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9110-9B-P

DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 115

ICEB-2012-0003

RIN 1653-AA65

Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities.

AGENCY: Department of Homeland Security.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Department of Homeland Security (DHS) proposes to issue regulations setting standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities.

DATES: Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before 11:59 p.m. on **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]** or reach the Mail or Hand Delivery/Courier address listed below in **ADDRESSES** by that date.

ADDRESSES: You may submit comments, identified by DHS Docket No. ICEB-2012-0003, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for

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submitting comments.

- Mail: Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Contact Telephone Number (202) 732-4292. To ensure proper handling, please reference DHS Docket No. ICEB-2012-0003 on your correspondence.
- Hand Delivery/Courier: Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732-4292 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

To avoid duplication, please use only one of these three methods. See the “Public Participation” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732-4292 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments.

We encourage you to participate in this rulemaking by submitting comments and related materials. Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the DHS public

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docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket 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 or made available in the public docket, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify 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 online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the DHS public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency’s public

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docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section above.

A. Submitting comments.

If you submit a comment, please include the docket number for this rulemaking (ICEB-2012-0003), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by mail or hand delivery. Please use only one of these means.

To submit your comment online, go to <http://www.regulations.gov>, click on the “submit a comment” box, which will then become highlighted in blue. In the “Document Type” drop down menu select “Proposed Rule” and insert “ICEB-2012-0003” in the “Keyword” box. Click “Search” then click on the balloon shape in the “Actions” column. If you submit comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the mailing address, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents.

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, and click on the “read comments” box, which will then become highlighted in blue. In the “Keyword” box insert “ICEB-2012-0003”, click

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“Search” and then click “Open Docket Folder” in the “Actions” column. Individuals without internet access can make alternate arrangements for viewing comments and documents related to this rulemaking by contacting DHS at the contact number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

C. Public meeting.

We do not now plan to hold a public meeting, but you may submit a request for one to the docket using one of the methods specified under **ADDRESSES**. In your request, explain why you believe a public meeting would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the Federal Register.

II. Abbreviations.

ADA	Americans with Disability Act of 1990, as amended
ANPRM	Advance Notice of Proposed Rulemaking
BJS	Bureau of Justice Statistics
CBP	U.S. Customs and Border Protection
CDF	Contract Detention Facility
CFR	Code of Federal Regulations
CMD	Custody Management Division
CRCL	DHS Office for Civil Rights and Civil Liberties
DHS	Department of Homeland Security
DOJ	Department of Justice
ERO	Enforcement and Removal Operations
FR	Federal Register
HHS	Department of Health and Human Services
ICE	U.S. Immigration and Customs Enforcement
IGSA	Intergovernmental Service Agreement
INA	Immigration and Nationality Act
IRIA	Initial Regulatory Impact Analysis
LEP	Limited English Proficiency
NAICS	North American Industry Classification System
NPREC	National Prison Rape Elimination Commission

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NPRM	Notice of Proposed Rulemaking
OMB	Office of Management and Budget
PBND	Performance Based National Detention Standards
PLRA	Prison Litigation Reform Act
PREA	Prison Rape Elimination Act of 2003
PSA	Prevention of Sexual Abuse
RFA	Regulatory Flexibility Act
SAAPID	Sexual Abuse and Assault Prevention and Intervention Directive
SPC	Service Processing Center
SSV	Survey of Sexual Violence
UMRA	Unfunded Mandate Reform Act of 1995
U.S.C.	United States Code
USMS	U.S. Marshals Service

III. Executive Summary.

A. Purpose of the Regulatory Action.

The purpose of this regulatory action is to propose regulations setting standards to prevent, detect, and respond to sexual abuse in Department of Homeland Security (DHS) confinement facilities.¹ Sexual violence, against any victim, is an assault on human dignity and an affront to American values. Many victims report persistent, even lifelong mental and physical suffering. As the National Prison Rape Elimination Commission explained in its 2009 report:

Until recently. . . the public viewed sexual abuse as an inevitable feature of confinement.

Even as courts and human rights standards increasingly confirmed that prisoners have the

¹ As discussed in greater detail below, in these proposed standards, “sexual abuse” includes sexual abuse and assault of a detainee by another detainee, as well as sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

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same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff. Tolerance of sexual abuse of prisoners in the government's custody is totally incompatible with American values.²

The commitment to eliminate sexual abuse behind bars applies equally to DHS confinement facilities, which detain individuals for civil immigration purposes. Sexual abuse is not an inevitable feature of detention, and with DHS's strong commitment, DHS immigration detention and holding facilities can have a culture that promotes safety and refuses to tolerate abuse. DHS is fully committed to a zero-tolerance policy against sexual abuse in its confinement facilities, and the proposed standards will effectively apply that policy across DHS confinement facilities. DHS is also fully committed to the full implementation of the proposed standards in DHS confinement facilities, and to robust oversight of these facilities to ensure this implementation.

The proposed standards build on current U.S. Immigration and Customs Enforcement (ICE) Performance Based National Detention Standards (PBNDS) and other DHS detention policies, and respond to the President's May 17, 2012 Memorandum, "Implementing the Prison Rape Elimination Act," which directs all agencies with Federal confinement facilities to work with the Attorney General to propose rules or procedures setting standards to prevent, detect, and respond to sexual abuse in confinement facilities. DHS seeks and welcomes public comments to this proposal.

B. Summary of the Provisions of the Regulatory Action.

² National Prison Rape Elimination Commission Report 1 (2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

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The proposed DHS provisions span eleven categories that were originally used by the National Prison Rape Elimination Commission (NPREC) to discuss and evaluate prison rape elimination standards: prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. Each provision proposed under these categories reflects the DHS experience in confinement of individuals and draws upon the unique experiences and requirements DHS faces in fulfilling its missions.

For example, DHS has broken down the standards to cover two distinct types of DHS facilities: (1) immigration detention facilities, which are overseen by U.S. Immigration and Customs Enforcement (ICE) and used for longer-term detention of individuals involved in immigration removal operations or processes; and (2) holding facilities, which are used by ICE, U.S Customs and Border Protection (CBP), and other DHS component agencies for temporary administrative detention of individuals pending transfer to a court, jail, prison, other agency or other unit of the facility or agency.

In addition, the standards reflect the characteristics of the population encountered by DHS in carrying out its border security and immigration enforcement missions by providing, for example, for language assistance services for limited-English proficient detainees, safe detention of family units, and other provisions specific to DHS's needs. A more detailed discussion of all of the proposed provisions in the rulemaking is included below in section V of this notice of

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proposed rulemaking, “Discussion of Proposed Rule,” including a section-by-section analysis of the DHS proposal.

C. Costs and Benefits.

The anticipated costs of full nationwide compliance with the proposed rule, if ultimately made final, as well as the benefits of reducing the prevalence of sexual abuse in DHS immigration detention facilities and holding facilities, are discussed at length in section VI, entitled “Statutory and Regulatory Requirements—Executive Orders 12866 and 13563” and in the accompanying Initial Regulatory Impact Analysis (IRIA), which is found in the Federal rulemaking docket for this rulemaking.

As shown in the Summary Table below, DHS estimates that the costs of these standards would be approximately \$57.7 million over the period 2013–2022, discounted at 7 percent, or \$8.2 million per year when annualized at a 7 percent discount rate.

With respect to benefits, DHS conducts what is known as a “break even analysis,” by first estimating the monetary value of preventing various types of sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. This analysis begins by estimating the current levels of sexual abuse in covered facilities. In 2011, ICE had two substantiated sexual abuse allegations in immigration detention facilities. During the same year, DHS experienced one substantiated allegation of sexual abuse of an individual detained in a DHS holding facility. (This does not include allegations involved in still-open investigations or allegations outside the scope of these

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proposed regulations.) The regulatory impact analysis extrapolates the number of substantiated and founded allegations at immigration detention facilities based on the premise that there may be additional detainees who may have experienced sexual abuse, but did not report it.

Next, DHS estimates how much monetary benefit (to the victim and to society) accrues from reducing the annual number of victims of sexual abuse. This is, of course, an imperfect endeavor, given the inherent difficulty in assigning a dollar figure to the cost of such an event. Executive Order 13563 states that agencies “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” Each of these values is relevant here, including human dignity, which is offended by acts of sexual abuse.

DHS uses the DOJ estimates of unit avoidance values for sexual abuse. DOJ estimates extrapolate from the existing economic and criminological literature regarding rape in the community.³ The RIA concludes that when all facilities and costs are phased into the rulemaking, the breakeven point would be reached if the standards reduced the annual number of incidents of sexual abuse by 55 from the estimated benchmark levels, which is 79 percent of the total number of assumed incidents in ICE confinement facilities, including an estimated number of those who may not have reported an incident. Chapter 3 of the IRIA presents detailed descriptions of the monetized benefits and break-even results. The Summary Table, below,

³ Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, Final Regulatory Impact Analysis, Docket No. DOJ-OAG-2011-0002, available at www.regulations.gov.

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presents a summary of the benefits and costs of the Notice of Proposed Rulemaking (NPRM).

The costs are discounted at seven percent.

Summary Table: Estimated Costs and Benefits of NPRM, (\$millions)

	Immigration Detention Facilities	Holding Facilities	Total DHS PREA Rulemaking
10-Year Cost Annualized at 7% Discount Rate	\$4.9	\$3.3	\$8.2
% Reduction of Sexual Abuse Victims to Break Even with Monetized Costs	N/A	N/A	79%*
Non-monetized Benefits	An increase in the general wellbeing and morale of detainees and staff, the value of equity, human dignity, and fairness for detainees in DHS custody.		
Net Benefits	N/A	N/A	N/A

*For ICE confinement facilities

IV. Background.

Rape is violent, destructive, and a crime, no matter where it takes place. In response to concerns related to incidents of rape of prisoners in Federal, State, and local prisons and jails, as well as the lack of data available about such incidents, Congress passed PREA in July 2003. The bill became law with the President’s signature in September 2003. See Pub. L. 108-79 (Sept. 4, 2003). Some of the key purposes of the statute were to “develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape,” and to “increase the available data and information on the incidence of prison rape.” 42 U.S.C. 15602(3), (4). As the memorandum issued by the President on May 17, 2012 makes clear, the Administration concluded that PREA applies to all federal confinement facilities, including those operated by DHS.

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To accomplish these ends, PREA established the NPREC to conduct a “comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States,” and to recommend national standards for the reduction of prison rape. 42 U.S.C. 15606. PREA charged the Attorney General, within one year of NPREC issuing its report, to “publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape . . . based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by [NPREC] . . . and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.” 42 U.S.C. 15607(a)(1)-(2).

The NPREC released its findings and recommended national standards in a report (the NPREC report) dated June 23, 2009. The report is available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>. In that report, NPREC set forth four sets of recommended national standards for eliminating prison rape and other forms of sexual abuse. Each set was applicable to one of four unique confinement settings: (1) adult prisons and jails; (2) lockups; (3) juvenile facilities; and (4) community corrections facilities. NPREC report at pgs. 215-235. The NPREC report recommends supplemental standards for facilities with immigration detainees. *Id.* at 219-220. Specifically, and of particular interest to DHS, the NPREC made eleven recommendations for supplemental standards for facilities with immigration detainees and four recommendations for supplemental standards for family facilities. NPREC felt that standards for facilities with immigrant detainees must be enforced in any facility that is run by ICE or through an ICE contract. Although immigrants are detained in

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various settings, efforts to prevent and respond to sexual abuse should require attention to the vulnerabilities of this detained population.

As stated above, PREA provides that the Attorney General's final rule "shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission . . . and being informed by such data, opinion, and proposals that the Attorney General determines to be appropriate to consider." 42 U.S.C. 15607(a)(2).

A. Department of Justice Rulemaking.

In response to the NPREC report, the Attorney General established a PREA Working Group to review the NPREC's proposed standards and to assist him in the rulemaking process. The Working Group included representatives from DOJ offices including the Access to Justice Initiative, the Bureau of Prisons (including the National Institute of Corrections), the Civil Rights Division, the Executive Office for United States Attorneys, the Office of Legal Policy, the Office of Legislative Affairs, the Office of Justice Programs (including the Bureau of Justice Assistance, the Bureau of Justice Statistics (BJS), the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime), the Office on Violence Against Women, and the United States Marshals Service. On March 10, 2010, DOJ published an advance notice of proposed rulemaking (ANPRM) to solicit public comment on the NPREC's proposed standards and to receive information useful in publishing a proposed rule proffering national standards as required under PREA. 75 FR 11077 (Mar. 10, 2010).

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Throughout the rulemaking process, DOJ solicited and received substantial public input in the form of written comments and from listening sessions with key stakeholders. In general, the commenters to the DOJ ANPRM supported the broad goals of PREA and the overall intent of the NPREC's recommendations. The commenters were sharply divided, however, as to the merits of a number of the NPREC's recommended national standards. Some commenters, particularly those whose responsibilities involve the care and custody of detainees, expressed concern that the NPREC's recommended national standards implementing PREA would impose unduly burdensome costs on already tight State and local government budgets. Other commenters, particularly advocacy groups concerned with protecting the health and safety of detainees, expressed concern that the NPREC's standards were not protective enough, and, therefore, would not fully achieve PREA's goals.

On February 3, 2011, after reviewing the public input to the ANPRM, DOJ issued a notice of proposed rulemaking (NPRM) setting forth proposed national PREA standards. 76 FR 6248 (Feb. 3, 2011). The DOJ NPRM solicited comments on DOJ's proposed standards, and posed 64 specific questions on the proposed standards and the accompanying economic analysis.

In response to the NPRM, DOJ received over 1,300 comments, representing the same broad range of stakeholders as commented to the DOJ ANPRM. Commenters provided general assessments of DOJ's efforts as well as specific and detailed recommendations regarding each standard. Pertinent to DHS, there was specific concern expressed by the commenters with respect to NPREC's recommended supplemental standards for immigration detention number six, which proposed to mandate that immigration detainees be housed separately from criminal

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detainees. The NPRM noted that several comments to the DOJ ANPRM raised a concern that this requirement would impose a significant burden on jails and prisons, which often do not have the capacity to house immigration detainees and criminal detainees separately. *Id.* The NPRM also noted DOJ's concern about other proposed supplemental standards, such as imposing separate training requirements, and requiring agencies to attempt to enter into separate memoranda of understanding with immigration-specific community service providers. *Id.* Furthermore, comments to the NPRM addressed whether the proposed standards should cover immigration detention facilities, prompting DOJ to examine the application of PREA to other federal confinement facilities, which is discussed further below.

Following the public comment period for the NPRM, DOJ issued a final rule setting national standards to prevent, detect, and respond to prison rape. 77 FR 37106 (June 20, 2012). The final rule incorporates changes based upon the public comments and sets a national framework of standards to prevent, detect, and respond to prison rape at DOJ confinement facilities, as well as State prisons and local jails.

B. Application of PREA Standards to Other Federal Confinement Facilities.

DOJ's NPRM interpreted PREA to bind only facilities operated by the Bureau of Prisons, and extended the standards to U.S. Marshals Service (USMS) facilities under other authorities of the Attorney General. 76 FR 6248, 6265. Numerous commenters criticized this interpretation of the statute. In light of those comments, DOJ re-examined whether PREA extends to Federal facilities beyond those operated by DOJ and concluded that PREA does, in fact, encompass *any*

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Federal confinement facility “whether administered by [the] government or by a private organization on behalf of such government.” 42 U.S.C. 15609(7).

In its final rule, DOJ further concluded that, in general, each Federal department is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. 77 FR 37106, 37113. In particular, DOJ noted that DHS possesses great knowledge and experience regarding the specific characteristics of its immigration facilities, which differ in certain respects from DOJ, State, and local facilities with regard to the manner in which they are operated and the composition of their populations. Thus, and given each department’s various statutory authorities to regulate conditions of detention, DOJ stated that Federal departments with confinement facilities, like DHS, will work with the Attorney General to issue rules or procedures consistent with PREA.

C. The Presidential Memorandum on Implementing the Prison Rape Elimination Act.

On May 17, 2012, the same day DOJ released its final rule, President Obama issued a Presidential Memorandum reiterating the goals of PREA and directing Federal agencies with confinement facilities that are not already subject to the DOJ final rule to propose rules or procedures necessary to satisfy the requirements of PREA within 120 days of the Memorandum. In the Memorandum, the President firmly establishes that sexual violence, against any victim, is an assault on human dignity and an affront to American values, and that PREA established a

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“zero-tolerance standard” for rape in prisons in the United States. The Memorandum further expresses the Administration’s conclusion that PREA encompasses all Federal confinement facilities, including those operated by executive departments and agencies other than DOJ, whether administered by the Federal Government or by an organization on behalf of the Federal Government, and that each agency is responsible for, and must be accountable for, the operations of its own confinement facilities. The President charged each agency, within the agency’s own expertise, to determine how to implement the Federal laws and rules that govern its own operations, but to ensure that all agencies that operate confinement facilities adopt high standards to prevent, detect, and respond to sexual abuse. The President directed all agencies with Federal confinement facilities that are not already subject to the DOJ final rule, such as DHS, to work with the Attorney General to propose rules or procedures that will satisfy the requirements of PREA.

As Congress and the President have concluded, sexual abuse in custodial environments is a serious concern with dire consequences for victims. DHS is firmly committed to protecting detainees from all forms of sexual abuse. By this regulation, DHS responds to and fulfills the President’s directive by proposing comprehensive, national regulations for the detection, prevention and reduction of sexual abuse at DHS immigration detention facilities and at DHS holding facilities.

D. Types of DHS Confinement Facilities.

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Unlike DOJ, which followed the pattern of the NPREC report by issuing regulations related to four types of confinement facilities, DHS has just two types of confinement facilities: (1) immigration detention facilities and (2) holding facilities.⁴

As proposed in this rule, DHS defines an immigration detention facility as a “confinement facility operated by or affiliated with U.S. Immigration and Customs Enforcement (ICE) that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an Intergovernmental Service Agreement.” These facilities are designed for long-term detention (more than 24 hours) and house the largest number of DHS detainees. ICE is the only DHS component agency with immigration detention facilities, and it has several types of such facilities: service processing center (SPC) facilities are ICE-owned facilities staffed by a combination of Federal employees and contract staff; contract detention facilities (CDFs) are owned by private companies and contracted directly with ICE; detention services at Intergovernmental Service Agreement (IGSA) facilities are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity; and Intergovernmental Agreement (IGA) facilities are provided to ICE by States or local governments through intergovernmental agreements and may be owned by the State or local government, but not private entities. In addition, there are two types of IGSA facilities:

⁴ For simplicity, all persons confined in DHS immigration detention facilities and holding facilities are referred to as “detainees” in this rulemaking.

