submitting comments, see “Public Participation” in the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket information:* For access to the docket to read a compilation of all

comments submitted, please visit <http://www.csb.gov/> after the final date for submission of comments.

**FOR FURTHER INFORMATION CONTACT:** Kara Wenzel, Acting General Counsel, 202–261–7600, or [kara.wenzel@csb.gov](mailto:kara.wenzel@csb.gov).

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

The FOIA, 5 U.S.C. 552, establishes basic procedures for public access to agency records. The FOIA requires federal agencies to issue regulations to establish procedures to implement the FOIA. The CSB’s current FOIA rule is codified at 40 CFR part 1601.

This interim rule revises 40 CFR part 1601 to implement provisions of the FOIA Improvement Act of 2016 and to make additional legal updates. Specifically, this interim rule implements changes to conform to the requirements of the following amendments to the FOIA since the adoption of the CSB’s current FOIA rule: The OPEN Government Act of 2007, Public Law 110–175, the OPEN FOIA Act of 2009, Public Law 111–83, and the FOIA Improvement Act of 2016, Public Law 114–185.

For example, the FOIA Improvement Act of 2016 introduced several changes to current law, including, but not

limited to the following: An increase in the minimum time for an administrative appeal to ninety (90) day; increased opportunities for dispute resolution services at various times throughout the FOIA process; waiver of fees if agencies do not meet mandated time limits; proactive disclosure of records of general interest to the public that are appropriate for such disclosure; and application of the Department of Justice's "foreseeable harm" standard as the basis for withholding information pursuant to a FOIA exemption, 5 U.S.C. 552(a)(8)(A)(i)(I).

### Public Participation

The CSB is issuing an interim final rule to revise its current FOIA regulation because these changes are required by statutory amendments to FOIA since the adoption of the CSB's original FOIA rule in 2000. By issuing an interim final rule, these regulatory changes will take effect sooner than would be possible with the publication of a Notice of Proposed Rulemaking. Even though the CSB has issued an interim final rule, the CSB welcomes public comments from interested persons regarding any aspect of the changes made by this interim final rule. Please refer to the **ADDRESSES** section above for guidance on submitting comments. The CSB will consider all public comments in drafting the final rule.

All comments must be submitted in English, or if not, accompanied by an English translation.

Please note that all comments received are considered part of the public record and will be made available for public inspection online at <http://www.csb.gov/disclaimers/legal-affairs-foia>. Posted information made available on the CSB Web site will include personal identifying information (such as name and address) voluntarily submitted by the commenter, unless the CSB receives a specific request as described below to withhold such information.

If you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted. If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include

the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify any confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.csb.gov/>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's records, but not posted online.

The CSB reserves the right, but has no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.csb.gov/> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the rulemaking record and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

### Regulatory Procedures

*Administrative Procedure Act (5 U.S.C. Ch. 5)*

The CSB's implementation of this rule as an interim final rule, with provision for post-promulgation public comment, is based on section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553(b). Under section 553(b), an agency may issue a rule without notice of proposed rulemaking and the pre-promulgation opportunity for public comment, with regard to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." The CSB has determined that many of the revisions are to interpretive rules issued by the CSB, as they merely advise the public of the CSB's implementation of recent amendments to the FOIA. Moreover, the CSB has determined that the remaining revisions are rules of agency procedure or practice, as they do not change the substantive standards the agency applies in implementing the FOIA. The CSB has also concluded that there is good cause to find that a pre-publication public comment period is unnecessary. These revisions to the existing regulations in 40 CFR part 1601 merely implement statutory changes, align the CSB's regulations with controlling judicial decisions, and clarify agency procedures.

*Unfunded Mandates Reform Act (2 U.S.C. Ch. 25)*

This interim final rule is not subject to the Unfunded Mandates Reform Act because it does not contain a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000.00 or more in any one year. Nor will it have a significant or unique effect on small governments.

