

**§ 71.901 [Amended]**

■ 11. Paragraph (a) of § 71.901 is amended by removing the words “FAA Order 7400.9L” and adding, in their place, the words “FAA Order 7400.9M.”

Issued in Washington, DC, on August 24, 2004.

**Reginald C. Matthews,**

*Manager, Airspace and Rules.*

[FR Doc. 04–19733 Filed 9–3–04; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF THE TREASURY****31 CFR Part 1**

**RIN 1505–AA97**

**Disclosure of Records in Legal Proceedings**

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final rule makes several amendments to an interim final rule that amended Treasury’s regulations that govern access to information and records in connection with litigation, including litigation in which neither the United States nor the Department of the Treasury is a party. The amendments made by this rule are in response to comments received on the interim final rule.

**DATES:** This final rule is effective September 7, 2004.

**FOR FURTHER INFORMATION CONTACT:** Christian Furey, Attorney-Advisor, Office of the Assistant to the General Counsel for Legislation, Litigation and Disclosure, at (202) 622–5441 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****I. Background**

Under 5 U.S.C. 301, heads of Executive or military departments may prescribe regulations for the custody, use, and preservation of the department’s records, papers, and property. Many departments and agencies have promulgated such regulations to provide procedures for the disclosure of official records and information. Generally, these are termed Touhy regulations, after the Supreme Court’s decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency’s Touhy regulations are the instructions agency employees are to

follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

Treasury’s Touhy regulations are codified in §§ 1.8 through 1.12 of title 31 of the Code of Federal Regulations. Generally, these regulations provide that employees of the Departmental Offices of the Department of the Treasury may not disclose documents or information in response to a demand or other order of a court or any other authority without first being authorized to do so. The purpose of these regulations is to conserve valuable agency resources, to protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government documents and decision making processes.

On March 17, 2003, Treasury published in the **Federal Register** an interim final rule (68 FR 12584) that amended its Touhy regulations. The interim final rule revised the regulations to prescribe the factors Treasury officials should consider when deciding whether to allow disclosure of documents and information in response to a demand or other order of a court, and which Treasury officials may make these decisions. The interim final rule also made a number of clarifying and technical amendments to the regulations and solicited public comment on Treasury’s revisions to its Touhy regulations.

**II. Analysis of the Final Rule**

This final rule adopts the provisions of the interim final rule with the following changes.

**Section 1.11 Testimony or the Production of Records in a Court or Other Proceeding**

This section sets forth the policies and procedures of the Department regarding the testimony of employees as witnesses in legal proceedings and the production or disclosure of Treasury documents for use in legal proceedings.

Paragraph (b) defines the terms used throughout the regulations. Paragraph (b)(5) defines “employee” to include “officers of the Department, including contractors and any other individuals who have been appointed by, or are subject to the supervision, jurisdiction or control of the Secretary.” We amended paragraph (b)(5) to clarify that the term “employee” also includes the Secretary of the Treasury. We also amended paragraph (b)(1) to clarify that the General Counsel may delegate his or her responsibilities as agency counsel with respect to the Departmental offices.

Paragraph (d) sets forth procedures applicable to requests for testimony or

the production of documents. Paragraph (d)(3) of the interim final rule provided that any request for testimony or the production of documents in litigation in which neither the Department nor the United States is a party be supported by an affidavit setting forth the nature of the litigation, describing the nature of the testimony and/or documents sought, and explaining why the testimony and/or documents are desired. Under paragraph (d)(3)(i) there had to be a “showing that the desired testimony or document is not reasonably available from any other source.”

One commenter suggested that the use of the terms “testimony” and “document” in paragraph (d)(3)(i) was misleading because it implied that unless a specific document or testimony from a particular person is not available from another source then the request should be granted. We agree with this comment. While government documents and testimony from specific individuals may be unique, the intent of this provision was to not grant requests if other documents and testimony could be obtained, thus ensuring that requesters have exhausted all other avenues to obtain the information sought. Accordingly, we are clarifying paragraph (d)(3)(i) to require a requester to show that information reasonably suited to the request is not available from any other source.

Paragraph (f)(1) provided that an “employee” may not provide expert testimony, except on behalf of the United States or a party represented by the Department of Justice, without written approval of agency counsel. Paragraph (f)(2) provided that agency counsel may approve a request for expert testimony from an “employee” or “former employee” upon a showing by the requestor of exceptional need or unique circumstances, provided that the testimony will not be adverse to the interests of Treasury or the United States. Paragraph (f)(3) provided expert or opinion testimony of a “former employee” is not subject to prohibition in paragraph (f)(1) if the testimony involves only general expertise gained while employed at the Department.