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dedicated IGSA facilities, which house only detained aliens, and non-dedicated IGSA facilities, which house a variety of detainees. The standards set forth in Subpart A of these proposed regulations are meant ultimately to apply to all of these various types of immigration detention facilities—but not, notably, to USMS facilities used by ICE under intergovernmental agreements; those facilities and their immigrant detainees would be covered by the DOJ PREA standards and not the provisions within Subpart A of these proposed rules.

The proposed regulations would not apply to CDF and IGSA facilities directly; rather, standards for these facilities would be phased in through new contracts and contract renewals. Specifically, the proposed regulations would require that when contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, the agency include in any new contracts or contract renewals the obligation to adopt and comply with these standards. In other words, DHS intends to enforce the proposed standards through terms in its contracts with facilities.

DHS defines a holding facility similarly to DOJ's definition of "lockup." A "holding facility" is a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) under the control of the agency; and (2) primarily used for the short-term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, or other agency. These facilities, which are operated by ICE, CBP, or other DHS components, are designed for confinement that is short-term in nature, but are permanent structures intended primarily for the purpose of such confinement. Temporary-use hold rooms and other types of short-term confinement areas not primarily used for confinement are not

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amenable to compliance with these standards, but are covered by other DHS policies and procedures. We discuss the distinctions between these facilities in more detail later in this proposal.

1. ICE Detention Facilities.

As stated above, the NPREC report contained eleven recommended standards for facilities with immigration detainees and four recommended standards specifically addressing family facilities. ICE oversees immigration detention facilities nationwide. The vast majority of facilities are operated through government contracts, State and local entities, private entities, or other federal agencies. The ICE Office of Enforcement and Removal Operations (ERO) is the subdivision within ICE that manages ICE operations related to the immigration detention system.

ERO is responsible for providing adequate and appropriate custody management to support the immigration removal process. This includes providing traditional and alternative custody arrangements for those in removal proceedings, providing aliens access to legal resources and representatives of advocacy groups, and facilitating the appearance of detained aliens at immigration court hearings. Through various immigration detention reform initiatives, ERO is committed to providing and maintaining appropriate conditions of confinement, providing required medical and mental healthcare, housing detainees in the least restrictive setting commensurate with their criminal background, ensuring appropriate conditions for all detainees, employing fiscal accountability, increasing transparency, and strengthening critical oversight, including efforts to ensure compliance with applicable detention standards through inspection programs.

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The ERO Custody Management Division (CMD) provides policy and oversight for the administrative custody of immigration detainees; one of the most highly transient and diverse populations of any correctional or detention system in the world. CMD's mission is to manage ICE detention operations efficiently and effectively to provide for the safety, security and care of aliens in ERO custody.

ERO is currently responsible for providing custody management to approximately 158 authorized immigration detention facilities, consisting of 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities (of which 64 are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities). ERO has 91 other authorized immigration detention facilities that typically hold detainees for more than 24 hours and less than 72 hours, including 55 USMS IGA facilities and 36 non-dedicated IGSA facilities. In addition, ICE has 149 holding facilities that hold detainees for less than 24 hours. These holding facilities are nationwide and are located within ICE ERO Field and Sub-Field Offices.

2. ICE Sexual Abuse and Assault Policies.

The proposed regulation for immigration detention facilities and holding facilities discussed in this rulemaking supports existing sexual abuse policies promulgated by ICE, including ICE's PBNDS 2011 and its 2012 Sexual Abuse and Assault Prevention and Intervention Directive (SAAPID),⁵ which provide strong safeguards against all sexual abuse of individuals within its custody, consistent with the goals of the PREA.

⁵ ICE, *Performance-Based National Detention Standards* (2011), <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>; ICE, *Directive No. 11062.1: Sexual Abuse and Assault Prevention and Intervention*

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ICE's PBNDS 2011 standard on "Sexual Abuse and Assault Prevention and Intervention" was developed in order to enhance protections for immigration detainees as well as ensure a swift and effective response to allegations of sexual abuse. This standard derived in significant part from earlier policies contained in the agency's PBNDS 2008, promulgated in response to the passage of PREA, and took into consideration the subsequently released recommendations of the NPREC (including those for facilities housing immigration detainees) in June 2009 and ensuing draft standards later issued by DOJ in its Advance Notice of Proposed Rulemaking in March 2010. In drafting the PBNDS 2011, ICE also incorporated the input of the DHS Office for Civil Rights and Civil Liberties (CRCL), local and national advocacy organizations, and representatives of DOJ (including correctional experts from the Bureau of Prisons) on methods for accomplishing the objectives of PREA in ICE's operational context, and closely consulted information and best practices reflected in policies of international corrections systems, statistical data on sexual violence collected by the DOJ BJS, and reports published by the United Nations High Commissioner for Refugees and the Inter-American Commission on Human Rights of the Organization of American States regarding sexual abuse and other issues affecting vulnerable populations in U.S. correctional systems. The PBNDS 2011 establish responsibilities of all immigration detention facility staff with respect to preventative measures such as screening, staff training, and detainee education, as well as effective response to all incidents of sexual abuse,

(2012), <http://www.ice.gov/detention-standards>. These documents are available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES**.

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including timely reporting and notification, protection of victims, provision of medical and mental health care, investigation, and monitoring of incident data.

The 2012 ICE SAAPID complements the requirements established by the 2011 PBNDS by delineating ICE-wide policy and procedures and corresponding duties of agency employees for reporting, responding to, investigating, and monitoring incidents of sexual abuse. In conjunction with the PBNDS, the Directive ensures an integrated and comprehensive system of preventing and responding to all incidents or allegations of sexual abuse of individuals in ICE custody.

ICE's combined policies prescribe a comprehensive range of protections against sexual abuse addressing prevention planning, reporting, response and intervention, investigation, and oversight, including: articulation of facility zero-tolerance policies; designation of facility and agency sexual abuse coordinators; screening and classification of detainees; staff training; detainee education; detainee reporting methods; staff reporting and notification; first responder duties following incidents or allegations of sexual abuse (including to protect victims and preserve evidence); emergency and ongoing medical and mental health services; investigation procedures and coordination; discipline of assailants; and sexual abuse incident data collection and review.

These policies are tailored to the unique operational and logistical circumstances encountered in the DHS confinement system in order to maximize their effective achievement of the goals of the PREA within the immigration detention context. To further improve transparency and enforcement, DHS has decided to issue this regulation and adopt the overall

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structure of the DOJ standards, as well as the wholesale text of various individual DOJ standards where it has deemed them appropriate and efficacious for DHS facilities, to meet the President's goal of setting high standards, government-wide, consistent with the goals of PREA. Where appropriate, DHS has also used the results of DOJ research and considered public comments submitted in response to the DOJ ANPRM and NPRM in formulating the DHS proposals.

3. U.S. Customs and Border Protection Detention Facilities.

U.S. Customs and Border Protection (CBP) has a priority mission of keeping terrorists and their weapons out of the United States. CBP is also responsible for securing and facilitating trade and travel while enforcing hundreds of U.S. statutes and regulations, including immigration and drug laws. All persons, baggage, and other merchandise arriving in or leaving the United States are subject to inspection and search by CBP officials under legal authorities for any number of reasons relating to its immigration, customs, and other law enforcement activities.

CBP detains individuals in a wide range of facilities. CBP detains some individuals in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. CBP uses "hold rooms" in its facilities for case processing, and to search, detain, or interview persons who are being processed. CBP does not currently contract for staff within its holding facilities, but exercises oversight of detainees with its own employees.

CBP generally detains individuals for only the short time necessary for inspection and processing, including pending release or transfer of custody to appropriate agencies. Some examples of situations in which CBP detains individuals prior to transferring them to other agencies are: (1) persons processed for administrative immigration violations may, for example,

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be repatriated to contiguous territory or transferred to ICE pending removal from the United States or removal proceedings with the Executive Office of Immigration Review; (2) unaccompanied alien children placed in removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. 1229a, are transferred, in coordination with ICE, to the Department of Health and Human Services (HHS), Office of Refugee Resettlement; (3) persons detained for criminal prosecution are temporarily held pending case processing and transfer to other Federal, State, local or tribal law enforcement agencies. CBP policies and directives currently cover these and other detention scenarios.

4. CBP Detention Directives and Guidance.

The various CBP policies and directives containing guidance on the topics addressed in these proposed regulations include, but are not limited to:

Personal Search Handbook, Office of Field Operations, CIS HB 3300-04B, July 2004 – describes the procedures for personal searches as well as detention of juveniles, short-term detention, and those persons being detained who require medical examinations. The handbook further details the procedures for transportation of, detention of and, reporting procedures for persons detained for prolonged medical examinations as well as detentions lasting more than two hours.

CBP Directive No. 3340-030B, Secure Detention, Transport and Escort Procedures at Ports of Entry – includes general guidelines on detention. The policy also defines procedures for the handling of juveniles, medical situations, meals, water, restrooms, phone notifications,

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sanitation of the hold room, restraining procedures, classification of detainees, transportation, emergency procedures, escort procedures, transfer procedures, and property disposition.

U.S. Border Patrol Policy No. 08-11267, Hold Rooms and Short-Term Custody – establishes national policy describing the responsibilities and procedures for the short-term custody of persons in Border Patrol hold rooms pending case disposition. The policy also contains requirements regarding the handling of juveniles in Border Patrol custody.

DHS referenced all of these policies in its consideration of DHS-wide standards to prevent, detect, and respond to sexual abuse in DHS confinement facilities. The policies are available, redacted as appropriate, in the docket for this rule where indicated under

ADDRESSES.

V. Discussion of Proposed Rule.

A. The DHS Proposal.

Sexual violence, against any victim, is an assault on human dignity. Such acts are particularly damaging in the detention environment, where the power dynamic is heavily skewed against victims and recourse is often limited. Until recently, however, this has been widely viewed as an inevitable aspect of imprisonment within the United States. This view is not only incorrect but incompatible with American values.

DHS keeps records of any known or alleged sexual abuse incidents in its facilities. ICE keeps records of any claims in its Joint Integrity Case Management System (JICMS). ICE records indicate 138 sexual abuse allegations from 2010 to June 2012. Of those, 57 percent were inmate- or detainee-on-detainee allegations, 38 percent were contract staff-on-detainee, and the

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remaining 5 percent were ICE and/or State or local staff-on-detainee. These figures are unacceptable to DHS and the Administration, which has articulated a “zero-tolerance” standard for sexual abuse in confinement facilities. Accordingly, DHS has a mandate to work towards eliminating all such incidents.

With respect to its proposal, DHS did not begin its work from a blank slate. Many correctional administrators have developed and implemented policies and practices to more effectively prevent and respond to sexual abuse in DHS confinement facilities. DHS applauds these efforts, and views them as an excellent first step. However, DHS needs a national effort to meet PREA’s goals and comply with the President’s directive that can be applied effectively to all covered facilities in light of their particular physical characteristics, the nature of their diverse populations, and resource constraints.

DHS appreciates the considerable work DOJ has done in this area, and also recognizes that each DHS component has extensive expertise regarding its own facilities, particularly those housing unique populations, and that each DHS component is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. Thus DHS, because of its own unique circumstances, has adopted the overall structure of DOJ’s regulations and has used its content to inform the provisions of this proposed rule, but has tailored individual provisions to maximize their efficacy in DHS confinement facilities.

DHS also emphasizes that these proposed standards are not intended to establish a safe harbor for otherwise constitutionally-deficient conditions regarding detainee sexual

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abuse. Likewise, while the DHS standards aim to include a variety of best practices, the need to adopt standards applicable to a wide range of facilities while accounting for costs of implementation means that the proposed standards do not incorporate every promising avenue of combating sexual abuse. The proposed standards represent policies and practices that are attainable by DHS components and their contractors, while recognizing that other DHS policies and procedures can, and in some cases currently do, exceed these standards in a variety of ways. DHS applauds such efforts, and encourages its components and contractors to further support the identification and adoption of additional innovative methods to protect detainees from sexual abuse.

B. Section by Section Analysis.

The DHS proposal follows the DOJ rule in devising separate sets of standards tailored to different types of confinement facilities utilized by the DHS: “immigration detention facilities” and “holding facilities.” Each set of standards consists of the same eleven categories used by the DOJ rule: prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. As in the DOJ rule, a General Definitions section applicable to both sets of standards is provided.

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Definitions. Sections 115.5 and 115.6 provide definitions for key terms used in the proposed standards, including definitions related to sexual abuse. The definitions in this section largely mirror those used in the DOJ rule, with adjustments as necessary for DHS operational contexts. DHS has also largely relied on the NPREC's definitions in the Glossary sections that accompanied the NPREC's four sets of standards, but has made a variety of adjustments and has eliminated definitions for various terms that either do not appear in the DHS proposed standards or whose meaning is sufficiently clear so as not to need defining. Below is an explanation for key definitions modified or added by DHS:

Agency. The rule proposes to define agency as the unit or component of DHS responsible for operating or supervising any facility, or part of a facility, that confines detainees. This definition reflects the common understanding of the term agency as a unit of the Federal government and permits DHS to more appropriately and clearly place responsibility for compliance with the individual standards set forth in the proposed rule on the DHS component responsible for overseeing or supervising the facility, including the DHS component's responsibility for implementing DHS policy.

Exigent circumstances. The rule proposes a definition for this term, which is used in several standards. The term is defined to mean "any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person." Such circumstances include, for example, the unforeseen absence of a staff member whose presence is

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indispensable to carrying out a specific standard, or an outbreak of violence within the facility that requires immediate action.

Facility. A facility for purposes of the proposed rule means a place, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that was built or retrofitted for the purpose of detaining individuals and is routinely used by the agency to detain individuals in its custody. The proposed rule also clarifies that “[r]eferences to requirements placed on facilities extend to the entity responsible for the direct operation of the facility” to ensure that there is no ambiguity about each operator’s responsibility to comply with given standards within the proposed rule. In the case of long-term detention facilities and holding facilities used by ICE, this generally refers to the corporate contractor or State or local government entity responsible for the day-to-day operation of the facility. In the case of CBP holding facilities, this generally refers to the agency itself. This definition does not include temporary locations—such as U.S. Coast Guard vessels, hotel rooms, and conference rooms—temporarily or sporadically used to detain individuals for short periods of time during agency operations.

Family unit. DHS, unlike DOJ, oversees a Family Residential Program which houses non-criminal residents in a family-friendly, shelter-like setting. In order to facilitate placing families into this arrangement, ICE is required to identify family units. As such, DHS proposes

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to adopt the definition of “family unit” from the ICE Family Detention and Intake Guidance.⁶ In the Guidance, and in this proposed rule, family unit means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), none of whom has a known history of criminal or delinquent activity, or of sexual abuse, violence, or substance abuse.

Holding Facility. The DHS proposed rule uses the DOJ’s definition of “lockup,” as the basis for its definition of “holding facility” which is more consistent with terminology used throughout DHS policy documents. Important to this definition is that the holding facility must be “primarily used” for the short-term confinement of individuals who have recently been detained. As with the definition of “facility” above, the definition does not include temporary locations—such as U.S. Coast Guard vessels, hotel rooms, and conference rooms—temporarily or sporadically used to detain individuals for short periods of time during agency operations. These are governed separately by other agency operational policies.

Immigration detention facility. DHS detains the largest number of its detainees at ICE immigration detention facilities around the country. DHS and ICE define an immigration detention facility as a confinement facility operated by or affiliated with ICE that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an IGSA. ICE

⁶ See Memorandum from David J. Venturella, Acting Dir., Office of Detention and Removal Operations, to Field Office Directors (Aug. 14, 2009). This document is available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES**.

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ERO is responsible for providing custody management to approximately 158 authorized immigration detention facilities that house detainees for over 72 hours, including 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities (62 of the non-dedicated IGSA facilities and 2 of the dedicated IGSA facilities are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities). ICE ERO also provides custody management to an additional 91 authorized immigration detention facilities that are contracted to hold detainees for less than 72 hours, including 36 non-dedicated IGSA facilities and 55 USMS IGA facilities. The provisions within Subpart A below apply to all of the facilities just mentioned that are not USMS facilities, which are already covered by the DOJ PREA rule: 94 over 72-hour facilities and 36 under 72-hour facilities. Please see Table 1 in Section VI.A.2 Summary of Affected Populations.

Juvenile. DHS's existing detention policies define a juvenile as any person under the age of 18. The DOJ rule further qualified this with the phrase "unless under adult court supervision and confined or detained in a prison or jail." DHS does not operate or oversee prison or jail facilities and, as such, this phrase was not included as it is not applicable to DHS facilities. DHS does not incorporate this qualification because the juveniles DHS detains are detained for civil administrative purposes.

Sexual abuse. The DHS definition of sexual abuse in the proposed rule differs slightly from DOJ's definition of sexual abuse in the DOJ final rule. Both the DHS and DOJ standards define staff-on-detainee sexual abuse to cover all types of sexual contact between detainees and staff members, volunteers, or contractors that is unrelated to proper searches or medical duties,

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as well as any attempts by staff to engage in such contact or to coerce a detainee into doing so. Detainee-on-detainee sexual abuse is similarly defined by both standards to encompass all types of sexual contact between detainees accomplished through force, coercion, or intimidation. In order to account for the fact that DHS detainees are often held with prisoners, inmates, and facility residents, the proposed rule includes sexual abuse of a detainee by a prisoner, inmate, or resident in the definition of “sexual abuse of a detainee by another detainee.” However, whereas the DOJ standards include *attempted* acts of sexual abuse (in addition to completed acts of sexual abuse) only in their definition of staff-on-detainee abuse, DHS believes it is important to provide equal protection against attempted sexual abuse in all instances, and therefore includes attempted acts of sexual abuse in its definitions of both staff-on-detainee and detainee-on-detainee sexual abuse. In addition, DOJ separately defines sexual harassment by an inmate to include “[r]epeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another.” DHS, instead, incorporates much of the same behavior into the proposed definition of sexual abuse, which forbids “threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.”