*Regulatory Flexibility Act (5 U.S.C. Ch. 6)*

This interim final rule is not subject to the Regulatory Flexibility Act. The CSB has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The rule implements the procedures for processing FOIA requests within the CSB. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for the requesters. Thus, fees assessed by CSB will be nominal. Further, the "small entities" that make FOIA requests, as compared with individual and other requesters, are relatively few in number.

*Paperwork Reduction Act (44 U.S.C. Ch. 35)*

This interim final rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. The Paperwork Reduction Act imposes certain requirements on Federal agencies in connection with the conducting or sponsoring of any collection of information. This interim rule does not contain any new collection of information requirement within the meaning of the Act.

*Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. Ch. 6)*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000.00 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*National Environmental Policy Act of 1969 (5 U.S.C. 804)*

This interim final rule will not have significant effect on the human environment. Accordingly, this rule is categorically excluded from environmental analysis under 43 CFR 46.210(i).

*E-Government Act of 2002 (44 U.S.C. 3504)*

Section 206 of the E-Government Act requires agencies, to the extent practicable, to ensure that all information about that agency required to be published in the **Federal Register** is also published on a publicly accessible Web site. All information about the CSB required to be published in the **Federal Register** may be accessed at <http://www.csb.gov/>. This Act also requires agencies to accept public comments "by electronic means." See the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document, for directions on the electronic submission of public comments on this interim final rule.

Finally, the E-Government Act requires, to the extent practicable, that agencies ensure that a publicly accessible Federal Government Web site contains electronic dockets for rulemakings under the Administrative Procedure Act of 1946 (5 U.S.C. 551 *et seq.*). Under this Act, an electronic docket consists of all submissions under section 553(c) of title 5, United States Code; and all other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically. The Web site <http://www.csb.gov/> will contain an electronic dockets for this rulemaking.

*Plain Writing Act of 2010 (5 U.S.C. 301)*

Under this Act, the term "plain writing" means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience. To ensure that this rulemaking has been written in plain and clear language so that it can be used and understood by the public, the CSB has modeled the language of this interim final rule on the Federal Plain Language Guidelines.

**List of Subjects in 40 CFR Part 1601**

Administrative practice and procedure, Archives and records, Confidential business information, Freedom of information, Privacy.

For the reasons stated in the preamble, the CSB revises 40 CFR part 1601 to read as follows:

**PART 1601—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT****Subpart A—Purpose, Scope, and Applicability**

Sec.

- 1601.1 Purpose and scope.  
1601.2 Applicability.

**Subpart B—Procedures for Requesting and Disclosing Records**

- 1601.10 Proactive disclosures.  
1601.11 Requirements for making requests.  
1601.12 Responsibility for responding to requests.  
1601.13 Timing of responses to requests.  
1601.14 Responses to requests.  
1601.15 Special procedures for confidential commercial information.

**Subpart C—Appeals**

- 1601.20 Processing of appeals.

**Subpart D—Administration**

- 1601.30 Protection of records.  
1601.31 Preservation of records pertaining to requests under this part.  
1601.32 Other rights and services.

**Subpart E—Fees**

- 1601.40 Procedures for fees.

**Authority:** 5 U.S.C. 552.

**Subpart A—Purpose, Scope, and Applicability****§ 1601.1 Purpose and scope.**

(a) *In general.* This part contains the Chemical Safety and Hazard Investigation Board ("CSB" or "agency") regulations implementing the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. These regulations provide the procedures by which members of the public may obtain access to records compiled, created, and maintained by the CSB, along with the CSB procedures for responding to such requests. The rules in this subpart are to be read in conjunction with the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the White House Office of Management and Budget (OMB Guidelines).

**(b) Definitions.**

(1) *Chairperson* means the Chairperson of the CSB.

(2) *Chief FOIA Officer* means the person designated by Chairperson who has overall responsibility for the CSB's compliance with the FOIA.

(3) *FOIA Officer* means a person designated by the Chief FOIA Officer to process requests for the CSB documents under the FOIA.