One commenter suggested that the term “former employee” be added to paragraph (f)(1) to clarify that the entirety of paragraph (f) applies to former employees. We agree that such an amendment is consistent with paragraph (f), and this final rule amends paragraph (f)(1) accordingly.

**III. Procedural Requirements**

Because this rule relates to agency management and personnel, and because it merely amends Treasury’s

existing regulations to more closely parallel similar regulations adopted by other Federal agencies, it is not subject to notice and public procedure pursuant to 5 U.S.C. 553(a)(2) and (b)(B). For the same reasons, a delayed effective date is not required pursuant to 5 U.S.C. 553(a)(2) and (d)(3).

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

It has been determined that this interim final rule is not a significant regulatory action for purposes of Executive Order 12866.

#### List of Subjects in 31 CFR Part 1

Courts, Freedom of information, Government employees, and Privacy.

■ Therefore, for the reasons discussed in the preamble, the interim rule amending 31 CFR part 1 which was published at 68 FR 12584 on March 17, 2003 is adopted as a final rule with the following changes:

#### PART 1—[AMENDED]

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

**Authority:** 5 U.S.C. 301 and 31 U.S.C. 321. Subpart A also issued under 5 U.S.C. 552, as amended. Subpart C also issued under 5 U.S.C. 552a.

■ 2. Sections 1.8 through 1.12 are revised to read as follows:

#### § 1.8 Scope.

The regulations in this subpart concern access to information and records other than under 5 U.S.C. 552. This subpart is applicable to the Departmental Offices and to the bureaus of the Department as defined in § 1.1(a) of this part, except to the extent that bureaus of the Department have adopted separate guidance governing the subject matter of a provision of this subpart.

#### § 1.9 Records not to be otherwise withdrawn or disclosed.

Except in accordance with this part, or as otherwise authorized, Treasury Department officers and employees are prohibited from making records or duplicates available to any person who is not an officer or employee of the Department, and are prohibited from withdrawing any such records or duplicates from the files, possession or control of the Department.

#### § 1.10 Oral information.

(a) Officers and employees of the Department may, in response to requests, orally provide information contained in records of the Department that are determined to be available to

the public. If the obtaining of such information requires a search of records, a written request and the payment of the fee for a record search set forth in § 1.6 will be required.

(b) Information with respect to activities of the Department not a matter of record shall not be disclosed if the information involves matters exempt from disclosure under 5 U.S.C. 552 or the regulations in this part, or if the disclosure of such information would give the person requesting the information advantages not accorded to other citizens.

#### § 1.11 Testimony or the production of records in a court or other proceeding.

(a) *Applicability.* (1) This section sets forth the policies and procedures of the Department regarding the testimony of employees and former employees as witnesses in legal proceedings and the production or disclosure of information contained in Department documents for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this subpart as a demand).

(2) This section does not apply to any legal proceeding in which an employee is to testify while on leave status regarding facts or events that are unrelated to the official business of the Department.

(3)(i) Nothing in this section affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (5 U.S.C. 552a).

(ii) Demands in legal proceedings for the production of records, or for the testimony of Department employees regarding information protected by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905) or other confidentiality statutes, must satisfy the requirements for disclosure set forth in those statutes and the applicable regulations of this part before the records may be provided or testimony given.

(4) This section is intended only to provide guidance for the internal operations of the Department and to inform the public about Department procedures concerning the service of process and responses to demands or requests, and the procedures specified in this section, or the failure of any Treasury employee to follow the procedures specified in this section, are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

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

(1) *Agency counsel* means:

(i) With respect to the Departmental Offices, the General Counsel or his or her designee; or

(ii) With respect to a bureau or office of the Department, the Chief Counsel or Legal Counsel (or his or her designee) of such bureau or office.

(2) *Demand* means a request, order, or subpoena for testimony or documents related to or for possible use in a legal proceeding.

(3) *Department* means the United States Department of the Treasury.

(4) *Document* means any record or other property, no matter what media and including copies thereof, held by the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes and sound or mechanical reproductions.

(5) *Employee* means all employees or officers of the Department, including contractors and any other individuals who have been appointed by, or are subject to the supervision, jurisdiction or control of the Secretary, as well as the Secretary of the Treasury. The procedures established within this subpart also apply to former employees of the Department where specifically noted.

(6) *General Counsel* means the General Counsel of the Department or other Department employee to whom the General Counsel has delegated authority to act under this subpart.

(7) *Legal proceeding* means all pretrial, trial and post trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings.

(8) *Official business* means the authorized business of the Department.

(9) *Secretary* means the Secretary of the Treasury.

(10) *Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videotaped statements or any responses given during discovery or similar proceedings, which response would involve more than the production of documents.