In addition, DHS has included sexual harassment within its definition of staff-on-detainee sexual abuse, as DHS believes that combating precursors to sexual abuse represents an important aspect of preventing sexual abuse. DHS also has included unnecessary or inappropriate visual surveillance of a detainee as part of the definition of sexual abuse of a detainee by a staff

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member, contractor, or volunteer. The DHS prohibition on unnecessary or inappropriate visual surveillance is consistent with and addresses the same types of conduct as DOJ's prohibition on voyeurism, as that term is defined in DOJ's PREA final rule. Under the DHS rule, unnecessary or inappropriate surveillance generally derives from a prurient interest and is carried out through one or a series of embarrassing, intimidating, or degrading incidents involving leering, unnecessary supervision, or improper photography or videotaping of the detainee in a state of undress or performing bodily functions. For example, as DOJ explained in its PREA final rule, a staff member who happens to witness a detainee in a state of undress while conducting rounds has not engaged in unnecessary and inappropriate visual surveillance. On the other hand, a staff member who, outside of their official duties, takes images of all or part of a detainee's naked body, or of an inmate performing bodily functions, for the staff member's own use or for further distribution, has likely engaged in unnecessary and inappropriate visual surveillance.

Coverage: Section 115.10 clarifies that Subpart A of the proposed rule is only applicable to ICE immigration detention facilities. DHS holding facilities are governed by Subpart B of the proposed rule. DHS recognizes the importance of preventing, detecting, and responding to all sexual abuse, but also that the resources and environment of immigration detention facilities and holding facilities are different by nature and need to have a respectively different set of standards tailored to each of them for an effective outcome.

Prevention Planning: Sections 115.11, 115.111, 115.12, 115.112, 115.13, 115.113, 115.14, 115.114, 115.15, 115.115, 115.16, 115.116, 115.17, 115.117, 115.18 and 115.118. DHS believes it is important to establish what actions facilities are expected to take to prevent sexual

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abuse. Sections 115.11 and 115.111 require each DHS agency responsible for operation of confinement facilities and each immigration detention facility covered by Subpart A to establish a written zero-tolerance policy toward sexual abuse outlining the agency's or facility's approach to preventing, detecting, and responding to such conduct.

Sections 115.11 and 115.111 also mandate that each covered agency appoint an upper-level, agency-wide Prevention of Sexual Abuse Coordinator (PSA Coordinator) to oversee agency efforts to comply with DHS sexual abuse prevention, detection, and response standards and that each immigration detention facility covered by Subpart A appoint a Prevention of Sexual Abuse Compliance Manager (PSA Compliance Manager) to oversee facility efforts in this regard. A similar facility-level requirement is not included for Subpart B holding facilities, as those are very numerous, often small, and operated directly by the agency, and thus overseen by the PSA Coordinator through the normal agency chain of command.

With respect to the reporting level of the DHS component PSA Coordinator, DHS's proposed standard requires that the position be "upper-level" but does not require that the coordinator report directly to the DHS component head. The PSA Coordinator should have access to agency and facility leadership on a regular basis, and have the authority to work with other staff, managers, and supervisors to effectuate change if necessary. By contrast, the facility-specific PSA Compliance Manager need not be "upper-level," but should have access to facility staff, managers, and supervisors in order to guide implementation of facility sexual abuse prevention and intervention policies and procedures.

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Sections 115.12 and 115.112 require that agencies that contract with private entities for the confinement of detainees include the entity's obligation to comply with the DHS sexual abuse standards in new contracts or contract renewals. Although the proposed regulation would not directly apply to non-DHS private or public agencies or other entities, the proposed regulation requires that new contracts or renewals include the entity's obligation to adopt and comply with these standards and "provide for agency contract monitoring to ensure that the contractor is complying with these standards."

Sections 115.13 and 115.113 govern the supervision and monitoring of detainees. The DHS proposal recognizes that direct staff supervision and video monitoring are two methods of achieving one goal: reducing the opportunity for sexual abuse to occur unseen. DHS recognizes that different agencies and facilities rely on staffing and technology to varying degrees depending upon their specific characteristics. Accordingly, the DHS proposal considers these issues together.

DHS is also mindful that staffing and video-monitoring systems are both expensive. Staff salaries and benefits are typically the largest item in a correctional agency's budget, see, e.g., National Institute of Corrections, Staffing Analysis: Workbook for Jails (2d ed.) at 2, and economies of scale are difficult to obtain: increasing staffing by 25% is likely to increase staff costs by 25%. Likewise, video-monitoring systems may be beyond the financial reach of some agencies and facilities, although the costs of such systems may diminish in future years as technology advances.

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DHS, however, recognizes the importance of detainee supervision in combating sexual abuse and believes that the correctional community shares this view. See, e.g., American Correctional Association, Public Correctional Policy on Offender Sexual Abuse (Jan. 12, 2005) (recommending that agencies “[m]aintain adequate and appropriate levels of staff to protect detainees against sexual assault”). Although proper detainee supervision and monitoring cannot eliminate the risk of sexual abuse, it can play a key role in reducing opportunities for it to occur.

At the same time, DHS recognizes that determining adequate detainee supervision and monitoring is a facility-specific enterprise. For example, the appropriate means of supervision and monitoring, including appropriate staffing levels, depends upon a variety of factors, including (but not necessarily limited to) the physical layout of a facility, the security level and gender of the detainees, whether the facility houses adults or juveniles, the length of time detainees reside in the facility, the amount of programming that the facility offers, and the facility’s population density (i.e., comparing the number of detainees to the number of beds or square feet). Also, the facility’s reliance on video monitoring and other technology may reduce staffing requirements, as long as the facility employs sufficient staff to monitor the video feeds or other technologies such as call buttons or sensors. The viability of technology may in turn depend upon, among other factors, the characteristics of the confined population.

Due to the complex interaction of these factors, DHS does not believe that it is possible to craft an agency-wide or facility-wide formula that would set appropriate staffing levels for all populations—although DHS is aware that some States do set such levels for juvenile facilities. Nor is it likely that an auditor would be able to determine the appropriate staffing level in the

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limited amount of time available to conduct an audit. Relying on reported incidents of sexual abuse to determine appropriate staffing levels is also an imperfect method given the uncertainty as to whether an incident will be reported. Indeed, facilities where detainees feel comfortable reporting abuse, and where investigations are conducted effectively, may be more likely than other facilities to experience substantiated allegations of sexual abuse, even if the facility is safer than its counterparts. For this reason, DHS, like DOJ, has opted not to adopt general across-the-board standards on this issue, as proposed by some commenters to the DOJ rulemaking.

Accordingly, DHS is of the view that any standard that governs detainee supervision and monitoring must protect detainees by providing sufficient clarity as to its requirements, recognizing that the adequacy of detainee supervision and monitoring depends on several factors that interact differently for each facility, and accounting for the costs involved in employing additional staff and in purchasing and deploying additional technology. The agency or the facility itself must, therefore, make its own comprehensive assessment of adequate supervision levels, taking into account its use, if any, of video monitoring or other technology. The fact that multiple factors bear on the adequacy of detainee supervision and monitoring is no barrier to requiring an agency to conduct such an assessment for each of its facilities. The agency or facility must reassess at least annually such adequate supervision and monitoring, including through appropriate staffing levels, and should also reassess its use of video monitoring systems and other technologies. This annual assessment will include an examination of the adequacy of resources the agency or facility has available to ensure adequate levels of detainee supervision and monitoring. The purpose of mandating such inquiries within these standards is to

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institutionalize the practice of assessing detainee supervision and monitoring in the context of considering how supervision and monitoring contribute to efforts to combat sexual abuse. DHS is interested in receiving comments on whether and to what extent this standard should include additional or alternative requirements.

DHS notes, however, that this standard, like all the standards, is not intended to serve as a legal safe harbor. A facility that makes its best efforts to design and comply with its detainee supervision plan is not necessarily in compliance with legal requirements, even if a staffing shortfall is due to budgetary factors beyond its control.

DHS also believes that heightened protection should be accorded detainees who are assessed to be at a high risk of victimization for sexual abuse. The proposed rule thus provides in the holding facility context under proposed 115.141 that the agency provide such detainees heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible. In the immigration detention context, heightened protection is addressed at another section of the proposed rule, 115.43, which imposes requirements more consistent with the long-term detention context and the more extensive resources found within those facilities, including consideration of administrative segregation. The proposed rule also includes proposed 115.13(d), which calls for unannounced security inspections to augment the safety of detainees held in the immigration detention facilities. This provision is not included in the holding facility provisions as the

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agency visual supervision of detainees in that context is frequently direct and more continuous than in the long-term detention context.

In general, DHS provides that juveniles will be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as any other laws, regulations, or legal requirements. Nearly all juveniles in ICE detention are located in family facilities, specifically in two family detention facilities that house juvenile detainees along with adult family members. Although the concern raised by potential mixing of adult and juvenile populations is thus unlikely to be an issue in ICE facilities as a whole, DHS has proposed a standard in section 115.14 that restricts, but does not forbid, the placement of juveniles in adult facilities. This provision is in recognition that it is possible under certain circumstances that adult and juvenile populations potentially could mix and it is important to clarify in regulation that DHS seeks to restrict such an outcome whenever possible.

The BJS previously reported that, based on its surveys of facility administrators, 20.6% of victims of substantiated incidents of inmate-on-inmate sexual violence in adult jails in 2005 were under the age of 18, and 13% of such victims in 2006 were under 18,⁷ despite the fact that under-18 inmates accounted for less than one percent of the total jail population in both years.⁸ These findings derived from facility responses to the BJS's *Survey of Sexual Violence (SSV)*, which was administered to a representative sampling of jail facilities in addition to all Federal

⁷See Beck, *Sexual Violence Reported by Correctional Authorities, 2005*, Table 4, BJS (2006); and Beck, *Sexual Violence Reported by Correctional Authorities, 2006*, Appendix Table 5, BJS (2007).

⁸See Minton, *Jail Inmates at Midyear 2010 – Statistical Tables*, Table 7, BJS (2011).

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and State prison facilities. However, upon further review, BJS has determined that these figures are not statistically significant due to the small number of reported incidents and the small number of jails contained in the sample. Indeed, in reporting data from the 2007 and 2008 SSVs, BJS determined that the standard errors around the under-18 estimates for adult jails were excessively large, and consequently did not report the estimates separately, but rather reported combined figures for inmates under the age of 25. BJS has now determined that it should have done the same for 2005 and 2006.

However, this conclusion does not impact the findings of the same BJS surveys performed in State prisons, which surveyed all State prisons (in contrast to the jails surveys, which included only a sampling of jails). According to SSV reports, from 2005 through 2008, 1.5% of victims of substantiated incidents of inmate-on-inmate sexual violence in State prisons were under 18, even though under-18 inmates constituted less than 0.2% of the State prison population. While the number of such substantiated incidents is small from 2005 through 2008—a total of 10—the combined data indicates that State prison inmates under the age of 18 are more than eight times as likely as the average State prison inmate to have experienced a substantiated incident of sexual abuse. Furthermore, the true prevalence of sexual abuse is undoubtedly higher than the number of substantiated incidents, due to the fact that many incidents are not reported, and some incidents that are reported are not able to be verified and thus are not classified as “substantiated.” Indeed, it is quite possible that prison inmates under 18 are more reluctant than the average inmate to report an incident because of their age and relative newness to the prison system.

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DOJ's review of State procedures in its final rule indicates that at least 28 States have laws, regulations, or policies that restrict the confinement of juveniles in adult facilities in varying degrees. Some jurisdictions house these juveniles in juvenile facilities until they reach a threshold age and then transfer them to an adult facility. Other jurisdictions require physical separation or sight and sound separation between these juveniles and adult offenders. Yet other jurisdictions maintain dedicated programs, facilities, or housing units for juveniles in the adult system. Overall, there appears to be a national trend toward limiting interaction between juveniles and adult inmates. In recent years, a number of States have imposed greater restrictions on the placement of juveniles in adult facilities or have passed legislation to allow juveniles tried as adults to be housed in juvenile facilities.⁹

⁹ See 77 FR 37106, 37128 n.14 (June 20, 2012) (citing 42 Pa. C.S.A. § 6327 (under-18 Pennsylvania inmates awaiting trial as adults may be detained in juvenile facilities until reaching 18); Va. S.B. 259, 2010 Gen. Assem., Reg. Sess. (eff. July 1, 2010) (presumption that under-18 Virginia inmates awaiting trial as adults be held in juvenile facilities); Colo. Rev. Stat. § 19-2-517 (2012) (preventing 14 and 15-year-olds from being tried as adults except in murder and sexual assault cases; requires prosecutors to state reasons and hear from defense counsel before exercising discretion to try 16 and 17-year-olds as adults); Ariz. S.B. 1009, 49th Leg., 2d Reg. Sess. (2010) (eliminating eligibility of some juveniles to be tried as adults by requiring a criminal charge brought against the juvenile to be based on their age at the time the offense was committed and not when the charge was filed); Utah H.B. 14, Gen. Sess. (Utah 2010) (granting justice court judge discretion to transfer a matter at any time to juvenile court if it is in the best interest of the minor and the juvenile court concurs); Miss. S.B. 2969, 2010 Leg., Reg. Sess. (2010) (limiting the types of felonies that 17 year olds can be tried for as an adult); Wash. Rev. Code § 13.04.030(1)(e)(v)(E)(III) (2012) (allowing juveniles to be transferred back to juvenile court upon agreement of the defense and prosecution); Wash. Rev. Code § 13.40.020 (14) (providing that juveniles previously transferred to adult court are not automatically treated as adults for future charges if found not guilty of original charge); 2009 Nev. Stat. 239 (raising the age a juvenile may be presumptively certified as an adult from 14 to 16); Me. Rev. Stat. Ann. tit. 17-A § 1259 (2011) (providing that juveniles under 16 who receive adult prison sentence must serve sentence in juvenile correctional facility until their 18th birthday); 2008 Ind. Acts 1142-1144 (limiting juvenile courts' ability to waive jurisdiction to felonies and requiring access for Indiana criminal justice institute inspection and monitoring of facilities that are or have been used to house or hold juveniles); Conn. Gen. Stat. § 54-76b-c (2012) (creating presumption that 16-17 year olds are eligible to be tried as youthful offenders unless they are charged with a serious felony or had previously been convicted of a felony or adjudicated a serious juvenile offender); 75 Del. Laws 269 (2005) (limiting Superior Court's original jurisdiction over robbery cases involving juveniles to crimes committed by juveniles who had previously been adjudicated delinquent for a felony charge and thereafter committed a robbery in which a deadly weapon was displayed or serious injury inflicted); 705 Ill. Comp.

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Furthermore, several accrediting and correctional associations have formulated position statements, issued standards, or provided comments urging either that all persons under 18 be held in juvenile facilities only, or that they be housed separately from adult inmates. For example, the National Commission on Correctional Healthcare, the American Jail Association, the National Juvenile Detention Association, and the National Association of Juvenile Correctional Agencies all support separate housing or placement for juveniles.¹⁰ So too does the American Bar Association.¹¹

Although many jurisdictions have moved away from incarcerating adults with juveniles, a significant number of juveniles continue to be integrated into the adult inmate population. DOJ estimates that in 2009, approximately 2,778 juveniles were incarcerated in State prisons and 7,218 were held in local jails.¹²

Taking these statistics and DHS operational requirements into consideration, DHS has decided to propose standards aimed at preventing unsupervised contact with adults without inadvertently causing harm to juveniles. The standard requires juveniles to be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such

Stat. 405/5-130 (2011) (eliminating the requirement that 15-17 year olds charged with aggravated battery with a firearm and violations of the Illinois Controlled Substances Act, while on or near school or public housing agency grounds, be tried as adults)).

¹⁰ See Letter from Campaign from Youth Justice, *et al.*, to Attorney General Holder, at 4, April 4, 2011; NCCHC Position Statement, Health Services to Adolescents in Adult Correctional Facilities, adopted May 17, 1998, <http://www.ncchc.org/resources/statements/adolescents.html>.

¹¹ See ABA Criminal Justice Standards on the Treatment of Prisoners, at 23-3.2(b), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.

¹² See West, Prison Inmates at Midyear 2009 – Statistical Tables, Table 21, BJS (Rev. 2011); Minton, Jail Inmates at Midyear 2010 – Statistical Tables, Table 6, BJS (Rev. 2011).

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setting is consistent with the need to protect the juvenile's well-being and that of others, as well as any other laws, regulations or legal requirements.

In section 115.14, Juvenile and family detainees, the proposed standard for ICE immigration detention facilities is consistent with ICE's Family Detention and Intake Guidance and recognizes that in some circumstances ICE detains families together. Under this standard, ICE immigration detention facilities would not be required to hold juveniles apart from adults if the adult is a member of the family unit and no other adult non-relative detainees are in the same detention cell, and provided there are no safety or security concerns with the arrangement. ICE policy and the standards would further require that facilities provide priority attention to unaccompanied alien children, as defined by 6 U.S.C. 279, whom DHS is legally required to transfer to a HHS Office of Refugee Resettlement facility within 72 hours, except in exceptional circumstances. If the unaccompanied alien child has been convicted of a sexual abuse-related crime as an adult, ICE will provide the entity taking custody of the juvenile—generally the facility or the HHS Office of Refugee Resettlement—with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in an HHS Office of Refugee Resettlement facility.

Section 115.114, the standard for detaining juveniles in holding facilities, leaves open the possibility that families detained while travelling or living together may be detained together, while providing that unaccompanied juveniles be held separately from adult detainees. This distinction is intended to protect unaccompanied juveniles who may be at an increased vulnerability to sexual abuse by virtue of their unaccompanied status but permit families

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travelling together to remain together while confined for temporary processing or other agency operations.

With these sections, DHS is mindful of agency concerns regarding cost, feasibility, and preservation of State law prerogatives. The proposed standard still affords facilities and agencies some flexibility in devising an approach to protecting juveniles. Compliance may be achieved by, for example: (1) confining juveniles to a separate unit, (2) transferring juveniles to a facility within the agency that enables them to be confined to a separate unit, (3) entering into a cooperative agreement with an outside jurisdiction to enable compliance, or (4) ceasing to confine juveniles in adult facilities as a matter of policy, or State or local law. Agencies may, of course, combine these approaches as they see fit.

Sections 115.15 and 115.115 address limits on cross-gender viewing and searches. The proposed rule would require policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or bowel movement under medical supervision. The proposed rule would also require that staff of the opposite gender announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing. The rule would further prohibit cross-gender strip searches except in exigent circumstances, or when performed by medical practitioners, and prohibits facility staff from conducting body cavity searches of juveniles, requiring instead that all body cavity searches of juveniles be referred to a medical

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practitioner. These DHS provisions are the same for immigration detention facilities and holding facilities, and reflect the existing policies related to ICE immigration detention operations.