(4) *Record* means information regardless of its physical form or characteristics including information created, stored, and retrievable by electronic means that is created or obtained by the CSB and under the

control of the CSB at the time of the request, including information maintained for the CSB by an entity under Government contract for records management purposes. *Record* includes any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved.

(5) *Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency that requests access to records in the possession of the CSB pursuant to 5 U.S.C. 552.

**§ 1601.2 Applicability.**

(a) *In general.* The FOIA and the regulations in this part apply to all CSB documents and information. However, if another law sets specific procedures for disclosure that supersede the FOIA, then CSB must process a request in accordance with the procedures that apply to those specific documents. If a request is received for disclosure of a document to the public that is not required to be released under the provisions of law other than the FOIA, then the CSB must consider the request under the FOIA and the regulations in this part. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with CSB's Privacy Act regulations (part 1602 of this chapter), as well as under this subpart.

(b) *Disclosure of requested records.* The CSB will only withhold information under the FOIA if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. The FOIA Officer will make requested records available to the public to the greatest extent possible in keeping with the FOIA, except for the following types of records, which are exempt from the disclosure requirements:

(1) Records specifically authorized under criteria established by an Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and which are, in fact, properly classified pursuant to such E.O.;

(2) Records related solely to the internal personnel rules and practices of the CSB;

(3) Records specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or that the statute establishes particular criteria for withholding information or refers to

particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. 552(b)(3);

(4) Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the CSB, provided that the deliberative process privilege shall not apply to records created twenty-five (25) years or more before the date on which the records were requested;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Records contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Geological or geophysical information and data, including maps, concerning wells.

(c) *Disclosure of segregable nonexempt material.* The CSB will consider whether partial disclosure of

information is possible whenever the agency determines that a full disclosure of a requested record is not possible. If a requested record contains exempted material along with nonexempted material, all reasonably segregable nonexempt material must be disclosed.

(d) *Records available through routine distribution procedures.* If the record requested includes material published and offered for sale, e.g., by the Superintendent of Documents of the Government Printing Office, or by an authorized private distributor, then the CSB will refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, then the CSB will process the request under its usual FOIA procedures, noting that the CSB will likely withhold copyrighted records under Exemption 4.

### Subpart B—Procedures for Requesting and Disclosing Records

#### § 1601.10 Proactive disclosures.

(a) *In general.* Records that the FOIA requires the CSB to make available for public inspection in an electronic format may be accessed through the CSB's Web site (which can be found at <http://www.csb.gov/disclaimers/legal-affairs-foia/>). The CSB is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The CSB must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The CSB has a FOIA Contact and FOIA Public Liaison who can assist individuals in locating records particular to the CSB. The most up to date contact information for the CSB's FOIA Contact and the CSB's FOIA Public Liaison is available at <http://www.foia.gov/report-makerrequest.html>.

(b) *Definitions.*

(1) *Disclose or disclosure* means making records available for examination or copying, or furnishing a copy of nonexempt responsive records.

(2) *FOIA Contact* means the name, address and phone number at the CSB where a requester can make a FOIA request.

(3) *FOIA Public Liaison* means the official who supervises the FOIA Requester Service Center.

#### § 1601.11 Requirements for making requests.

(a) *General information.* (1) To make a request for records, a requester should write directly to the FOIA office of the

agency that maintains the records sought. A request will receive the quickest possible response if the request is addressed to the FOIA office of the agency that maintains the records sought. If the CSB is the agency that maintains the records sought, then the contact information for the CSB's FOIA office is listed at <http://www.foia.gov/report-makerrequest.html>, and any additional requirements for submitting a request can be found herein.

Additionally, requesters who have questions or concerns about making a request, and those who have made a request who have questions or concerns, may discuss their request(s) with the CSB's FOIA Contact or FOIA Public Liaison.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements described in this section. Requesters must provide either a notarized statement or a statement signed under penalty of perjury stating that the requester is the person they claim to be. This certification is required in order to protect the requester's privacy and to ensure that private information about the requester is not disclosed inappropriately to another individual.