(c) *Department policy.* No current or former employee shall, in response to a

demand, produce any Department documents, provide testimony regarding any information relating to or based upon Department documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties or official status, without the prior authorization of the General Counsel or the appropriate agency counsel.

(d) *Procedures for demand for testimony or production of documents.*

(1) A demand directed to the Department for the testimony of a Department employee or for the production of documents shall be served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedures and shall be directed to the General Counsel, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, or to the Chief or Legal Counsel of the concerned Department component. Acceptance of a demand shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under the applicable laws or rules.

(2) A subpoena or other demand for testimony directed to an employee or former employee shall be served in accordance with the Federal Rules of Civil or Criminal Procedure or applicable State procedure and a copy of the subpoena shall be sent to agency counsel.

(3)(i) In court cases in which the United States or the Department is not a party, where the giving of testimony or the production of documents by the Department, or a current or former employee is desired, an affidavit (or if that is not feasible, a statement) by the litigant or the litigant's attorney, setting forth the information with respect to which the testimony or production is desired, must be submitted in order to obtain a decision concerning whether such testimony or production will be authorized. Such information shall include: the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reason for the demand, a showing that other evidence reasonably suited to the requester's needs is not available from any other source and, if testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony. The purpose of this requirement is to assist agency counsel in making an informed decision regarding whether testimony or the

production of document should be authorized. Permission to testify or produce documents will, in all cases, be limited to the information set forth in the affidavit or statement, or to such portions thereof as may be deemed proper.

(ii) Agency counsel may consult or negotiate with an attorney for a party, or the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or obtain information necessary to make the determination required by paragraph (e) of this section. Failure of the attorney or party to cooperate in good faith to enable agency counsel to make an informed determination under this subpart may serve, where appropriate, as a basis for a determination not to comply with the demand.

(iii) A determination under this subpart to comply or not to comply with a demand is without prejudice as to any formal assertion or waiver of privilege, lack of relevance, technical deficiency or any other ground for noncompliance.

(4)(i) Employees shall immediately refer all inquiries and demands made on the Department to agency counsel.

(ii) An employee who receives a subpoena shall immediately forward the subpoena to agency counsel. Agency counsel will determine the manner in which to respond to the subpoena.

(e) *Factors to be considered by agency counsel.* (1) In deciding whether to authorize the release of official information or the testimony of personnel concerning official information (hereafter referred to as "the disclosure") agency counsel shall consider the following factors:

(i) Whether the request or demand is unduly burdensome;

(ii) Whether the request would involve the Department in controversial issues unrelated to the Department's mission;

(iii) Whether the time and money of the United States would be used for private purposes;

(iv) The extent to which the time of employees for conducting official business would be compromised;

(v) Whether the public might misconstrue variances between personal opinions of employees and Department policy;

(vi) Whether the request demonstrates that the information requested is relevant and material to the action pending, genuinely necessary to the proceeding, unavailable from other sources, and reasonable in its scope;

(vii) Whether the number of similar requests would have a cumulative effect on the expenditure of agency resources;

(viii) Whether disclosure otherwise would be inappropriate under the circumstances; and

(ix) Any other factor that is appropriate.

(2) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors exists:

(i) The disclosure would violate a statute, Executive order, or regulation;

(ii) The integrity of the administrative and deliberative processes of the Department would be compromised;

(iii) The disclosure would not be appropriate under the rules of procedure governing the case or matter in which the demand arose;

(iv) The disclosure, including release in camera, is not appropriate or necessary under the relevant substantive law concerning privilege;

(v) The disclosure, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified or other matters exempt from unrestricted disclosure; or

(vi) The disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, or disclose trade secrets or similarly confidential commercial or financial information.

(f) *Requests for opinion or expert testimony.*

(1) Subject to 5 CFR 2635.805, an employee or former employee shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice, without written approval of agency counsel.

(2) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department or the United States, agency counsel may, in writing, grant authorization for an employee, or former employee, to appear and testify at no expense to the United States.

(3) Any expert or opinion testimony by a former employee of the Department shall be excepted from § 1.11(f)(1) where the testimony involves only general expertise gained while employed at the Department.

(g) *Procedures when agency counsel directs an employee not to testify or provide documents.* (1) If agency counsel determines that an employee or former employee should not comply with a subpoena or other request for

testimony or the production of documents, agency counsel will so inform the employee and the party who submitted the subpoena or made the request.

(2) If, despite the determination of the agency counsel that testimony should not be given and/or documents not be produced, a court of competent jurisdiction or other appropriate authority orders the employee or former employee to testify and/or produce documents, the employee shall notify agency counsel of such order.