In Subpart A, the DHS proposal imposes limits on immigration detention facilities' cross-gender searches that are broader in scope than the DOJ PREA final rule, generally prohibiting cross-gender pat-down searches of all detainees, male or female. The DOJ regulations governing adult prisons and jails prohibit cross-gender pat-down searches of female inmates only, with a relatively narrow exception for exigent circumstances. DHS adopts the DOJ standard on cross-gender pat-down searches of female inmates (for DHS's purposes, female detainees). DHS has also incorporated the PBNDS 2011 standard prohibiting cross-gender pat-down searches of male detainees, with an exception for situations where, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances. DHS intends this standard to require facilities to make considerable efforts to facilitate same-gender staff availability. Whereas DOJ's rule is being phased in over three to five years, depending on the size of the affected facility, DHS proposes implementation of this standard at the same time as all other requirements placed on facilities through this rulemaking. DHS is soliciting public comment on this proposed approach to restrictions on cross-gender pat-down searches.

DOJ explained in its final rule that it had received numerous comments on its proposed limits on cross-gender pat-down searches during the course of its rulemaking. Multiple State and local agencies expressed concern about a complete prohibition on cross-gender pat-down searches, as applied to male inmates. The commenters wrote that such a requirement might

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affect an agency's ability either to hire significant numbers of additional male staff or to lay off significant numbers of female staff, due to their overwhelmingly male inmate population and substantial percentage of female staff. In addition, many agencies expressed concern that the necessary adjustments to their workforce could violate Federal or State equal employment opportunity laws. DHS has taken note of these comments in formulating its proposals but believes its circumstances can accommodate the proposed prohibition of cross-gender pat-down searches unless staff of the same gender is not available, after reasonable diligence, or in exigent circumstances.

Accordingly, and consistent with existing DHS policies, in Section 115.15, DHS proposes to prohibit cross-gender pat-down searches in its immigration detention facilities unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required (for male detainees), or in exigent circumstances (for female and male detainees alike). DHS proposes to require that all cross-gender pat-down searches conducted pursuant to these exceptions be documented. Cross-gender pat-downs are not prohibited in the holding facility context, in Section 115.115, because of the exigencies encountered in those environments and the staffing and timing constraints in those small and short-term facilities.

Sections 115.15 and 115.115, consistent with existing DHS policy, also bar examinations of detainees for the sole purpose of determining gender status. Rather, if the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records (if available), or, if necessary, learning that information as part of a broader medical examination conducted in private by a medical practitioner. The proposed standard also

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mandates that agencies train security staff, in the immigration detention facility context, and law enforcement staff, in the holding facility context, in proper procedures for conducting all pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. The DHS standard mandates that all pat-down searches be conducted in a professional and respectful manner, and in the least intrusive manner possible consistent with security needs, including officer safety concerns, and existing agency policy.

Sections 115.16 and 115.116 govern the accommodation of detainees with disabilities and detainees with limited English proficiency (LEP). As the NPREC noted, “[t]he ability of all detainees to communicate effectively and directly with staff, without having to rely on detainee interpreters, is crucial for ensuring that they are able to report sexual abuse as discreetly as possible.” Prison/Jail Standards at 13. Moreover, the Americans with Disabilities Act (ADA) requires State and local governments and their instrumentalities to make their services, programs, and activities accessible to individuals with all types of disabilities. See 42 U.S.C. 12132. The ADA also requires State and local governments to ensure that their communications with individuals with disabilities affecting communication (blindness, low vision, deafness, or other speech or hearing disability) are as effective as their communications with individuals without disabilities. In addition, the ADA requires each State and local government to make reasonable modifications to its policies, practices, and procedures when necessary to avoid discrimination against individuals with disabilities, unless it can demonstrate that making the modifications would fundamentally alter the nature of the relevant service, program, or activity. These

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nondiscrimination obligations apply to all confinement facilities operated by or on behalf of State or local governments. See Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209-10 (1998).

DHS's proposed standard requires all facilities to take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse. Such steps would include, when necessary, ensuring effective communication with detainees who are deaf or hard of hearing, and providing access to in-person, telephonic, or video interpretive services. In addition, DHS will provide all facilities with written materials related to sexual abuse in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. Consistent with DOJ regulations under title II of the ADA, 28 CFR 35.164, the agency would not be required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens.

Similarly, DHS agencies would be required to take reasonable steps to ensure meaningful access for LEP detainees to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse, including steps to provide in-person or telephonic interpretive services to enable effective, accurate, and impartial interpretation, both receptively and expressively, using any

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necessary specialized vocabulary. These requirements are consistent with the existing DHS-wide Language Access Plan.¹³

With respect to relying on detainee interpreters, 115.16(c) limits reliance on detainee interpreters in circumstances related to allegations of sexual abuse. Specifically, the DHS standard proposes to require that the agency provide access to in-person or telephonic interpretation services by someone other than another detainee when dealing with issues related to sexual abuse, but would not prohibit reliance on a detainee interpreter where the detainee expresses a preference for a detainee interpreter and the agency determines that such interpretation is appropriate. A detainee would not be an appropriate interpreter if he or she is the alleged abuser or a witness to the alleged abuse, or has some significant relationship with the alleged abuser. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser to provide interpretation is not appropriate in matters relating to allegations of sexual abuse. This provision is intended to ensure access to the effective, accurate, and impartial interpretation that is essential when addressing sensitive issues such as those involving allegations of sexual abuse, but to accommodate detainees who prefer to have another detainee interpret for them.

DHS re-emphasizes that the requirements in this proposed standard are not intended to relieve agencies of any preexisting obligations imposed by the ADA, the Rehabilitation Act of 1973, or the meaningful access requirements of Title VI of the Civil Rights Act of 1964, 42

¹³ The DHS Language Access Plan can be found at www.dhs.gov/crcl-lep.

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U.S.C. 2000d *et seq.*, and Executive Order 13166. DHS encourages all agencies to refer to the relevant statutes, regulations, and guidance when determining the extent of their obligations.

Sections 115.17 and 115.117 govern hiring and promotion decisions. Like the DOJ standards, the proposed DHS standard would restrict agencies' ability to hire or enlist the services of anyone who may have contact with detainees and who previously engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity. The agency or facilities will also be required to consider any substantiated allegations of sexual abuse made against staff in making promotion decisions.

Finally, like the DOJ final rule, the DHS proposal would require a background investigation before the agency or facility hires employees, staff, or contractors who may have contact with detainees. These background investigations will include accessing the standard criminal records databases maintained and widely used by law enforcement agencies. To ensure that facilities perform a background investigation consistent with agency standards, DHS proposes to require the facility to provide written documentation to the agency upon request showing the elements completed in the background check and the facility's final determination for the agency's approval. DHS will repeat these background checks for agency employees every five years. In addition, these proposed standards would require an updated background

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investigation every five years for those facility staff who may have contact with detainees and who work in immigration-only detention facilities. Unlike the DOJ final rule, however, DHS does not propose to require all facilities to repeat the background checks every five years; the burden of this requirement seems to outweigh its beneficial effect, particularly given that many facility staff do not frequently have contact with immigrant detainees.

Sections 115.18 and 115.118 require agencies and facilities to consider the effect of any facility designs, modifications, or technological upgrades on efforts to combat sexual abuse when designing or expanding facilities and when installing or updating a video monitoring system or other technology. DHS believes that it is appropriate to require agencies to consider the impact of their physical and technological upgrades. Indeed, the American Correctional Association has recommended that, as a means of deterring sexual abuse, agencies should promote facility design that enables effective supervision within facilities, including, for instance, direct lines of sight, video monitoring systems, and other physical and technology features. American Correctional Association, Public Correctional Policy on Offender on Offender Sexual Abuse (Jan. 12, 2005; Jan. 27, 2010). DHS agrees that it needs to be forward-looking in its strategy to prevent sexual abuse in its immigration detention and holding facilities, and believes that this provision will institute appropriate strategic thinking within DHS and its partners for future construction.

Responsive Planning: Sections 115.21, 115.121, 115.22 and 115.122. DHS believes it is important to establish standards that address how facilities are expected to respond to an incident of sexual abuse. Sections 115.21 and 115.121 set forth requirements to ensure each agency and facility establishes a protocol for the investigation of allegations of sexual abuse, or the referral

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of allegations of sexual abuse to the appropriate investigative authorities. Agencies and facilities are also required to establish protocols that maximize the potential for preserving usable physical evidence for administrative or criminal proceedings, and are required to publish the agency and facility protocols on their respective websites, or otherwise make those protocols available to the public. In addition, all detainee victims must be provided access to a forensic medical examination as appropriate, at no cost to the detainee.

These proposed standards make clear that DHS components and facilities must have protocols in place that maximize the potential for obtaining usable physical evidence. Similarly, the proposed standard specifies that the protocol must be developmentally appropriate for juveniles, where applicable. Recognizing the value of victim advocacy services in these circumstances, the proposed standards provide that immigration detention facilities must establish procedures to make available, to the extent possible, outside victim services following incidents of sexual abuse. DHS holding facilities would also be required to consider how best to utilize available community resources and victim services and if, in connection with an allegation of sexual abuse at a holding facility, the detainee is transported for an examination to an outside hospital that offers victim advocacy services, the detainee would be permitted to use such services to the extent available, consistent with DHS security needs.

This proposed standard takes into account the fact that some DHS component agencies and facilities are not responsible for investigating alleged sexual abuse within their facilities and that those agencies and facilities may not be able to dictate the conduct of investigations conducted by outside entities, such as law enforcement agencies. In such situations, the

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proposed standard requires the agency or facility to request that the investigating entity follow the relevant investigatory requirements set out in the standard.

Sections 115.22 and 115.122 propose standards to ensure that, to the extent the agency is responsible for investigating allegations of sexual abuse, an administrative and/or criminal investigation is completed for all allegations of sexual abuse. Where the agency or facility is not responsible for conducting such investigation, they would ensure that the allegations are promptly referred to an appropriate entity with the legal authority to conduct the investigation. The DHS proposal thus mandates that each DHS component have in place policies to ensure that allegations of sexual abuse either are investigated by the agency or are promptly referred to an appropriate entity for investigation. In order for the PSA Coordinator to have appropriate oversight of these allegations across the agency, and to support the PSA Coordinator's recordkeeping and reporting functions, all incidents of detainee sexual abuse would be promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS.

Sections 115.22 and 115.122 also would require that when an allegation of detainee abuse that is criminal in nature is being investigated, each agency shall ensure that any alleged detainee victim of criminal sexual abuse is provided access to relevant information regarding the U nonimmigrant visa process. DHS intends to implement this requirement by providing either the phone number to an appropriate national hotline or relevant informational materials printed by U.S. Citizenship and Immigration Services. In addition, facilities are required to post lists of pro bono legal service providers with contact information and Legal Orientation Program

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presentations and materials to assist detainees seeking information regarding the U nonimmigrant visa process. Should the available informational resources change, DHS will change its practices accordingly to satisfy this requirement.

Training and Education: Sections 115.31, 115.131, 115.32, 115.132, 115.33, 115.34, 115.134, and 115.35. DHS believes that training for individuals who may have contact with detainees is a key component in combating sexual abuse. Training will create awareness on the topic of sexual abuse in facilities, clarify staff responsibilities, provide staff with information regarding reporting mechanisms, and provide specialized information for staff with key roles in responding to sexual abuse. In addition, each standard in this category requires documentation that the required training was provided. In order to facilitate compliance, such documentation may be electronic.

Sections 115.31 and 115.131 require that all employees who have contact with detainees, and all facility staff receive training concerning sexual abuse, with refresher training to be provided thereafter as appropriate. This training must include at a minimum: the agency's zero-tolerance policies for all forms of sexual abuse; the right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse; definitions and examples of prohibited and illegal sexual behavior; recognition of situations where sexual abuse may occur; recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences; and procedures for reporting knowledge or suspicion of sexual abuse; the requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative

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purposes. The agency or facility would need to document completion of the training and complete the training for current staff within one year of the effective date of the standard for immigration detention facilities and within two years of the effective date of the standard for holding facilities. The proposal permits holding facilities a longer period of time to implement the training. In light of the very large number of CBP personnel who will receive this training, two years is a more appropriate timeframe to ensure completion of the training. In the meantime, the agency will publish and disseminate to all agency personnel the agency policy mandating zero tolerance toward all forms of sexual abuse.

Section 115.32 ensures that volunteers and contractors at immigration detention facilities have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures; in holding facilities, volunteers and contractors are covered by 115.131.

DHS believes that educating detainees concerning sexual abuse protections is of the utmost importance. Section 115.132 requires the agency to make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.

Separately, section 115.33 requires each immigration detention facility to inform detainees about the agency's and the facility's zero-tolerance policies regarding sexual abuse. DHS believes that regular communication and publication of these policies are important means of creating the appropriate tone to ensure compliance. As such, section 115.33 requires that

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information about combating sexual abuse is provided to individuals in custody upon intake. Several agency commenters to the DOJ PREA proposed rule expressed concern that DOJ's standard would impose a vague mandate by requiring the provision of comprehensive education to detainees within a "reasonably brief period of time" following intake. The proposed DHS standard for immigration detention facilities requires the provision of comprehensive education upon intake, and not following intake. Given the relatively short amount of time that individuals are detained in DHS holding facilities, this requirement is limited to Subpart A.

Sections 115.34 and 115.134 require that the agency or facility provide specialized training to agency or facility investigators who conduct investigations into allegations of sexual abuse at confinement facilities, and require that all investigations into alleged sexual abuse be conducted by qualified investigators. To the extent not already included in agency training, ICE and CBP will train investigators on sexual abuse investigations, covering interviewing sexual abuse and assault victims; sexual abuse evidence collection in confinement settings; and the criteria and evidence required for administrative action or prosecutorial referral. DHS is also interested in receiving feedback on how it can provide additional assistance to facilities in developing and administering such training.

Section 115.35 requires that the agency provide specialized training to DHS employees who serve as full- and part-time medical practitioners and mental health practitioners in immigration detention facilities where medical and mental health care is provided. DHS believes that investigative and medical staff members serve vital roles in the response to sexual abuse and, due to the nature of their responsibilities, require additional training in order to be effective.

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With regard to facility medical staff, the standard requires that the agency review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse. A parallel standard is not included for DHS holding facilities, which usually do not employ or contract for medical or mental health practitioners.

Assessment for Risk of Sexual Victimization and Abusiveness: Sections 115.41, 115.141 and 115.42 and 115.43. DHS believes that the proper assessment of detainees is crucial to preventing sexual abuse. Protection of detainees in immigration detention and holding facilities requires that agencies and facilities obtain information from detainees and use such information to assign detainees to facilities or specific cells in which they are likely to be safe. These proposed standards are substantially similar to those implemented by DOJ, except that reassessment is required to take place 60-90 days after the initial assessment, rather than 30 days after. The average length of stay in ICE detention is 26 days, with many detainees staying just a few days or weeks more than that average. In addition, ICE has a robust onsite monitoring and review process that includes routine interaction with ICE detainees. This monitoring would allow ICE to be made aware of any additional, relevant information after the intake assessment, to determine whether a reassessment is appropriate.

Sections 115.41 and 115.141 require that before placing any detainees together in a holding facility or housing unit, staff consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused or abusing others. When appropriate, staff shall take necessary steps to mitigate any such danger to the detainee. In the list of factors

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to consider, DHS proposes, to the extent that the information is available, that the agency consider whether the detainee has a mental, physical, or developmental disability; the age of the detainee; the physical build and appearance of the detainee; whether the detainee has previously been incarcerated; the nature of the detainee's criminal history; whether the detainee has any convictions for sex offenses against an adult or child; whether the detainee has self-identified as being gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; whether the detainee has self-identified as having previously experienced sexual victimization; and the detainee's own concerns about his or her physical safety. For holding facilities, under section 115.141, the proposed standard adds an abbreviated risk assessment process for facilities that do not hold detainees overnight, and a more extensive risk assessment process for holding facilities where detainees may be held overnight with other detainees.

Section 115.42 requires administrators of immigration detention facilities to use the information obtained in an assessment interview in order to separate individuals who are at risk of abuse from those at high risk of being sexually abusive. The proposed DHS regulation is substantially similar to the NPREC's standard with one exception. The proposed standard does not include the NPREC's recommended ban on assigning detainees to particular units solely on the basis of sexual orientation or gender identity, but requires that the facility consider detainees' gender self-identification and make an individualized assessment of the effects of placement on detainee mental health and well-being. DHS believes that retaining some flexibility will allow facilities to employ a variety of options tailored to the needs of detainees with a goal of offering the least restrictive and safest environment for individuals.

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Section 115.43 governs the use of protective custody. Due to the importance of protective custody, DHS believes it warrants its own standard, applicable only to immigration detention facilities, as other types of DHS confinement facilities usually do not have protective custody assignments of this nature. The proposed standard provides that administrative segregation shall be used to protect vulnerable populations only in those instances where reasonable efforts have been made to provide appropriate housing, and shall be used for the least amount of time practicable, and when no other viable housing options exist, as a last resort. DHS recognizes that protective custody may be necessary in a confinement setting to ensure the safety of detainees and staff. However, DHS also notes that the prospect of placement in segregated housing may deter detainees from reporting sexual abuse. The new standard attempts to balance these concerns and ensure that alternatives to involuntary protective custody are considered. In addition, the proposed standard reflects the NPREC's recommendation that, to the extent possible, facilities that place detainees in administrative segregation for protective custody should provide those detainees access to programs, services, visitation, counsel and other services available to the general population to the maximum extent practicable.

Reporting: Sections 115.51, 115.151, 115.52, 115.53, 115.54, and 115.154. DHS believes that reporting instances of sexual abuse is critical to deterring future acts.

Sections 115.51 and 115.151 require agencies to enable detainees to privately report sexual abuse, retaliation for reporting sexual abuse, and related misconduct. The NPREC recommendations proposed that agencies be required to allow detainees to report abuse to an outside public entity, which would then forward reports to the facility head "except when [a

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detainee] requests confidentiality.” Several commenters to the DOJ PREA rulemaking expressed concern that a public entity would be required to ignore reports of criminal activity if a detainee requested confidentiality. DHS proposes that detainees be provided instruction on how to contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially report sexual abuse. However, DHS will also provide and facilities shall inform the detainees of at least one way for detainees to report sexual abuse to a public or private entity or office not part of the agency, and that is able to receive and immediately forward detainee’s reports of sexual abuse to agency officials allowing the detainee to remain anonymous, upon request. In light of the short time in which individuals are detained in holding facilities, the requirement in section 115.151 would be met if information regarding consular notification is posted in holding facilities. DHS further proposes that policies and procedures include provisions for staff to accept reports of sexual abuse, and to promptly document any verbal reports.

Consistent with existing policy, DHS employees may report misconduct outside their chain of command to, for instance, the Joint Intake Center; likewise, the proposed rule requires an option for staff of non-chain-of-command reporting.