(3) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, the CSB can require a requester to supply additional information, if necessary, in order to verify that a particular individual has consented to disclosure.

(b) *Addressing requests.* (1) All requests for records to the CSB must be made in writing.

(2) *For hard copy requests:* The envelope and the request both should be clearly marked "FOIA Request" and addressed to: Chief FOIA Officer—FOIA Request, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(3) *For electronic requests:* The subject line of the request should be marked "FOIA Request" and the request may be submitted by email to [foia@csb.gov](mailto:foia@csb.gov).

(4) A request that is improperly addressed will be deemed to have been

received by the CSB on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Officer.

(c) *Description of records sought.* (1) Requesters must describe the records sought in sufficient detail to enable the CSB's personnel to locate them with a reasonable amount of effort.

(2) To the extent possible, requesters should include specific information that may help the CSB identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the CSB's FOIA Contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

(3) If, after receiving a request, the CSB determines that the request does not reasonably describe the records sought, then the CSB must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the CSB's FOIA Contact or with the CSB's FOIA Public Liaison. If a request does not reasonably describe the records sought, the CSB's response to the request may be delayed.

(d) *Form of records.* Requests may specify the preferred form or format (including electronic formats) for the records that the requester seeks. The CSB must accommodate requests if the record is readily reproducible in that form or format. If a person seeks information from the CSB in a format that does not currently exist, then the CSB must make reasonable efforts to provide the information in the format requested. The CSB will not create a new record of information to satisfy a request.

(e) *Contact information.* Requesters must provide their first and last name along with their contact information, such as their phone number, email address, and/or mailing address, to assist the CSB in communicating with them and providing released records.

(f) *Agreement to pay fees.* The CSB considers a FOIA request an agreement by the requester to pay all applicable fees charged unless the requester seeks a waiver of fees. The CSB ordinarily will confirm this agreement in an acknowledgement letter. The CSB will not charge any fee if the total cost of the

response is less than \$25.00. See § 1601.40 [discussing fees in more detail]. If the fee will be greater than \$25.00, then the CSB must contact the requester to discuss how the requester wants to proceed.

(g) *Types of records not available.* The FOIA does not require the CSB to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or otherwise disposed of.

#### **§ 1601.12 Responsibility for responding to requests.**

(a) *In general.* The agency that first receives a request for a record and maintains that record is the agency responsible for responding to the request. In determining which records are responsive to a request, the CSB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the CSB must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer or a designee is authorized to grant or to deny any initial request for records that are maintained by the CSB and to determine any appropriate fees.

(c) *Consultation, referral, and coordination.* When reviewing records, the CSB must determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the CSB must proceed in one of the following ways:

(1) *Consultation.* When records originated with the CSB, but contain within them information of interest to another agency or other Federal Government office, the CSB should consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the CSB believes that a different agency or component of a different agency is best able to determine whether to disclose the record, the CSB should refer the responsibility for responding to the request regarding that record to that agency or component. Ordinarily, the agency that originated the record is presumed to be the best agency to make

the disclosure determination. However, if the CSB and the originating agency jointly agree that the CSB is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the CSB refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the CSB must coordinate with the originating agency to seek its views on whether the record can be disclosed. The release determination for the record that is the subject of the coordination will then be conveyed to the requester by the CSB.

(d) *Classified information.* Upon receipt of any request involving classified information, the CSB must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable E.O. concerning the classification of records, the CSB must refer the responsibility for responding to the request regarding that information to the agency that classified the information,

or to the agency that should consider the information for classification. Whenever the CSB's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the CSB must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the CSB must be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The CSB may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

(g) *No responsive record.* If no records are responsive to the request, the FOIA Officer will so notify the requester in writing.

#### § 1601.13 Timing of responses to requests.

(a) *In general.* The CSB ordinarily will respond to requests according to their order of receipt.

(b) *Definitions.*

(1) *Working day* means a Federal workday; Saturdays, Sundays, and Federal holidays are excluded in computing the response time for processing FOIA requests.