(i) If agency counsel determines that no further legal review of, or challenge to, the order will be sought, the employee or former employee shall comply with the order.

(ii) If agency counsel determines to challenge the order, or that further legal review is necessary, the employee or former employee should not comply with the order. Where necessary, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of this subpart and respectfully inform the legal tribunal that he/she has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the subpoena must be complied with, the employee shall respectfully decline to comply, citing this section and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### **§ 1.12 Regulations not applicable to official request.**

The regulations in this part shall not be applicable to official requests of other governmental agencies or officers thereof acting in their official capacities, unless it appears that granting a particular request would be in violation of law or inimical to the public interest. Cases of doubt should be referred for decision to agency counsel (as defined in § 1.11(b)(1)).

Dated: August 23, 2004.

**Arnold I. Havens,**  
General Counsel.

[FR Doc. 04-20219 Filed 9-3-04; 8:45 am]

BILLING CODE 4810-25-P

## **POSTAL SERVICE**

### **39 CFR Part 111**

#### **Eligibility Requirements for Certain Nonprofit Standard Mail Material**

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Postal Service adopts an amendment to *Domestic Mail Manual* standards governing insurance advertising in Nonprofit Standard Mail. The amendment sets forth guidelines for determining whether the coverage provided by an insurance policy offered by an authorized nonprofit organization to its members is not generally otherwise commercially available.

**DATES:** Effective September 8, 2004.

**FOR FURTHER INFORMATION CONTACT:** Jerome M. Lease, Mailing Standards, United States Postal Service, 202-268-7264.

**SUPPLEMENTARY INFORMATION:** In a proposed rule published in the **Federal Register** on June 15, 2004 (69 FR 33341), the Postal Service proposed an amendment to *Domestic Mail Manual* (DMM) E670.5.5, which provides guidelines for determining whether insurance solicitations are eligible to be mailed at Nonprofit Standard Mail rates ("nonprofit rates"). The Postal Service has determined to adopt the proposed amendment. The change sets forth additional circumstances where the coverage provided by a general type of insurance, such as homeowner's, property, casualty, marine, and professional liability, would be considered not generally otherwise commercially available and, accordingly, mail promoting that coverage would be eligible to be mailed at Nonprofit Standard Mail rates.

Mailings permitted at nonprofit rates according to the policies in effect since 1991 will continue to be eligible for the nonprofit rates. These include, as discussed in the proposal, material promoting charitable gift annuities and material promoting insurance to a target group that does not otherwise have a source to obtain that type of coverage. The change amends the DMM to clarify that section E670.5.5 does not restrict the use of the nonprofit rates for mailings of an authorized fraternal benefit society or any other nonprofit organization when the material advertises, promotes, or offers insurance that is underwritten by the nonprofit organization itself. Nor does it restrict the use of the nonprofit rates for mailings of an authorized organization's material that advertises, promotes, or offers insurance, if the coverage is provided or promoted by the nonprofit organization to its members, donors, supporters, or beneficiaries in such a way that those parties may make tax-deductible donations to the organization of their proportional shares of income in excess of costs that the nonprofit organization receives from the purchase

of the coverage by its members, donors, supporters, or beneficiaries. The changes take into account court rulings, the Postal Service Appropriations Act of 1991, and related legislative history.

As explained in the proposal, mailings that are ineligible for Nonprofit Standard Mail rates under the cooperative mail rule or other standards remain ineligible for nonprofit rates, regardless whether they violate the amended standards related to insurance. Moreover, mailers continue to bear the burden to substantiate that mailings qualify for nonprofit rates, and may be asked to provide evidence to support eligibility for those rates before a mailing is accepted.

The Postal Service received one comment concerning its proposal. This comment supported the amendments proposed by the Postal Service.

Accordingly, for the reasons explained here and in the notice proposing the amended standard, the Postal Service adopts the rule as proposed.

#### **List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

#### **PART 111—[AMENDED]**

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001-3011, 3201-3219, 3403-3406, 3621, 3626, 5001.

■ 2. Revise the *Domestic Mail Manual* (DMM) as set forth below:

#### **E Eligibility**

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#### **E600 Standard Mail**

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#### **E670 Nonprofit Standard Mail**

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#### **5.0 ELIGIBLE AND INELIGIBLE MATTER**

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#### **5.5 Definitions, Insurance**

*[Revise 5.5 to read as follows:]*

For the standard in 5.4b:

a. Except as specified in 5.5c, the phrase *not generally otherwise commercially available* applies to the actual coverage stated in an insurance policy, without regard to the amount of the premiums, the underwriting practices, and the financial condition of the insurer. When comparisons are made with other policies, consideration is given to coverage benefits, limitations, and exclusions, and to the