Section 115.52 governs grievance procedures and the methods by which detainees can, if they choose, file grievances related to sexual abuse. First, the proposal requires that facilities not impose any deadline on the submission of a grievance regarding sexual abuse incidents. Detainees are to be permitted to file a formal grievance at any time before, during, after, or in lieu of lodging an informal complaint related to sexual abuse. The facility then must issue a

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decision on the formal grievance within five days of receipt. To prepare a grievance, a detainee may obtain assistance from fellow detainees, the housing officer, other facility staff, family members, attorneys, or outside advocates. DHS does not use a formal grievance process to govern holding facilities because of the short-term, transitory nature of detention in such facilities; detainees can use any of the methods in Section 115.151 to report misconduct.

Several State correctional agencies asserted in comments to the DOJ PREA rulemaking that imposing a standard governing the exhaustion of administrative remedies would undermine or violate the Prison Litigation Reform Act (PLRA). DOJ determined that its corresponding standards were not, however, inconsistent with the PLRA. And in any event, the PLRA does not apply to immigration detainees, even if they are housed in correctional settings. See 18 U.S.C. 1997e.

Several agency commenters to the DOJ PREA rulemaking stated that a requirement to treat any notification of an alleged sexual assault as a grievance, regardless of the method by which notification was made (other than by notification by a fellow inmate), would pose administrative difficulties, particularly when such notification came from a third party. Commenters suggested that it would be burdensome and impracticable to require staff to complete a grievance form on behalf of an inmate whenever staff learns of an allegation of sexual abuse. DHS agrees with these commenters and has not included a similar provision in its proposed rule.

Section 115.53 requires that agencies provide detainees access to outside confidential support services, similar to the NPREC's recommended standard. The DHS proposed standard

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modifies the NPREC's recommended language, which would require communications to be "private, confidential, and privileged, to the extent allowable by Federal, State, and local law." Instead, the proposed DHS rule requires that each facility consider utilizing available community resources and services to provide valuable expertise and support in the areas of crisis intervention, counseling, investigation and the prosecution of sexual abuse perpetrators to most appropriately address victims' needs. DHS recognizes that allowing detainee access to outside victim advocacy organizations can greatly benefit detainees who have experienced sexual abuse yet who may be reluctant to report it to facility administrators, and notes that some agencies, such as the California Department of Corrections and Rehabilitation, have established successful pilot programs working with outside organizations.¹⁴ At the same time, DHS recognizes that communications with outsiders raise legitimate security concerns. The proposed DHS standard strikes a balance by allowing confidentiality while recognizing the importance of safeguarding security. The DHS proposal further requires each facility's written policies to establish procedures to include outside agencies in the facility's sexual abuse prevention and intervention protocols, if resources are available, and to make available to detainees the names of local organizations that can assist detainee victims of sexual abuse. PSA Compliance Managers are in the best position to assist with identifying these community victim service resources given their familiarity with the local environment and should make such contact information available to

¹⁴ See Testimony of Wendy Still, Assoc. Dir. of Female Offender Program and Services, Cal. Dep't of Corr. and Rehab., Testimony at a Public Hearing of the National Prison Rape Elimination Commission, Confidentiality and Reporting: Medical Ethics, Victim Safety, and Facility Security 230 (Dec. 5, 2007).

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victims. Under current ICE policy, the PSA Compliance Managers are required to develop written protocols, including any available outside agencies/resources in the facility's sexual abuse and assault prevention and intervention program. Again, DHS does not propose a requirement for access to outside confidential support services in DHS holding facilities due to the very short-term, transitory nature of detention in such facilities.

Sections 115.54 and 115.154 require that immigration detention facilities and holding facilities establish a method to receive third-party reports of sexual abuse and publicly distribute information on how to report such abuse on behalf of a detainee. DHS believes this provision is essential to promptly receiving reports of sexual abuse, as some reports of sexual abuse may undoubtedly come to the attention of third parties before they are brought to the agency.

Official Response Following a Detainee Report: Sections 115.61, 115.161, 115.62, 115.162, 115.63, 115.163, 115.64, 115.164, 115.65, 115.165, 115.66, 115.67 and 115.167. DHS proposes standards addressing the appropriate official response following a report of sexual abuse. These standards are intended to ensure coordinated, thorough, and complete reactions to reports of sexual abuse.

Sections 115.61 and 115.161 set forth staff and agency reporting duties regarding incidents of sexual abuse. The standards require all staff to report immediately and according to agency or facility policy: (1) any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in any facility; (2) retaliation against detainees or staff who reported such an incident; and (3) any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The standards would prohibit the agency from revealing

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any information related to a sexual abuse report to anyone other than to the extent necessary to make medical treatment, investigation, law enforcement, and other security and management decisions.

Sections 115.62 and 115.162 require generally that when an agency employee has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, the agency must take immediate action to protect the detainee. Section 115.62 further places this protection duty on facility staff, given that in the immigration detention facility context often the facility staff is best positioned to take such protective action, for example, when conducting initial intake or receiving a detainee from another facility.

Sections 115.63 sets forth responsibilities for reporting allegations of sexual abuse to other confinement facilities. Upon receiving an allegation that a detainee was sexually abused, the facility is required to: (1) if the alleged sexual abuse occurred at a different facility than where it was reported, ensure that the appropriate office of the facility where the sexual abuse is alleged to have occurred is notified as soon as possible, but no later than 72 hours after receiving the allegation; (2) document the efforts taken under this section; and (3) ensure the allegation is referred for investigation, to the extent that the facility that receives the notification is covered by these regulations. Section 115.163 proposes that these same requirements also apply to DHS holding facilities, but instead places the reporting and documentation requirements on the agency, given that DHS components are responsible for the management and operation of DHS holding facilities.

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Sections 115.64 and 115.164 address responder duties. Upon learning of an allegation that a detainee was sexually abused, the first security staff member at an immigration detention facility or law enforcement staff member at a holding facility to respond to the report, or his or her supervisor, would be required to separate the alleged victim and abuser, and to preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence. If the abuse occurred within a time period that still allows for the collection of physical evidence, the agency would be required to request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating. Similarly, if the abuse occurred within a time period that still allows for the collection of physical evidence, the agency would be required to ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

Sections 115.65 and 115.165 require a coordinated approach to responding to sexual abuse. This includes utilizing a multidisciplinary team approach, with appropriate information sharing, as permitted by law, in the case of a transfer of a victim of sexual abuse between DHS facilities or from a DHS facility to a non-DHS facility.

Section 115.66 requires the agency to remove staff suspected of perpetrating sexual abuse from all duties requiring detainee contact pending the outcome of an investigation. In Section 115.166, the DHS proposal includes a similar requirement for holding facilities, adjusted to reflect the smaller staff at holding facilities that would make an absolute rule administratively

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onerous. The proposal requires supervisors to affirmatively *consider* removing staff pending the completion of an investigation, and to remove them if the seriousness and/or plausibility of the allegation make such removal appropriate.

Section 115.67 would require that agency and/or facility staff, and immigration detention facility detainees, not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force. Section 115.167 prescribes the same requirement for agency employees at DHS holding facilities. Retaliation for reporting instances of sexual abuse and for cooperating with sexual abuse investigations is a real and serious threat in detention facilities. Fear of retaliation, such as being subjected to harsh or hostile conditions, being attacked by other detainees, or suffering harassment from staff, may prevent many detainees and staff from reporting sexual abuse, which in turn would make it difficult to keep facilities safe and secure.

Section 115.68 requires facilities to take care to place detainee victims of sexual abuse in a supportive environment that represents the least restrictive housing option possible. A detainee in protective custody who has been subjected to sexual abuse shall not be returned to the general population until proper re-assessment, taking into consideration any increased vulnerability of the detainee as a result of the abuse, is completed. In addition, section 115.68 proposes that detainee victims shall not be held for longer than five days in any type of administrative segregation, except in unusual circumstances or at the request of the detainee. DHS does not propose such post-allegation protective custody requirements for the holding facility context.

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Detainees in a holding facility typically are in such confinement for a short period of time only and, accordingly, provision of post-allegation protective custody is not appropriate.

Investigations: Sections 115.71, 115.171, 115.72, 115.172, 115.73. It is important to set standards to govern investigations of allegations of sexual abuse. The DHS standard requires that investigations by the agency or facility with responsibility for investigating the allegations of sexual abuse be prompt, thorough, objective, fair, and concluded by specially trained, qualified investigators. The standard does not distinguish between third-party allegations of abuse and allegations from a victim, staff, etc. In instances where the agency or facility does not investigate allegations of sexual abuse, it must refer the allegation to the appropriate investigating authority. Because sexual abuse often has no witnesses and often leaves no visible injuries, investigators must be diligent in tracking down all possible evidence, including collecting DNA and electronic monitoring data, conducting interviews, assessing the credibility of alleged victims, witnesses, or suspects, document each investigation by written report, to include descriptions of the physical and testimonial evidence, reviewing prior complaints and reports of sexual abuse involving the alleged perpetrator, and retaining the report for as long as the alleged abuser is detained or employed by the agency or facility plus an additional five years. The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation. Because of the delicate nature of these investigations, investigators should be trained in conducting sexual abuse investigations.

The proposed DHS standard also includes a requirement to establish a process for an administrative investigation of substantiated allegations of sexual abuse, only after consultation

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with the assigned criminal investigative entity or after a criminal investigation has concluded.

Where a criminal investigation determines that an allegation was unsubstantiated, the standard nonetheless requires a review of any completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. DHS intends the standard to ensure proper sequencing of the investigations and preservation of investigative resources should the leading investigation, usually the criminal investigation, find the allegations unsubstantiated.

Sections 115.72 and 115.172 set forth parameters on the evidentiary standard for administrative investigations regarding allegations of sexual abuse. Under these proposed standards, when an administrative investigation is undertaken the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated. This is the same standard found in the DOJ PREA final rule.

Section 115.73 addresses the agency's duty to report to detainees, a topic that the NPREC included as part of its Investigations (IN)-1 standard. Specifically, following an investigation into a detainee's allegation of sexual abuse, the agency shall notify the detainee as to the result of the investigation when the detainee is still in immigration detention, as well as where otherwise feasible. DHS does not propose a comparable provision to govern holding facilities, because holding facility detainees would no longer be in the custody of the holding facility by the time the investigation is completed.

The NPREC's recommended standard would require a facility to "notif[y] victims and/or other complainants in writing of investigation outcomes and any disciplinary or criminal sanctions, regardless of the source of the allegation." Several agency commenters to the DOJ

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PREA rulemaking expressed concern with the NPREC's proposal on security or privacy grounds. These commenters questioned the wisdom of providing written information to victims and third-party complainants, where such information could easily become widely known throughout the facility and possibly endanger other detainees or staff. In addition, commenters noted that privacy laws may restrict the dissemination of certain information about staff members. DHS believes that its proposed standard strikes the proper balance between staff members' privacy rights and the detainee's right to know the outcome of the investigation, while protecting the security of both detainees and staff.

Discipline: Sections 115.76, 115.176, 115.77 and 115.177. DHS proposes two standards to ensure appropriate and proper discipline in relation to cases of sexual abuse with regard to staff, contractors, and volunteers. These standards are substantively similar to those offered by the NPREC and DOJ in its PREA final rule.

Sections 115.76 and 115.176 govern disciplinary sanctions for staff members who violate sexual abuse policies, regardless of whether they have been found criminally culpable. Imposing appropriate disciplinary sanctions against such staff members is critical not only to providing a just resolution to substantiated allegations of sexual abuse and sexual harassment but also to fostering a culture of zero tolerance for such acts. Staff are subject to disciplinary sanctions up to and including removal for violating agency sexual abuse rules, policies or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or threatened to engage in sexual abuse, as defined under the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1) - (4) and

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(7) - (8). Sections 115.76 and 115.176 further require the agency to review and approve policies and procedures regarding disciplinary sanctions for staff at immigration detention facilities and holding facilities. In order to limit the potential for additional sexual abuse by former staff, sections 115.76 and 115.176 would require that all removals or resignations in lieu of removal for violations of agency sexual abuse policies be reported to law enforcement agencies, unless the activity was clearly not criminal, and reasonable efforts be made to report such removals or resignations in lieu of removal to any licensing bodies, to the extent known.

Sections 115.77 and 115.177 govern corrective action for contractors and volunteers who have engaged in sexual abuse. DHS proposes to require that any contractor or volunteer who has engaged in sexual abuse be prohibited from contact with detainees. These sections would also require that reasonable efforts be made to report to any licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

Section 115.78 addresses the circumstance where a detainee is alleged to have sexually abused another detainee in an immigration detention facility. Holding detainees accountable for such abuse is an essential deterrent and a critical component of a zero-tolerance policy. As with sanctions against staff, sanctions against detainees must be fair and proportional, taking into consideration the detainee's actions, disciplinary history, mental disabilities or mental illness, and sanctions imposed on other detainees in similar situations, and must send a clear message that sexual abuse is not tolerated. The disciplinary process must also take into account any mitigating factors, such as mental illness or mental disability, and must consider whether to incorporate therapy, counseling, or other interventions that might help reduce recidivism.

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Holding facilities generally do not hold detainees for prolonged periods of time and do not impose discipline, and so agencies are not made responsible under these proposed standards for imposing disciplinary sanctions on holding facility detainees.

Medical and Mental Health Care: Sections 115.81, 115.82, 115.182 and 115.83. DHS has proposed three standards to ensure that detainees receive the appropriate medical and mental health care. Each proposed standard is substantially similar to that recommended by the NPREC and adopted by DOJ in its PREA rulemaking.

Section 115.81 requires that, pursuant to the assessment for risk of victimization and abusiveness in section 115.41, facility staff shall ensure immediate referral to a qualified medical or mental practitioner, as appropriate, for detainees found to have experienced prior sexual victimization or perpetrated sexual abuse. Although the proposed standards do not require detainees to answer the assessment questions, detainees should be informed that disclosing prior sexual victimization and abuse is in their own best interest as such information is used both to determine whether follow-up care is needed and where the detainee can be safely placed within the facility. The DHS proposal does not provide for these requirements in DHS holding facilities because detainees with medical needs are referred for treatment outside the holding facility instead of provided the treatment in the holding facilities themselves.

Some commenters to the DOJ PREA proposed rule suggested that the NPREC's recommended standard would be too costly because it would require that medical or mental health practitioners conduct these interviews. Unlike the NPREC's standard, the proposed DHS standard does not specify who should conduct this inquiry, but instead requires the detainee to

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receive a health evaluation no later than two working days from the date of the assessment, when a referral for a medical follow-up is initiated. In addition, when a referral for mental health follow-up is initiated, the detainee shall receive a mental health evaluation no later than 72 hours after the referral.

Neither the NPREC's recommended standard nor DHS's proposed standard applies to holding facilities. The proposed standard is not appropriate for holding facilities given the short time that those facilities are responsible for detainee care.

Sections 115.82 and 115.182, like the DOJ PREA final rule, require that victims of sexual abuse have timely, unimpeded access to emergency medical treatment if they have been a victim of sexual abuse. Under section 115.82, similar to the DOJ PREA final rule, the proposed DHS standard applicable to immigration detention facilities would expressly require timely, unimpeded access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under professional medical standards. Like the DOJ PREA final rule's standard on lockup detention, however, the proposed standard applicable to DHS holding facilities would not require such facilities to provide emergency contraception or sexually transmitted infections prophylaxis, in light of the very short-term nature of holding facility detention. Consistent with its obligation to provide timely, unimpeded access to emergency medical treatment, a DHS holding facility would transfer such a detainee to an appropriate emergency medical provider, which would be expected to provide such care as appropriate. Emergency medical treatment services would be

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provided to the victim at no financial cost to the victim and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

Section 115.83 requires that victims of sexual abuse receive access to ongoing medical and mental health care. This proposed standard recognizes that victims of sexual abuse can experience a range of physical injuries and emotional reactions, even long after the abuse has occurred, that can require medical or mental health attention. Thus, this standard requires facilities to offer ongoing medical and mental health care during the victim's detention consistent with the community level of care for as long as such care is needed, without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident. This access to care includes pregnancy tests for detainee victims of sexual abuse including vaginal penetration by a male abuser. DHS believes that if specific mental health concerns have contributed to the abuse, treatment may improve facility security. The DHS proposal does not provide for these requirements in DHS holding facilities because agencies refer holding facility detainees with emergency medical needs for treatment instead of providing medical care in the holding facilities themselves.

Data Collection and Review: Sections 115.86, 115.186, 115.87, 115.187, 115.88, 115.188, 115.89 and 115.189. DHS has proposed standards addressing how agencies and facilities should collect and review data to identify those policies and practices that are contributing to or failing to prevent sexual abuse.

Sections 115.86 and 115.186 set forth the requirements for sexual abuse incident reviews, including when reviews should take place and who should take part. The sexual abuse review is

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separate from the sexual abuse investigation, and is intended to evaluate whether the facility's or agency's policies and procedures would benefit from change in light of the incident or allegation. By contrast, the investigation is intended to determine whether the abuse actually occurred. A review would be required after every investigation, and consider whether changes in policy or practice could better prevent, detect, or respond to sexual abuse incidents like the one alleged. The DHS proposal further would require an annual review of all sexual abuse investigations, in order to assess and improve sexual abuse intervention, prevention and response efforts. Some commenters to the DOJ PREA rulemaking raised concerns about the cost of conducting sexual abuse incident reviews. There are, however, facilities that already do these reviews, and DHS believes that the required steps need not be onerous. The purpose of this requirement is not to require a duplicative investigation but rather to require the facility or agency to pause and consider what lessons, if any, it can learn from the investigation it has conducted and what additional steps, if any, it should take to further protect detainees.

Sections 115.87 and 115.187 specify the incident-based data each agency or facility is required to collect in order to detect possible patterns and help prevent future incidents. The agency or facility would be required, under this standard, to aggregate the incident-based sexual abuse data at least annually and to maintain, review, and collect data as needed from all available agency records. The agency would work with facilities to collect and aggregate the data in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents. Section 115.87 would provide for the PSA Coordinator to work on an ongoing basis with the relevant PSA Compliance Managers and DHS entities to share data regarding effective

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agency response methods to allegations of sexual abuse. Upon request, the agency would be required to provide all such data from the previous calendar year to the DHS Office for Civil Rights and Civil Liberties no later than June 30 of the next calendar year.

Sections 115.88 and 115.188 describe how the collected data should be analyzed and reported. The proposed DHS standard mandates that agencies use the data to identify problem areas, take ongoing corrective action, and prepare an annual report for each facility as well as the agency as a whole, including a comparison with data from previous years. The report must be made public through the agency's website or other means to help promote agency accountability.