(2) [Reserved]

(c) *Multitrack processing.* The CSB has a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (f) of this section. In addition, the CSB uses two standard processing tracks— one for simple requests and a separate track for complex requests. The CSB will assign requests to the simple or complex track based on the estimated amount of work or time needed to process the request. Among the factors the CSB may consider are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. The CSB must advise each requester of the track into which their request falls and, when appropriate, will offer a requester an opportunity to narrow or modify their request so that it can be placed in the simple processing track.

(d) *Unusual circumstances.* Whenever the CSB cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the CSB extends the time limit on that basis, the CSB must, before expiration of the twenty (20) day period

to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the CSB estimates processing of the request will be completed. Where the extension exceeds ten (10) working days, the CSB must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The CSB must make available its designated FOIA Contact or its FOIA Public Liaison for this purpose. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>. The CSB must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, the CSB may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The CSB must not aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The CSB must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (f)(1)(i) through (iv) of this section must be submitted to the CSB. When making a request for expedited processing of an administrative appeal, the request must be submitted to the CSB's FOIA Appeals Officer in accordance with § 1601.20.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (f)(1)(ii) of this section, a requester who is not a

full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the CSB may waive the formal certification requirement.

(4) The CSB must notify the requester within ten (10) calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, then the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, then the CSB must act on any appeal of that decision expeditiously.

#### § 1601.14 Responses to requests.

(a) *In general.* The CSB, to the extent practicable, will communicate electronically with requesters having access to the Internet, such as by email or web portal.

(b) *Acknowledgments of requests.* The CSB must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than ten (10) working days to process. The CSB must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, the CSB must provide an estimated date by which the CSB expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the CSB may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once the CSB determines it will grant a request in full or in part, it must notify the requester in writing. The notice must describe the manner in which the record or records will be disclosed, whether by providing a copy of the record or records with the response, or providing them at a later date, or by making a copy of the record available to the requester for inspection

at a reasonable time and place. The procedure for such an inspection must not unreasonably disrupt the operation of the CSB. The CSB must also inform the requester of any fees charged under § 1601.40 and must disclose the requested records to the requester promptly upon payment of any applicable fees. The CSB must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the CSB makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the Chairperson or the FOIA Officer and must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption(s) applied by the CSB in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 1601.20, and a description of the appeal requirements.

(5) A statement notifying the requester of the assistance available from the CSB's FOIA Public Liaison and the dispute resolution services offered by the OGIS.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that the CSB identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the CSB must confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) When invoking an exclusion, the CSB must maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

**§ 1601.15 Special procedures for confidential commercial information.**

(a) *In general.* Confidential commercial information provided to the CSB by a submitter must not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.*

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

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, Indian tribal governments but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(c) *Designation of confidential commercial information.* A submitter of confidential commercial information must make good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). These designations expire ten (10) years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *When notice to submitters is required.* (1) The CSB must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the CSB determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The CSB has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet

determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the CSB may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(e) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The CSB determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of E.O. 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such case, the CSB must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(f) *Opportunity to object to disclosure.*

(1) The CSB must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the CSB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The CSB is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter

under this subpart may itself be subject to disclosure under the FOIA.

(g) *Analysis of objections.* The CSB must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(h) *Notice of intent to disclose.* Whenever the CSB decides to disclose information over the objection of a submitter, the CSB must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the CSB intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the CSB must promptly notify the submitter.

(j) *Requester notification.* The CSB must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure because the request includes information that may arguably be exempt from disclosure under Exemption 4 of the FOIA; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

### Subpart C—Appeals

#### § 1601.20 Processing of appeals.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to the CSB's FOIA Appeals Officer.

(b) *Definitions.*

(1) *FOIA Appeal* means an independent review of an adverse determination initial determination made in response to a FOIA request.

(2) *FOIA Appeals Officer* means the person designated by the Chairperson to process and to decide a FOIA appeal.