Sections 115.89 and 115.189 provide guidance on how to store, publish, and retain the data collected pursuant to sections 115.87 and 115.187. Data must be stored in a way that protects its integrity and must be retained for an adequate length of time. In addition, data must protect the confidentiality of victims and alleged perpetrators. This standard also requires that the agency make its aggregated data publicly available at least annually on its website, consistent with existing agency information disclosure policies and processes, following the removal of all personal identifiers.

Audits and Compliance: Sections 115.93, 115.193, 115.201, 115.202, 115.203, 115.204, and 115.205. Like the NPREC and DOJ, DHS believes that audits are critical to ensuring that facilities are doing all they can to eliminate sexual abuse in detention facilities. The NPREC's proposed standard would require triennial audits of all facilities. The NPREC explained its inclusion of this standard as follows:

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Publicly available audits allow agencies, legislative bodies, and the public to learn whether facilities are complying with the PREA standards. Audits can also be a resource for the Attorney General in determining whether States are meeting their statutory responsibilities. Public audits help focus an agency's efforts and can serve as the basis upon which an agency can formulate a plan to correct any identified deficiencies.

Prison/Jail Standards at 57.

Numerous agency commenters to the DOJ PREA rulemaking criticized the NPREC's proposals on various grounds, including cost, duplication of audits performed by accrediting organizations, duplication of existing State oversight, and the possibility that disagreements in interpretation could lead to inconsistencies in auditing. Other commenters endorsed the NPREC's proposal as necessary to ensure proper oversight; some commenters suggested that audits should be more frequent than once every three years.

DHS believes that audits can play a key role in implementation of sexual abuse prevention standards. The proposed standards for audits clarify the requirements for an audit to be considered adequate and transparent. All audits would be required to be conducted using an audit instrument developed by the agency, in coordination with CRCL. CRCL has extensive experience in conducting civil rights site inspections of detention facilities, including inspections and investigations relating to sexual abuse prevention and response. The agency would coordinate external audits with CRCL, to ensure that CRCL is informed about the operation of

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the audit program and any findings relating to non-compliance, in support of CRCL's statutory advice and oversight role with respect to civil rights issues.

DHS believes that external audits are necessary to ensure that the audits are conducted independently and objectively, and with the full confidence of the public. In these proposed standards, DHS has incorporated many of DOJ's standards related to external auditing and has tailored them to suit the unique characteristics of immigration detention and holding facilities. The proposed DHS standards set forth in sections 115.201-205 would prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and detainees.

The DHS proposed standards would require that external audits be conducted by an outside entity or individual with relevant experience and certified by the agency. The DHS standards would preclude use of an outside auditor with a financial relationship with the agency within three years of an audit, except for contracts for other audits or for detention-reform related consulting.

DHS has attempted to incorporate objective criteria and written documentation requirements into these proposed standards wherever practicable, although auditors would retain appropriate discretion. The proposed standards provide that a facility would be required to allow the auditor to enter and tour facilities, review documents, and interview staff and detainees to conduct a comprehensive audit. The auditor would be permitted to review all relevant agency-wide policies, procedures, reports, and internal and external audits, as well as a sampling of relevant documents and other records and information for the most recent one-year period.

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Under the DHS proposed standards, the auditor would be permitted to request and receive copies of any relevant documents (including electronically stored information), and would be required to retain and preserve all documentation (such as videotapes and interview notes) relied upon in making audit determinations. In order to enhance the effectiveness of external audits, the proposed standards would permit the auditor to conduct private interviews with detainees, and detainees would be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel. Auditors would be required to attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

This rule proposes that the external auditor would determine whether the audited facility reaches one of the following: “Exceeds Standard” (substantially exceeds requirement of standard); “Meets Standard” (substantial compliance; complies in all material ways with the standard for the relevant review period); or “Does Not Meet Standard” (requires corrective action). The auditor would be required to prepare an audit summary indicating the number of provisions the facility has achieved at each grade level.

Any finding of “Does Not Meet Standard” would trigger a 180-day corrective action period. Under the proposed standards, the auditor, the agency, and the facility (if it is not operated by the agency) would jointly develop a corrective action plan to achieve compliance. The auditor would be required to take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility. After the end of the 180-day corrective action period, the auditor would be

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required to issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action. In the event that the facility does not achieve compliance with each standard, it would have the opportunity (at its discretion and cost) to request a subsequent audit, once it believes that it has achieved compliance. A facility would be permitted to file an appeal with the agency regarding any specific finding that it believes to be incorrect. If the agency determines that the facility has demonstrated good cause for a re-evaluation, the facility may, at its complete discretion and cost, commission a re-audit by a mutually agreed upon external auditor. The agency may also, in its complete discretion, commission a re-audit of any facility for any reason it deems appropriate. In order to further promote transparency, the proposed standards also provide that the agency would ensure that the auditor's final report is published on the agency's website.

Immigration Detention Facilities

The proposed standards provide that external audits of immigration detention facilities shall be conducted on a triennial cycle. During the three-year cycle, the agency would ensure that each immigration detention facility is audited at least once. DHS believes that this standard would allow substantial flexibility in scheduling audits within each three-year cycle while ensuring that external facility audits occur regularly. In addition, DHS provides a procedure for an expedited audit in the event the agency has reason to believe that a particular facility may be experiencing problems related to sexual abuse.

Immigration Holding Facilities

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DHS operates immigration holding facilities under the authority of both CBP and ICE. The ICE holding facilities do not generally house detainees overnight and thus are not covered by the auditing requirements for holding facilities under proposed section 115.193.

CBP operates 768 holding facilities at ports of entry and Border Patrol stations, checkpoints, and processing facilities across the country. These holding facilities, which far outnumber those facilities operated directly by any other corrections/detention/law enforcement authority, nationwide (including ICE, the Bureau of Prisons, and other agencies), are currently subject to oversight by the CBP Office of Internal Affairs. All these holding facilities taken together hold, on average, approximately 1,100 detainees a day; however, hundreds of them may be unused on any given day.

For the CBP holding facilities that house detainees overnight, DHS proposes a two-part audit process. The proposed standards provide that all holding facilities that house detainees overnight shall be subject to an external audit within three years of the effective date of the rule. If an external audit determines that a holding facility is low-risk based on (1) whether it passed its current audit and (2) its physical characteristics, including lines of sight, other design features, and video and other monitoring technologies, the facility will be classified as low-risk. Low-risk facilities would be subject to further external audits once every five years, unless design changes are made that could increase the risk of sexual abuse. Facilities that are not classified as low-risk would be subject to audits once every three years. If additional holding facilities are established, they would be subject to an initial audit within three years to determine if they are low-risk. Audits of new holding facilities as well as holding facilities that have

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previously failed to meet the standards shall occur as soon as practicable within the three-year cycle. Where it is necessary to prioritize, priority shall be given to facilities that have previously failed to meet the standards.

Solicitation of Comments Specific to Audits

Given the potential costs associated with the proposed auditing requirements DHS is specifically seeking public input on the following:

- Would external audits of immigration detention facilities and/or holding facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?
- Once a holding facility is designated as low risk, would it be a more cost effective yet still sufficient approach to furthering compliance with the standards to externally audit a random selection of such facilities instead of re-auditing each such facility once every five years?
- Would the potential benefits associated with requiring external audits outweigh the potential costs?
- Is there a better approach to external audits other than the approaches discussed in this proposed rule?
- In an external auditing process, what types of entities or individuals should qualify as external auditors?

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- Would external audits of immigration detention facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?

Additional Provisions in Agency Policies. Sections 115.95 and 115.195 provide that the regulations in both Subparts A and B establish minimum requirements for agencies. As such, they do not preclude agency policies from including additional requirements.

VI. Statutory and Regulatory Requirements.

A. Executive Orders 12866 and 13563.

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS considers this to be a “significant regulatory action,” although not an economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. The IRIA, summarized below, is available in the docket. It contains a discussion of the costs and benefits of this rule.

1. Summary of Proposed Rule

The objective of the proposed rule is to propose minimum requirements for DHS immigration detention and holding facilities for the prevention, detection, and response to sexual

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abuse. The proposed rule, if made final, would require prevention planning; prompt and coordinated response and intervention; training and education of staff, contractors, volunteers and detainees; proper treatment for victims; procedures for investigation, discipline and prosecution of perpetrators; data collection and review for corrective action; and audits for compliance with the standards. The cost estimates set forth in this analysis represent the costs of compliance with, and implementation of, the proposed standards in facilities within the scope of the proposed rulemaking.

2. Summary of Affected Population

DHS has two types of confinement facilities: (1) immigration detention facilities, and (2) holding facilities. Immigration detention facilities, which are operated or supervised by ICE, routinely hold persons for over 24 hours pending resolution or completion of immigration removal or processing. Holding facilities, used and maintained by DHS components including ICE and CBP, tend to be short-term. The analysis below presents immigration detention facilities and holding facilities separately.

This proposed rule will directly regulate the Federal Government, notably any DHS agency with immigration detention facilities or holding facilities. The sections below describe and quantify, where possible, the number of affected DHS immigration detention facilities or holding facilities.

a. Subpart A – Immigration Detention Facilities

ICE is the only DHS component with immigration detention facilities. ICE holds detainees during proceedings to determine whether they will be removed from the United States,

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and pending their removal, in ICE-owned facilities or in facilities contracting with ICE.

Therefore, though this rule will directly regulate the Federal Government, it would require that its standards ultimately apply to some State and local governments as well as private entities through contracts with DHS. The types of authorized ICE immigration detention facilities are as follows:

- Contract Detention Facility (CDF) – owned by a private company and contracted directly with the government;
- Service Processing Center (SPC) – full service immigration facilities owned by the government and staffed by a combination of Federal and contract staff;
- Intergovernmental Service Agreement Facility (IGSA) – facilities at which detention services are provided to ICE by State or local government(s) through agreements with ICE and which may fall under public or private ownership and may be fully dedicated immigration facilities (housing detained aliens only) or non-dedicated facilities (housing various detainees).

ICE enters into Intergovernmental Service Agreements (IGSAs) with States and counties across the country to use space in jails and prisons for civil immigration detention purposes. Some of these facilities are governed by IGSAs that limit the length of an immigration detainee's stay to under 72 hours. Some of these facilities have limited bed space that precludes longer stays by detainees. Others are used primarily under special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court

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appearances in a different jurisdiction. In some circumstances the under-72-hour facilities house immigration detainees only occasionally.

At the time of writing, ICE owns or has contracts with approximately 158 authorized immigration detention facilities that hold detainees for more than 72 hours. The 158 facilities consist of 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities. (64 of the IGSA facilities are covered by the DOJ PREA, not this proposed rule, because they are USMS IGA facilities.) As the USMS IGA facilities are not within the scope of this rulemaking, this analysis covers the 94 authorized SPC, CDF, dedicated IGSA, and non-dedicated IGSA immigration detention facilities that hold detainees for more than 72 hours.

ICE additionally has 91 authorized immigration detention facilities that are contracted to hold detainees for less than 72 hours. All 91 facilities are non-dedicated IGSA facilities, but 55 of them are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities. Again, ICE excludes the USMS IGA facilities from the scope of this rulemaking and analysis; the analysis covers the 36 authorized non-dedicated IGSA immigration detention facilities that hold detainees for under 72 hours. Facilities that are labeled by ICE as “under 72-hour” still meet the definition of immigration detention facilities, because they process detainees for detention intake. Detainees housed in these facilities are processed into the facility just as they would be in a long-term detention facility.

Furthermore, ICE also has two authorized family residential centers. These are IGSA facilities that house only ICE detainees. One of the facilities accommodates families subject to mandatory detention and the other is a dedicated female facility. ICE family residential centers

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are subject to the immigration detention facility standards proposed in Subpart A. The table below summarizes the facilities included in this analysis. For the purposes of the cost analysis in Chapter 2, DHS includes the family residential facilities in the cost estimates for the over 72-hour authorized immigration detention facilities.

Table 1: Summary of ICE Authorized Immigration Detention Facilities

Facility	Over 72 Hours	Under 72 Hours	Family Residential
Non-Dedicated IGSA	74	36	0
SPC	6	0	0
CDF	7	0	0
Dedicated IGSA	7	0	2
Total Covered by Rule	94	36	2
USMS IGA ^a	64	55	0
Total Authorized Facilities	158	91	2

^aNot within the scope of the proposed rule

b. Subpart B – Holding Facilities

A holding facility may contain holding cells, cell blocks, or other secure locations that are: (1) under the control of the agency and (2) primarily used for the confinement of individuals who have recently been detained, or are being transferred to another agency.

ii. *U.S. Immigration and Customs Enforcement*

Most ICE holding rooms are in ICE field offices and satellite offices. These rooms are rooms or areas that are specifically designed and built for temporarily housing detainees in ICE Enforcement and Removal Operations (ERO) offices. It may also include staging facilities. ICE holding facilities as presented in this analysis are exclusive of hold rooms or staging areas at immigration detention facilities, which are covered by the standards of the immigration detention

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facility under Subpart A of this proposed rule. ICE has 149 holding facilities that would be covered under Subpart B of the proposed rule.

i. U.S. Customs and Border Protection

There is a wide range of facilities where CBP detains individuals. Some individuals are detained in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. Hold rooms in CBP facilities where case processing occurs are used to search, detain, or interview persons who are being processed. CBP operates 768 holding facilities at ports of entry and Border Patrol stations, checkpoints, and processing facilities across the country.

3. Estimated Costs of Proposed Rule

The proposed rule will cover DHS immigration detention facilities and holding facilities. Table 2 summarizes the number of facilities covered by the proposed rulemaking over ten years.

Table 2: Estimated Population Summary for Proposed Rule

Year	Immigration Detention Facilities	Holding Facilities		Total
	ICE	ICE	CBP	
1	132	149	768	1,049
2	134	149	768	1,051
3	136	149	768	1,053
4	138	149	768	1,055
5	140	149	768	1,057
6	142	149	768	1,059
7	144	149	768	1,061
8	146	149	768	1,063
9	148	149	768	1,065
10	150	149	768	1,067

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The cost estimates set forth in this analysis represent the costs of compliance with, and implementation of, the proposed standards in facilities within the scope of the proposed rulemaking. This analysis concludes that compliance with the proposed standards, in the aggregate, would be approximately \$57.7 million, discounted at 7 percent, over the period 2013-2022, or \$8.2 million per year when annualized at a 7 percent discount rate. Table 3 below, presents a 10-year summary of the estimated benefits and costs of the Notice of Proposed Rulemaking (NPRM).

Table 3: Total Cost of NPRM (\$millions)

Year	Immigration Detention Facilities Subpart A		Holding Facilities Subpart B		Total
	Over 72 Hours	Under 72 Hours	ICE	CBP	
1	\$4.2	\$1.4	\$0.0	\$5.6	\$11.2
2	\$3.6	\$1.1	\$0.0	\$5.5	\$10.2
3	\$3.6	\$1.1	\$0.0	\$3.6	\$8.3
4	\$3.7	\$1.1	\$0.0	\$2.4	\$7.1
5	\$3.7	\$1.1	\$0.0	\$2.4	\$7.2
6	\$3.7	\$1.1	\$0.0	\$2.3	\$7.2
7	\$3.7	\$1.1	\$0.0	\$2.3	\$7.2
8	\$3.8	\$1.1	\$0.0	\$2.3	\$7.2
9	\$3.8	\$1.1	\$0.0	\$2.3	\$7.2
10	\$3.8	\$1.2	\$0.0	\$2.3	\$7.3
Total	\$37.6	\$11.4	\$0.0	\$31.0	\$79.9
Total (7%)	\$26.4	\$8.0	\$0.0	\$23.2	\$57.7
Total (3%)	\$32.1	\$9.7	\$0.0	\$27.2	\$69.0
Annualized (7%)	\$3.8	\$1.1	\$0.0	\$3.3	\$8.2
Annualized (3%)	\$3.8	\$1.1	\$0.0	\$3.2	\$8.1

The total cost, discounted at 7 percent, consists of \$34.5 million for immigration detention facilities under Subpart A, and \$23.2 million for holding facilities under Subpart B.

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The largest costs for immigration detention facilities are for staff training, documentation of cross-gender pat-downs, duties for the Prevention of Sexual Abuse Compliance Manager, and audit requirements. DHS estimates zero compliance costs for ICE holding facilities under the proposed rule as the requirements of ICE's Sexual Abuse and Assault Prevention and Intervention Directive and other ICE policies are commensurate with the requirements of the proposed rule. The largest costs for CBP holding facilities are staff training, audits, and facility design modifications and monitoring technology upgrades.

4. Estimated Benefits of the Rule

DHS has not estimated the anticipated benefits of this proposed rule. Instead, DHS conducts what is known as a "break even analysis," by first estimating the monetary value of preventing victims of various types of sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. The IRIA concludes that when all facilities and costs are phased into the rulemaking, the break even point would be reached if the standards reduced the annual number of incidents of sexual abuse by 55 from the estimated benchmark level, which is 79 percent of the total number of assumed incidents in ICE confinement facilities, including those who may not have reported an incident.

5. Alternatives

As alternatives to the preferred regulatory regime proposed in the NPRM, DHS examined three other options. The first is taking no regulatory action. For over 72-hour immigration

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detention facilities, the 2011 PBNDS sexual abuse standards might reach all facilities over time as the new version of the standards are implemented at facilities as planned. However, in the absence of regulatory action, proposed sexual abuse standards for ICE under 72-hour immigration detention facilities and DHS holding facilities would remain largely the same.

DHS also considered requiring the ICE immigration detention facilities that are only authorized to hold detainees for under 72 hours to meet the proposed standards for holding facilities under Subpart B, rather than the standards for immigration detention in Subpart A, as proposed in the NPRM. The standards proposed in Subpart B are somewhat less stringent than those for immigration detention facilities, as appropriate for facilities holding detainees for a much shorter time and with an augmented level of direct supervision.

Finally, DHS considered changing the audit requirements proposed under sections 115.93 and 115.193. Immigration detention facilities currently undergo several layers of inspections for compliance with ICE's detention standards. This alternative would have allowed ICE to incorporate the audit requirements for the proposed standards into current inspection procedures. However, it would require outside auditors for all immigration detention facilities. For holding facilities that hold detainees overnight, it would require 10 internal audits, 10 external audits, and 3 audits by CRCL be conducted annually. The following table presents the 10-year costs of the alternatives compared to the costs of the NPRM. These costs of these alternatives are discussed in detail in Chapter 2 of the IRIA.

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Table 4: Cost Comparison of Regulatory Alternatives to the Proposed NPRM (\$millions)

10-Year Total Costs by Alternative	Total	Total (7%)	Total (3%)
Alternative 1 – No Action	\$0	\$0	\$0
Alternative 2 – Under 72-Hour	\$77.7	\$56.1	\$67.1
Alternative 3 – Proposed Rule	\$79.9	\$57.7	\$69.0
Alternative 4 – Audit Requirements	\$70.0	\$50.5	\$60.4

B. Executive Order 13132—Federalism.

This proposed regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. This proposed rule implements the Presidential Memorandum of May 17, 2012 “Implementing the Prison Rape Elimination Act” by recommending national DHS standards for the detection, prevention, reduction, and punishment of sexual abuse in DHS immigration detention and holding facilities. In drafting the standards, DHS was mindful of its obligation to meet the President’s objectives while also minimizing conflicts between State law and Federal interests.

Insofar, however, as the proposal sets forth standards that might apply to immigration detention facilities and holding facilities operated by State and local governments and private entities, this proposed rule has the potential to affect the States, the relationship between the Federal government and the States, and the distribution of power and responsibilities among the various levels of government and private entities. With respect to the State and local agencies, as well as the private entities, that own and operate these facilities across the country, the Presidential Memorandum provides DHS with no direct authority to mandate binding standards

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for their facilities. Instead, these standards will impact State, local, and private entities only to the extent that they make voluntary decisions to contract with DHS for the confinement of immigration detainees. This approach is fully consistent with DHS's historical relationship to State and local agencies in this context. Therefore, in accordance with Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, DHS welcomes consultation with representatives of State and local prisons and jails, juvenile facilities, community corrections programs, and lockups—among other individuals and groups—during the course of this rulemaking.

C. Executive Order 12988—Civil Justice Reform.

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

D. Unfunded Mandates Reform Act of 1995.

Section 202 of the Unfunded Mandate Reform Act of 1995 (UMRA) (Pub. L. 104-4, 109 Stat. 48, 2 U.S.C. 1532) generally requires agencies to prepare a statement before submitting any rule that may result in an annual expenditure of \$100 million or more (adjusted annually for inflation) by State, local, or tribal governments, or by the private sector. DHS has assessed the probable impact of these proposed regulations and believes these regulations may result in an

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aggregate expenditure by State and local governments of approximately \$4.3 million in the first year.

However, DHS believes the requirements of the UMRA do not apply to these regulations because UMRA excludes from its definition of “Federal intergovernmental mandate” those regulations imposing an enforceable duty on other levels of government which are “a condition of Federal assistance.” 2 U.S.C. 658(5)(A)(i)(I). Compliance with these standards, as proposed, would be a condition of ongoing Federal assistance through implementation of the standards in new contracts and contract renewals. While DHS does not believe that a formal statement pursuant to the UMRA is required, it has, for the convenience of the public, summarized as follows various matters discussed at greater length elsewhere in this rulemaking which would have been included in a UMRA statement should that have been required:

- These standards are being issued pursuant to the Presidential Memorandum of May 17, 2012, and DHS detention authorities.
- A qualitative and quantitative assessment of the anticipated costs and benefits of these standards appears below in the Regulatory Flexibility Act section;
- DHS does not believe that these standards will have an effect on the national economy, such as an effect on productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services;
- Before it issues final regulations implementing standards DHS will:

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(1) Provide notice of these requirements to potentially affected small governments, which it has done by publishing this notice of proposed rulemaking, and by other activities;

(2) Enable officials of affected small governments to provide meaningful and timely input, via the methods listed above; and

(3) Work to inform, educate, and advise small governments on compliance with the requirements.

- As discussed above in the Initial Regulatory Impact Assessment summary, DHS has identified and considered a reasonable number of regulatory alternatives and from those alternatives has attempted to select the least costly, most cost effective, or least burdensome alternative that achieves DHS's objectives.

E. Small Business Regulatory Enforcement Fairness Act of 1996.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, DHS wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact DHS via the address or phone number provided in the **FOR FURTHER INFORMATION CONTACT** section above. DHS will not retaliate against small entities that question or complain about this rule or about any policy or action by DHS related to this rule.

F. Regulatory Flexibility Act.

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DHS drafted this proposed rule so as to minimize its impact on small entities, in accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, while meeting its intended objectives. The term “small entities” comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Based on presently available information, DHS is unable to state with certainty that the proposed rule, if promulgated as a final rule, would not have any effect on small entities of the type described in 5 U.S.C. 601(3). Accordingly, DHS has prepared an Initial Regulatory Flexibility Impact Analysis (IRFA) in accordance with 5 U.S.C. 603.

1. A description of the reasons why the action by the agency is being considered.

In 2003 Congress passed PREA, 42 U.S.C. 15601. PREA directs the Attorney General to promulgate national standards for enhancing the prevention, detection, reduction, and punishment of prison rape. On May 17, 2012, President Obama issued a Presidential Memorandum confirming the goals of PREA and directing Federal agencies with confinement facilities to issue regulations or procedures within 120 days of his Memorandum to satisfy the requirements of PREA. This regulation responds to and fulfills the President’s direction by proposing comprehensive, national regulations for the detection, prevention, and reduction of prison rape at DHS confinement facilities.

2. A succinct statement of the objectives of, and legal basis for, the proposed rule.

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On May 17, 2012, DOJ released a final rule setting national standards to prevent, detect, and respond to prison rape for facilities operated by the Bureau of Prisons and the USMS. The final rule was published in the Federal Register on June 20, 2012. 77 FR 37106 (June 20, 2012). In its final rule, DOJ concluded that PREA “encompass[es] any Federal confinement facility ‘whether administered by [the] government or by a private organization on behalf of such government.’” *Id.* at 37113 (quoting 42 U.S.C. 15609(7)). DOJ recognized, however, that, in general, each Federal agency is accountable for, and has statutory authority to regulate the operations of its own facilities and is best positioned to determine how to implement Federal laws and rules that govern its own operations, staff, and persons in custody. *Id.* The same day that DOJ released its final rule, President Obama issued a Presidential Memorandum directing Federal agencies with confinement facilities to issue regulations or procedures within 120 days of his Memorandum to satisfy the requirements of PREA.

DHS uses a variety of legal authorities, which are listed below in the “Authority” provision preceding the proposed regulatory text, to detain individuals in confinement facilities. Most individuals detained by DHS are detained in the immigration removal process, and normally DHS derives its detention authority for these actions from section 236(a) of the INA, 8 U.S.C. 1226(a), which provides the authority to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States, and section 241(a)(2) of the INA, 8 U.S.C. 1231(a)(2), which provides the authority to detain an alien during the period following the issuance of an order of removal. DHS components, however, use many other legal

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authorities to meet their statutory mandates and to detain individuals during the course of executing DHS missions.

The objective of the proposed rule is to propose minimum requirements for DHS immigration detention and holding facilities for the prevention, detection, and response to sexual abuse. The rule, if made final, would ensure prompt and coordinated response and intervention, proper treatment for victims, discipline and prosecution of perpetrators, and effective oversight and monitoring to prevent and deter sexual abuse.

3. A description and, where feasible, an estimate of the number-of small entities to which the proposed rule will apply.

The proposed rule would affect owners of DHS confinement facilities, including private owners, State and local governments, and the Federal government. DHS has two types of confinement facilities: (1) immigration detention facilities, and (2) holding facilities. Holding facilities tend to be short-term in nature. ICE, in particular, is charged with administration of the immigration detention facilities while CBP and ICE each have many holding facilities under their detention authority. The analysis below addresses immigration detention facilities and holding facilities separately.

i. Immigration Detention Facilities

ICE divides its detention facilities into two groups: there are 158 for use over 72 hours, and 91 that typically hold detainees for more than 24 hours and less than 72 hours. These are treated separately, below. Further, there are several types of immigration detention facilities. Service processing center (SPC) facilities are ICE-owned facilities and staffed by a combination

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of Federal and contract staff. Contract detention facilities (CDFs) are owned by a private company and contracted directly with ICE. Detention services at Intergovernmental Service Agreement (IGSA) facilities are provided to ICE by State or local governments(s) through agreements with ICE and may be owned by the State or local government, or by a private entity. Finally, there are two types of IGSA facilities: dedicated and non-dedicated. Dedicated IGSA facilities hold only detained aliens whereas non-dedicated facilities hold a mixture of detained aliens and inmates. ICE does not include USMS facilities used by ICE under intergovernmental agreements in the scope of this rulemaking. Those facilities would be covered by the DOJ PREA standards. Any references to authorized immigration detention facilities is exclusive of these 119 USMS IGA facilities.

Of the current 158 ICE detention facilities that are for use over 72 hours, 6 are owned by the Federal government and are not subject to the Regulatory Flexibility Act (RFA). An additional 64 are covered not by this proposed rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 88 facilities subject to the RFA, there are 79 distinct entities. DHS uses ICE information and public databases such as Manta.com and data from the U.S. Census Bureau¹⁵ to search for entity type (public, private, parent, subsidiary, etc.), primary line of business, employee size, revenue, population, and any other necessary information. This information is used to determine if an entity is considered small by SBA size standards, within its primary line of business.

¹⁵ U.S. Census Bureau, State and County QuickFacts, 2010 Population Data, available at <http://quickfacts.census.gov/qfd/index.html>

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Of the 79 entities owning immigration detention facilities and subject to the RFA, the search returned 75 entities for which sufficient data are available to determine if they are small entities, as defined by the RFA. The table below shows the North American Industry Classification System (NAICS) codes corresponding with the number of facilities for which data are available. There are 27 small governmental jurisdictions, 1 small business, and 1 small not-for-profit. In order to ensure that the interests of small entities are adequately considered, DHS assumes that all entities without available ownership, NAICS, revenue, or employment data to determine size are small. Therefore, DHS estimates there are a total of 33 small entities to which this rule would apply. The table below shows the number of small entities by type for which data are available.

Table 5: Small Entities by Type – Immigration Detention Facilities

Type	Entities Found	SBA Size Standard
Small Governmental Jurisdiction	27	Population less than 50,000
Small Business	1	\$7 million (NAICS 488999) \$30 million (NAICS 488119)
Small Organization	1	Independently owned and operated not-for-profit not dominant in its field
Subtotal	29	
Entities without Available Information	4	
Total Small Entities	33	

ICE also has shorter-term immigration detention facilities, for several reasons: Some of ICE’s immigration detention facilities are governed by IGSA’s that limit the length of an immigration detainee’s stay to under 72 hours for various reasons. Some of these facilities have limited bed space that prohibits longer stays by detainees. Others are used primarily under

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special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court appearances in a different jurisdiction. In some circumstances the under 72-hour facilities are located in rural areas that only occasionally have immigration detainees.

At the time of writing, ICE has 91 immigration detention facilities for use under 72 hours. Of those, three are owned by the Federal or State government and are not subject to the RFA. An additional 55 are covered not by this proposed rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 33 facilities subject to the RFA, all are owned by distinct entities. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size, revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards.

Of the 33 entities owning immigration detention facilities and subject to the RFA, all have sufficient data available to determine if they are small entities as defined by the RFA. The table below shows the NAICS codes corresponding with the number of facilities for which data are available. DHS determines there are 10 small governmental jurisdictions, 0 small businesses, and 0 small organizations. The table below shows the number of small entities by type for which data are available.

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Table 6: Small Entities by Type – Other DHS Confinement Facilities

Type	Entities Found	SBA Size Standard
Small Governmental Jurisdiction	10	Population less than 50,000
Small Business	0	
Small Organization	0	
Total Small Entities	10	

At the time of writing, ICE has 2 immigration detention facilities that are considered family residential facilities. Both are owned by counties. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size, revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards. DHS was able to obtain sufficient data to determine if they are small entities. Based on the size of the counties, DHS determines neither would be considered small governmental jurisdictions as defined by the RFA.

ii. Holding Facilities

U.S. Customs and Border Protection. CBP operates 768 facilities with holding facilities. Of the 768, 364 are owned by private sector entities. CBP is responsible for funding any facility modifications once CBP has begun operations at the location. As such, any modifications at these facilities as a result of this rule will have no direct impact on the facilities.

U.S. Immigration and Customs Enforcement. Most ICE hold rooms are in ICE field offices and satellite offices. ICE estimates it has 149 holding facilities that would be covered

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under the proposed rule. None of these facilities would be considered small entities under the RFA.

4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

With regard to non-DHS facilities, the requirements of the proposed rule are applicable only to new detention contracts with the Federal Government, and to contract renewals. To the extent this rule increases costs to any detainment facilities, which may be small entities, it may be reflected in the cost paid by the Federal Government for the contract. Costs associated with implementing the proposed rule paid by the Federal Government to small entities are transfer payments ultimately born by the Federal Government. However, DHS cannot say with certainty how much, if any, of these costs will be paid in the form of increased bed rates for facilities. Therefore, for the purposes of this analysis, DHS assumes all costs associated with the proposed rule will be borne by the facility. The following discussion addresses the proposed provisions for which facilities currently operating under the NDS may incur implementation costs.

i. Contracting with other non-DHS entities for the confinement of detainees, § 115.12

The proposed rule would require that any new contracts or contract renewals comply with the proposed rule and provide for agency contract monitoring to ensure that the contractor is complying with these standards. Therefore, DHS adds a 20-hour opportunity cost of time for the

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contractor to read and process the modification, determine if a request for a rate increase is necessary, and have discussions with the government if needed. DHS estimates this provision may cost a facility approximately \$1,488 (20 hours x \$74.41) in the first year.¹⁶

ii. Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator, § 115.11

The proposed rule would require immigration detention facilities to have a written zero-tolerance policy for sexual abuse and establish a Prevention of Sexual Assault (PSA) Compliance Manager at each facility. ICE is not requiring facilities to hire any new staff for these responsibilities; rather ICE believes the necessary PSA Compliance Manager duties can be collateral duties for a current staff member.

For some of the standards proposed in this rulemaking, the actual effort required to comply with the standard will presumably be undertaken by the PSA Compliance Manager. The costs of compliance with those standards are thus essentially subsumed within the cost of this standard. For this reason, and to avoid double counting, many standards are assessed in their as having minimal to zero cost even though they will require some resources to ensure compliance; this is because the cost of those resources is assigned to this standard to the extent DHS assumes the primary responsibility for complying with the standard will lie with the PSA Compliance

¹⁶ Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 11-1021 General and Operations Manager Median Hourly Wage, retrieved on June 29, 2012 from http://www.bls.gov/oes/2011/may/naics4_999300.htm . Loaded for benefits. Bureau of Labor Statistics, Employer Cost for Employee Compensation, June 2011, Table 3: Employer Costs per hour worked for employee compensation and costs as a percent of total compensation: State and local government workers, by major occupational and industry group, Service Occupations, Salary and Compensation Percent of Total Compensation, retrieved on June 29, 2012 from http://www.bls.gov/news.release/archives/ecec_09082011.pdf. \$74.41 = \$44.42/0.597.

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Manager. The table below presents the provisions and requirements DHS assumes would be the responsibility of the PSA Compliance Manger, and are included in the costs estimated for this provision.

Table 7: Assumed PSA Compliance Manager Duties – Immigration Detention Facilities

Proposed Standard	
115.11	Zero tolerance of sexual abuse
115.21	Evidence protocols and forensic medical examinations
115.31	Staff training
115.32	Volunteer and contractor training
115.34	Specialized training: Investigations
115.63*	Reporting to other confinement facilities
115.65	Coordinated response
115.67	Agency protection against retaliation
115.86	Sexual abuse incident reviews
115.87	Data collection
115.93*	Audits

*Indicates new requirement for facilities under 2011 PBNDS or FRS

DHS spoke with some SPCs and CDFs who had SAAPICs required under the 2008 PBNDS. Based on these discussions, DHS estimates a PSA Compliance Manager will spend, on average, 114 hours in the first year and 78 hours thereafter, which includes writing/revising policies related to sexual abuse and working with auditors. DHS estimates this provision may cost a facility approximately \$5,330 (114 hours x \$46.75) in the first year.¹⁷

¹⁷ Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 33-1011 First Line Supervisors of Correctional Officers Median Hourly Wage, retrieved on June 29, 2012 from <http://www.bls.gov/oes/2011/may/oes331011.htm>. Loaded for benefits. \$46.75 = \$29.67/0.597

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iii. *Limits to cross-gender viewing and searches, § 115.15*

The proposed requirement would prohibit cross-gender pat-down searches unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required (for male detainees), or in exigent circumstances (for female and male detainees alike). In addition, it would ban cross-gender strip or body cavity searches except in exigent circumstances; require documentation of all strip and body cavity searches and cross-gender pat-down searches; prohibit physical examinations for the sole purpose of determining gender; require training of law enforcement staff on proper procedures for conducting pat-down searches, including transgender and intersex detainees; and, implement policies on staff viewing of showering, performing bodily functions, and changing clothes.

The restrictions placed on cross-gender pat-down searches would be a new requirement for facilities operating under the NDS or 2008 PBNDS, and a modified requirement for facilities operating under the 2011 PBNDS.¹⁸ ICE's detention population is 10 percent female, and 90 percent male. In comparison, 13 percent of correctional officers at Federal confinement facilities¹⁹ and 28 percent at jails are female.²⁰ Though there may be disproportionate gender ratios of staff to detainees at some individual facilities, the overall national statistics do not indicate that there would be a significant problem with compliance. Facilities are allowed to

¹⁸ Specifically, the 2011 PBNDS permits cross-gender pat-down searches of women when staff of the same gender is not available at the time the pat-down search is required. Under the proposed standard, cross-gender searches of females would be allowed only in exigent circumstances.

¹⁹ Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005, page 4, retrieved on August 13, 2012 from <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

²⁰ Department of Justice, Final Regulatory Impact Analysis, section 5.6.15.1 Analysis and Methodology for Adult Facilities of standards 115.15, retrieved May 24 from www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.

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conduct cross-gender pat down searches on male detainees when, after reasonable diligence by the facility, a member of the same gender is not available at the time. The pat-down restrictions for female detainees are more stringent. Female detainees only comprise 10 percent of the overall population, and one to five percent are held at ICE's dedicated female facility. The Family Residential Standards, under which the dedicated female facility operates, already prohibit cross-gender pat-downs.

DHS does not expect any facilities to hire new staff or lay off any staff specifically to meet the proposed requirement. Instead, DHS expects that facilities which may have an unbalanced gender ratio take this requirement into consideration during hiring decisions resulting from normal attrition and staff turnover. However, DHS requests comments from facilities on this conclusion. Please include information that would help determine and monetize the possible impact to facilities.