(c) *Requirements for making an appeal.* (1) A requester may appeal any adverse determinations to the FOIA Appeals Officer. Examples of adverse determinations are provided in § 1601.14(e).

(2) The requester must make the appeal in writing. Requesters can submit appeals by mail or email in accordance with the following requirements herein, which are also listed on the CSB's Web site. To facilitate handling, the requester should

mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal" or "FOIA Appeal."

(i) For hard copy requests: The envelope and the request both should be addressed to: FOIA Appeals Officer—FOIA Appeal, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(ii) For electronic requests: The appeal should be addressed to the FOIA Appeals Officer and may be submitted by email to [foiaappeals@csb.gov](mailto:foiaappeals@csb.gov).

(3) To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, within ninety (90) calendar days after the date of the adverse determination that is the subject of the appeal. For purposes of apply the ninety (90) calendar day deadline, the CSB will treat an appeal that is improperly addressed as being received on the date on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Appeals Officer.

(4) The appeal should clearly identify the adverse determination that is being appealed and the assigned request number.

(5) An appeal should also include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments advanced in support of disclosure of the requested record.

(d) *Adjudication of appeals.* (1) The CSB FOIA Appeals Officer or designee will act on behalf of the CSB's Chief FOIA Officer on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOIA Appeals Officer must take appropriate action to ensure compliance with applicable classification rules.

(e) *Decisions on appeals.* The CSB must provide its decision on an appeal in writing. The disposition of an appeal will be in writing and will constitute the final action of the CSB on a request. A decision that upholds the CSB's determination in whole or in part will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will also inform the requester of the mediation services offered by the OGIS of the National

Archives and Records Administration as a non-exclusive alternative to litigation. If the CSB's decision is remanded or modified on appeal, the CSB must notify the requester of that determination in writing. The CSB must then further process the request in accordance with that appeal determination and will respond directly to the requester.

(f) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the CSB agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(g) *When appeal is required.* Before seeking review by a court of the CSB's adverse determination, a requester generally must first submit a timely administrative appeal.

### Subpart D—Administration

#### § 1601.30 Protection of records.

(a) *In general.* (1) Except as authorized by this part or as otherwise necessary in performing official duties, CSB employees must not disclose or permit disclosure of any document or information in the possession of the CSB that is confidential or otherwise of a nonpublic nature, including that regarding the CSB, the Environmental Protection Agency or the Occupational Safety and Health Administration.

(2) No person may, without permission, remove from the place where it is made available any record made available to him for inspection or copying. Stealing, altering, mutilating, obliterating, or destroying a Federal record, in whole or in part, is a violation of Federal law.

(b) [Reserved]

#### § 1601.31 Preservation of records pertaining to requests under this part.

The CSB must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code and the General Records Schedule 4.2 of the National Archives and Records Administration. The CSB must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

#### § 1601.32 Other rights and services.

Nothing in this subpart will be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

**Subpart E—Fees****§ 1601.40 Procedures for fees.**

(a) *In general.* The CSB must charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: Commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. The CSB must consider requests for fee waivers in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, the CSB may contact a requester for additional information. The CSB must ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The CSB ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the CSB.

**(b) Definitions.**

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The CSB's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The CSB must notify requesters of their placement in this category.

(2) *Direct costs* are those expenses that the CSB incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, plus sixteen percent (16%) of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others. The

copies provided must be in a form that is reasonably usable by requesters.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The CSB may seek verification from the requester that the request is in furtherance of scholarly research and the CSB must advise requesters of their placement in this category.

(i) *Example 1.* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

(ii) *Example 2.* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

(iii) *Example 3.* A student who makes a request in furtherance of the student's coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) of this section and 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 requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The CSB must advise requesters of their placement in this category.

(6) *Representative of the news media* is 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. Accordingly, the term includes any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the

public at large, and publishers of periodicals that disseminate news and make their products available through a variety of means to the general public, including news organizations that make their products available for purchase by or subscription by or free distribution to the general public, including those solely on the Internet. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. *Freelance* journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the CSB can also consider a requester's past publication record in making this determination. The CSB will advise requesters of their placement in this category.

(7) *Review* is the examination of a record located in response to a FOIA request in order to determine whether any portion of it is exempt from disclosure under one or more of the FOIA exemptions. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1601.15, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the CSB will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the CSB should

not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The CSB must charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The CSB may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: \$6.00 for clerical personnel; \$11.00 for professional personnel; and \$15.00 for managerial personnel.

(iii) The CSB must charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The CSB must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by the CSB at a Federal records center operated by the National Archives and Records Administration (NARA), the CSB must charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* The CSB will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The CSB must honor a requester's preference for receiving a record in a particular form or format where the CSB can readily reproduce it in the form or format requested. Where photocopies are supplied, the CSB must provide one copy per request at the cost of \$0.17 per page. For copies of records produced on tapes, disks, or other media, the CSB must charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the CSB must charge the direct costs.

(3) *Review.* The CSB must charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.*, the review conducted by the CSB to

determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the CSB's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the CSB determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If the CSB fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii)–(iv).

(ii) If the CSB has determined that unusual circumstances as defined by the FOIA apply and the CSB provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit must be excused for an additional ten (10) days.

(iii) If the CSB has determined that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request, the CSB may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The CSB must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the CSB must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the CSB may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, the CSB must provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.00.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When the CSB determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the CSB must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the CSB must advise the requester accordingly. If the request is for non-commercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the CSB notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a non-commercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The CSB is not required to accept payments in installments. Requesters must respond to their fee estimate within thirty (30) working days, or the CSB will assume that the requester is no longer interested in their FOIA request(s), and the case will be administratively closed.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the CSB estimates that the total fee will exceed that amount, the CSB will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has

indicated a willingness to pay. The CSB will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The CSB must make available its FOIA Public Liaison or another FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the CSB chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The CSB may charge interest on any unpaid bill starting on the thirty-first (31) day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the CSB. The CSB must follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When the CSB reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the CSB may aggregate those requests and charge accordingly. The CSB may presume that multiple requests of this type made within a thirty (30) day period have been made in order to avoid fees. For requests separated by a longer period, the CSB must aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the CSB must not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(2) When the CSB determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The CSB may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the CSB within thirty (30) calendar days of the billing date, the CSB may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the CSB may require that the requester make an advance payment of the full amount of any anticipated fee before the CSB begins to process a new request or continues to process a pending request or any pending appeal. Where the CSB has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the CSB requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within thirty (30) calendar days after the date of the CSB's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires the CSB to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the CSB must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how 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 is not primarily in the commercial interest of the requester.

(2) The CSB must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that 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 is not primarily in the commercial interest of the requester. In deciding whether this standard is satisfied the CSB must consider the factors described in paragraphs (k)(2)(i) through (iii) of this section:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The CSB will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the CSB must consider the following criteria:

(A) The CSB must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the CSB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) are satisfied and any commercial interest is not the primary

interest furthered by the request. The CSB ordinarily will presume that when a news media requester has satisfied the factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the CSB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

Dated: September 25, 2017

**Kara Wenzel,**

*Acting General Counsel, Chemical Safety and Hazard Investigation Board.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 42 CFR Part 10

RIN 0906-AB11

#### 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Final rule; further delay of effective date.

**SUMMARY:** The Health Resources and Services Administration (HRSA) administers section 340B of the Public Health Service Act (PHSA), known as the “340B Drug Pricing Program” or the “340B Program.” HRSA published a final rule on January 5, 2017, that set forth the calculation of the ceiling price and application of civil monetary penalties. The final rule applied to all drug manufacturers that are required to make their drugs available to covered entities under the 340B Program. On August 21, 2017, HHS solicited comments on further delaying the effective date of the January 5, 2017,

final rule to July 1, 2018 (82 FR 39553). HHS proposed this action to allow a more deliberate process of considering alternative and supplemental regulatory provisions and to allow for sufficient time for additional rulemaking. After consideration of the comments received on the proposed rule, HHS is delaying the effective date of the January 5, 2017, final rule, to July 1, 2018.

**DATES:** As of September 29, 2017, the effective date of the final rule published in the **Federal Register** (82 FR 1210, January 5, 2017) is further delayed to July 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** CAPT Krista Pedley, Director, Office of Pharmacy Affairs, Healthcare Systems Bureau, HRSA, 5600 Fishers Lane, Mail Stop 08W05A, Rockville, MD 20857, or by telephone at 301-594-4353.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On September 30, 2010, HHS published an advanced notice of proposed rulemaking (ANPRM) in the **Federal Register**, “340B Drug Pricing Program Manufacturer Civil Monetary Penalties” (75 FR 57230, September 20, 2010). HHS subsequently published a notice of proposed rulemaking (NPRM) on June 17, 2015, to implement CMPs for manufacturers that knowingly and intentionally charge a covered entity more than the ceiling price for a covered outpatient drug; to provide clarity regarding the requirement that manufacturers calculate the 340B ceiling price on a quarterly basis; and to establish the requirement that a manufacturer charge \$.01 (penny pricing) for drugs when the ceiling price calculation equals zero (80 FR 34583, June 17, 2015). The public comment period closed on August 17, 2015, and HRSA received 35 comments. After review of the initial comments, HHS reopened the comment period (81 FR 22960, April 19, 2016) to invite additional comments on the following areas of the NPRM: 340B ceiling price calculations that result in a ceiling price that equals zero (penny pricing); the methodology that manufacturers use when estimating the ceiling price for a new covered outpatient drug; and the definition of the “knowing and intentional” standard to be applied when assessing a CMP for manufacturers that overcharge a covered entity. The comment period closed May 19, 2016, and HHS received 72 comments.

On January 5, 2017, HHS published a final rule in the **Federal Register** (82 FR 1210, January 5, 2017); comments from both the original comment period

established in the NPRM and the reopened comment period announced in the April 19, 2016 notice were considered in the development of the final rule. The provisions of that final rule were to be effective March 6, 2017; however, HHS issued a subsequent final rule (82 FR 12508, March 6, 2017) delaying the effective date to March 21, 2017, in accordance with a January 20, 2017, memorandum from the Assistant to the President and Chief of Staff, titled “Regulatory Freeze Pending Review.”<sup>1</sup> In the January 5, 2017, final rule, HHS acknowledged that the effective date fell during the middle of a quarter and stakeholders needed time to adjust systems and update their policies and procedures. As such, HHS stated that it intended to enforce the requirements of the final rule at the start of the next quarter, which began April 1, 2017.

After further consideration and to provide affected parties sufficient time to make needed changes to facilitate compliance, and because questions were raised, HHS issued an interim final rule (82 FR 14332, March 20, 2017), to delay the effective date of the final rule to May 22, 2017, and solicited additional comments on whether that date should be further extended to October 1, 2017. HHS received 51 comments on the interim final rule, some supporting and some opposing the delay of the effective date to May 22, 2017, or alternatively to October 1, 2017. After careful consideration of the comments received, HHS delayed the effective date of the January 5, 2017, final rule to October 1, 2017 (82 FR 22893, May 19, 2017).

HHS subsequently published a proposed rule (82 FR 39553, August 21, 2017) to further delay the effective date of the final rule to July 1, 2018. The further delay allows necessary time to fully consider the substantial questions of fact, law, and policy raised by the rule, consistent with the aforementioned “Regulatory Freeze Pending Review,” memorandum. Requiring manufacturers to make targeted and potentially costly changes to pricing systems and business procedures in order to comply with a rule that is under further consideration and for which substantive questions have been raised would be disruptive. The further delay allows HHS to consider objections regarding the timing of the effective date and challenges associated with complying with the rule, as well as other objections to the rule.

In addition, Executive Order 13765 (82 FR 8351) titled, “Minimizing the

<sup>1</sup> See: <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.