DHS includes a cost for facilities to examine their staff rosters, gender ratios, and staffing plans for all shifts for maximum compliance with cross gender pat downs. The length of time it takes for facilities to adjust staffing plans, strategies, and schedules for gender balance while ensuring there is adequate detainee supervision and monitoring pursuant to section 115.13 will vary with the size of the facility. DHS estimates this may take a supervisor 12 hours initially. DHS anticipates facilities will be able to incorporate these considerations into regular staffing decisions in the future. DHS estimates the restrictions on cross-gender pat-downs may cost a facility approximately \$561 (12 hours x \$46.75) in the first year.

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The requirement for documentation of cross-gender pat-down searches would be new for all facilities, regardless of the version of the detention standards under which the facility operates. Presumably, cross-gender pat-down searches of female detainees would occur rarely, as the proposed rule would allow them in exigent circumstances only. However, cross-gender pat-down searches of male detainees may happen more frequently. DHS believes this requirement would be a notable burden on facilities both for the process of documenting the pat-down, but also keeping these records administratively. Therefore, as we discuss below, DHS includes an opportunity cost for this provision. ICE does not currently track the number of cross-gender pat-down searches, or any pat-down searches conducted. ICE requests comment from facilities on the number of cross-gender pat-down searches conducted. Please include details that would help with an aggregate estimate, such as the average daily population of detainees at your facility, the number of pat-downs that may occur daily, the percentage that are cross-gender, etc.

Because DHS believes this may be a noticeable burden on facilities, DHS includes a rough estimate using assumptions. DHS also welcomes comment on these assumptions. Detainees may receive a pat-down for a number of reasons. All detainees receive a pat-down upon intake to the facility, detainees may receive a pat-down after visitation, before visiting the attorney room, if visiting medical, if in segregation, etc. Therefore, DHS assumes that in any given day, approximately 50 percent of detainees may receive a pat-down. DHS uses the ratio of male guards to male detainees and female guards to female detainees as a proxy for the percentage of these pat-downs that would be cross-gender, realizing that this may not be

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representative of every facility, the circumstances at the time a pat-down is required, nor the results after the staff realignment previously discussed. As referenced previously, between 72 and 87 percent of guards are male and 90 percent of detainees are male. Therefore, to estimate a rough order of magnitude, DHS assumes between 3 and 18 percent of pat-downs of male detainees may be cross-gender, with a primary estimate of 10 percent.

DHS finds the total average daily population of male detainees at the 43 facilities classified as small entities and takes the average to determine an average daily population of 93 for a facility classified as a small entity ($4,457 \times 90\% \div 43$). Then DHS applies the methodology described above to estimate that approximately 2,000 cross gender pat-downs may be conducted at an average small entity annually ($93 \text{ male ADP} \times 50\% \text{ receive pat-down daily} \times 365 \text{ days} \times 10\% \text{ cross-gender}$), which is rounded to the nearest thousand due to uncertainty. DHS estimates it will require an average of 5 minutes of staff for documentation. DHS estimates this provision may cost a facility approximately \$5,435 ($5 \text{ minutes} \times \32.61 per hour), annually.

The total estimate per small entity for proposed section 115.15 is \$5,996 (\$561 for staff realignment + \$5,435 for cross-gender pat-down documentation).

iv. Evidence protocols and forensic medical examinations, § 115.21

The proposed rule would require ICE and any of its immigration detention facilities to establish a protocol for the investigation of allegations of sexual abuse or the referral of allegations to investigators. In addition, where appropriate, at no cost to the detainee, a forensic medical exam should be offered and an outside victim advocate shall be made available for support if requested.

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DHS includes a cost for facilities to enter into a memorandum of understanding (MOU) with entities that provide victim advocate services, such as rape crisis centers. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this provision may cost a facility approximately \$1,488 (20 hours x \$74.41).

v. Staff training, § 115.31, Volunteer and contractor training, § 115.32

Under section 115.31 the proposed rule would require that any facility staff and employee who may have contact with immigration detention facilities have training on specific items related to prevention, detection, and response to sexual abuse. In addition, under section 115.32 the proposed rule would require that any volunteers and contractors who may have contact with immigration detention facilities also receive training on specific items related to prevention, detection, and response to sexual abuse.²¹ Both sections would also require facilities to maintain documentation that all staff, employees, contractors, and volunteers have completed the training requirements.

DHS uses the NCIC 2-hour training as an approximation for the length of the training course to fulfill the proposed requirements. DHS estimates this provision may cost a facility

²¹ ICE does not keep record of the number of staff and contractors at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and approximately 290 staff and contractors per new facility.

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approximately \$20,922 (2 hours x 290 staff and contractors x \$32.61) + (2 hours x 30 volunteers x \$33.47).^{22, 23}

vi. *Specialized training: Investigations, § § 115.34, 115.134*

The proposed rule would require the agency or facility to provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into alleged sexual abuse at immigration detention facilities.

DHS conducts investigations of all allegations of detainee sexual abuse in detention facilities. The 2012 ICE SAAPID mandates that ICE's OPR provide specialized training to OPR investigators and other ICE staff. However, facilities may also conduct their own investigations. However, because ICE conducts investigations into the allegations, training for facility investigators would likely be less specialized than required of ICE investigators. DHS includes a cost for the time required for training investigators. DHS estimates the training may take approximately 1 hour. DHS estimates this provision may cost a facility approximately \$468 (1 hour x 10 investigators x \$46.75).^{24, 25}

²² Though there may be other types of facility staff or contractors that would require this training, such as medical practitioners or administrative staff, DHS assumes correctional officers and their supervisors comprise the majority of staff with detainee contact.

²³ Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, SOC 00-0000 All Occupations Median Hourly Wage, retrieved on August 16, 2012 from http://www.bls.gov/oes/2011/may/naics4_999300.htm. Loaded for benefits. \$33.47 = \$19.98/0.597

²⁴ ICE does not keep record of the number of investigators at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and based on the data from the sample of facilities, 10 investigators per new facility.

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vii. Specialized training: Medical and mental health care, § 115.35

The proposed rule would require specialized training to DHS medical and mental health care staff. In addition, it would require all facilities to have policies and procedures to ensure that the facility trains or certifies all full- or part-time facility medical and mental health care staff in procedures for treating victims of sexual abuse, in facilities where medical or mental health staff may be assigned these activities.²⁶

DHS searched for continuing medical education courses that focused on the evaluation and treatment for victims of sexual assault. Based on the results, DHS estimates an average course will be one hour in length and cost between \$10 and \$15, and can be completed online. DHS estimates this provision may cost a facility approximately \$1,957 (30 medical and mental health care practitioners x (\$50.23 x 1 hr + \$15)).²⁷

viii. Detainee access to outside confidential support services, § 115.53

The proposed rule would require facilities to maintain or attempt to enter into MOUs with organizations that provide legal advocacy and confidential emotional support services for victims

²⁵ Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Median Wage Rate for SOC 33-1011 First-Line Supervisors of Correctional Officers, retrieved on August 16, 2012 from http://www.bls.gov/oes/2011/may/naics4_999300.htm. Loaded for benefits. \$46.75 = \$27.91/0.597

²⁶ ICE does not keep record of the number of medical and mental health care providers at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and based on the data from the sample of facilities, 30 medical and mental health care providers per new facility.

²⁷ Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Weighted Average Median Wage Rate for SOC 29-1062 Family and General Practitioners; 29-1066 Psychiatrists; 29-1071 Physician Assistants; 29-1111 Registered Nurses; 29-2053 Psychiatric Technicians; and 29-2061 Licensed Practical and Licensed Vocational Nurses, retrieved on August 16, 2012 from http://www.bls.gov/oes/2011/may/naics4_999300.htm. Loaded for benefits. \$50.23 = \$29.99/0.597

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of sexual abuse. It also requires notices of these services be made available to detainees, as appropriate.

DHS includes a cost for facilities to enter into a MOU with entities that provide legal advocacy and confidential support services, such as services provided by a rape crisis center. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this provision may cost a facility approximately \$1,488 (20 hours x \$74.41).

ix. Audits, § 115.93

Facilities may also incur costs for re-audits. Re-audits can be requested in the event that the facility does not achieve compliance with each standard or if the facility files an appeal with the agency regarding any specific finding that it believes to be incorrect. Costs for these audits would be borne by the facility, however the request for these re-audits is at the discretion of the facility.

x. Additional Implementation Costs

Facilities contracting with DHS agencies may incur organizational costs related to proper planning and overall execution of the rulemaking, in addition to the specific implementation costs facilities are estimated to incur for each of the proposed requirements. The burden resulting from the time required to read the rulemaking, research how it might impact facility operations, procedures, and budget, as well as consideration of how best to execute the rulemaking requirements or other costs of overall execution. This is exclusive of the time

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required under section 115.12 to determine and agree upon the new terms of the contract and the specific requirements expected to be performed by the facility PSA Compliance Manager under section 115.11.

To account for these costs, DHS adds an additional category of implementation costs for immigration detention facilities. Implementation costs will vary by the size of the facility, a facility's current practices, and other facility-specific factors. DHS assumes the costs any additional implementation costs might occur as a result of the provisions with start-up costs, such as entering into MOUs, rather than provisions with action or on-going costs, such as training. DHS estimates additional implementation costs as 10 percent of the total costs of provisions with a start-up cost. DHS requests comment on this assumption. The tables below present the estimates for additional implementation costs. DHS estimates this provision may cost a facility approximately \$1,579 ($10\% \times (\$1,488 \text{ for section } 115.12 + \$5,330 \text{ for section } 115.11 + \$5,996 \text{ for section } 115.15 + \$1,488 \text{ for section } 115.21 + \$1,488 \text{ for section } 115.53)$).

xi. Total Cost per Facility

DHS estimates the total cost per immigration detention facility under the NDS for compliance with the standards is approximately \$40,716 for the first year. In subsequent years, DHS estimates the costs drop to approximately \$9,990. The following table summarizes the preceding discussion.

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Table 8: Estimated Cost per Small Entity under NDS – Immigration Detention Facilities

Proposed Provision		Cost in Year I	On-going Cost
115.12	Consulting with non-DHS entities for the confinement of detainees	\$1,488	\$0
115.11	Zero tolerance of sexual abuse; PSA Coordinator*	\$5,330	\$3,647
115.15	Limits to cross-gender viewing and searches	\$5,996	\$5,435
115.21	Evidence protocols and forensic medical examinations	\$1,488	\$0
115.31 & 115.32*	Staff training & Volunteer and contractor training	\$20,922	\$0
115.34	Specialized training: Investigations	\$468	\$0
115.35	Specialized training: Medical and mental health care	\$1,957	\$0
115.53	Detainee access to outside confidential support Services	\$1,488	\$0
	Additional Implementation Costs*	\$1,579	\$908
Total		\$40,716	\$9,990

*Provisions for which DHS estimates there may be on-going costs

DHS welcomes comments on this analysis. Members of the public should please submit a comment, as described in this proposed rule under “Public Participation,” if they think that their business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it. It would be helpful if commenters provide DHS with as much of the following information as possible: Does the commenter’s facility currently have a contract with ICE? What does the commenter expect to be the type and extent of the direct impact on the commenter’s facility? What are any recommended alternative measures that would mitigate the impact on a small business, organization, or governmental jurisdiction?

- 5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.**

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On May 17, 2012, DOJ released a final rule setting national standards to prevent, detect, and respond to prison rape. 77 FR 37106 (June 20, 2012). The final rule is applicable to facilities operated by DOJ entities including the Bureau of Prisons and the USMS. While many of the immigration detention facilities with which DHS contracts may be facilities that would also be subject to the DOJ rule, the specific characteristics of immigration detention facilities differ in certain respects from other facilities with regard to the manner in which they are operated and the composition of their population. Therefore, DHS promulgated its own rulemaking to account for these differences.

In preparing this proposed rule, DHS has utilized its existing sexual abuse policies and procedures as a baseline for setting DHS standards. However, recognizing that one of the key purposes of PREA is to “develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape,” DHS has coordinated its proposed regulations with the final standards in the DOJ rulemaking to the extent practicable, given the differences in the types and operations of the facilities. DHS does not expect local jurisdictions with which DHS has contracts to have conflicts with any differences in the requirements between the two rulemakings. DHS, however, welcomes comment on this conclusion.

6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

DHS considered a longer phase-in period for small entities subject to the rulemaking. A longer period would reduce immediate burden on small entities with current contracts. The

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current requirements propose that facilities must comply with the standards upon renewal of a contract or exercising a contract option. Essentially, this would phase-in all authorized immigration detention facilities within a year of the effective date of the final rule. DHS is willing to work with small facilities upon contract renewal in implementing these standards.

DHS also considered requiring lesser standards, such as those under the National Detention Standards (NDS) or the 2008 PBNDS for small entities. However, DHS rejected this alternative because DHS believes in the importance of protecting detainees from, and providing treatment after, instances of sexual abuse, regardless of a facility's size.

G. Paperwork Reduction Act.

DHS is proposing to set standards for the prevention, detection, and response to sexual abuse in its confinement facilities. For DHS facilities and as incorporated in DHS contracts, these standards will require covered facilities to retain and report to the agency certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect, retain, and report to the agency certain specified information relating to allegations of sexual abuse within the covered facility. DHS believes that most of the information collection requirements placed on facilities already are requirements derived from existing contracts with facilities for immigration detention. However, DHS is including these requirements as part of an information collection request, pursuant to the Paperwork Reduction Act (PRA), so as to ensure clarity of requirements associated with this rulemaking.

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DHS will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the review procedures of the Paperwork Reduction Act of 1995. The proposed information collection requirements are outlined in this proposed rule to obtain comments from the public and affected entities. All comments and suggestions, or questions regarding additional information, should be directed to Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732-4292 (not a toll-free number). Written comments and suggestions from the public and affected agencies concerning the collection of information are encouraged. Your comments on the information collection-related aspects of this rule should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, DHS requests comments on the recordkeeping

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cost burden imposed by this rule and will use the information gained through such comments to assist in calculating the cost burden.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in DHS Confinement Facilities.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* No form.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal governments, State governments, local governments, and businesses or other for profits.

Other: None.

Abstract: DHS is publishing a notice of proposed rulemaking (NPRM) to adopt standards for the detection, prevention, and response to sexual abuse in its confinement facilities. These standards will require covered facilities to retain, and report to the agency certain specified information relating to sexual abuse prevention planning, education and training, responsive planning, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Covered facilities include: 126 DHS immigration detention facilities and holding facilities.

(5) An estimate of the total number of responses/respondents and the total amount of time estimated for respondents in an average year to keep the required records is: 1,379,533

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responses annually; 118,348 hours. The breakout of the estimated burden and responses are stated in the table immediately below. However, the number of responses from each immigration detention facility will vary depending on a variety of factors which may include: how many annual allegations, the number of staff at each facility, and the number of detainees held at a facility.

(6) An estimate of the total public burden (in hours) associated with the collection: 118,348 hours. There are no current information collection requirements based on a PRA instrument or approved collection on facilities to retain certain sexual abuse incident data. This information collection will be the first regulation-based national data collection for DHS facility-reported information on sexual abuse within correctional facilities, characteristics of the victims and perpetrators, circumstances surrounding the incidents, and how incidents are reported, tracked, and adjudicated. For the facilities that already maintain such records, there will be no additional burden of recordkeeping and reporting as their current recordkeeping and reporting will be sufficient for the need of DHS. The DHS rule would not impose a requirement on facilities to maintain duplicative records. However, for the purposes of this collection of information, DHS has estimated the burden as if the collection and reporting requirements are new for all 126 facilities.

The recordkeeping requirements set forth by this rule are new requirements that will require a new OMB Control Number. DHS is seeking comment on these new requirements as part of this NPRM. These new requirements will require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning,

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education and training, investigations and to collect and retain certain specified information relating to allegations of sexual abuse within the confinement facility.

The proposed recordkeeping requirements may be found in the following sections of the proposed rule:

Subpart A—Immigration Detention Facilities

Subpart B— Holding Facilities

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Function	NPRM Cite	Avg Annual Responses	Avg Annual Hour Burden
Documentation & Recordkeeping			
Strip and visual body cavity searches	115.15(e)	500	83
Cross-gender pat-downs	115.15 (d)	444,000	37,000
Reports and referrals of allegations	115.22 (b), 115.51(c), 115.61 (a)	50	25
Detainee education	115.33 (c)	882,520	73,543
Administrative segregation	115.43 (a)	500	125
Training records	115.31(c), 115.32(c), 115.34(b), 115.35(c)	37,550	3,129
Incident reviews	115.86(a), 115.87(b)	50	100
Maintaining case records of allegations	115.87(a)	50	100
Reporting Requirements			
Reporting to other confinement facilities	115.63 (c)	50	4
Annual report for agency	115.86(b)	50	50
ICE Review of Facility Policies and Procedures			
Medical staff training policy	115.35(c)	45	223
Staff disciplinary policy	115.76(b)	45	223
Administrative investigation policy	115.71(c), (d)	45	223
Provide Evidence of Background Investigation			
Background Investigation Records	115.17(c), (d)	14,079	3,520
TOTAL		1,379,533	118,348

If additional information is required contact:

Alexander Y. Hartman; Office of Policy; U.S. Immigration and Customs Enforcement,
 Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC
 20536; Telephone: (202) 732-4292 (not a toll-free number).

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

List of Subjects in 6 CFR Part 115

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, Part 115 of Title 6 of the Code of Federal Regulations is added as follows:

Part 115 – SEXUAL ABUSE AND ASSAULT PREVENTION STANDARDS

Sec.

115.5 General definitions.

115.6 Definitions related to sexual abuse and assault.

Subpart A – Standards for Immigration Detention Facilities

Coverage

115.10 Coverage of DHS immigration detention facilities.

Prevention Planning

115.11 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.

115.12 Contracting with non-DHS entities for the confinement of detainees.

115.13 Detainee supervision and monitoring.

115.14 Juvenile and family detainees.

115.15 Limits to cross-gender viewing and searches.

115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.

115.17 Hiring and promotion decisions.

115.18 Upgrades to facilities and technologies.

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Responsive Planning

115.21 Evidence protocols and forensic medical examinations.

115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

Training and Education

115.31 Staff training.

115.32 Volunteer and contractor training.

115.33 Detainee education.

115.34 Specialized training: Investigations.

115.35 Specialized training: Medical and mental health care.

Assessment for Risk of Sexual Victimization and Abusiveness

115.41 Assessment for risk of victimization and abusiveness.

115.42 Use of assessment information.

115.43 Protective custody.

Reporting

115.51 Detainee reporting.

115.52 Grievances.

115.53 Detainee access to outside confidential support services.

115.54 Third-party reporting.

Official Response Following a Detainee Report

115.61 Staff reporting duties.

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115.62 Protection duties.

115.63 Reporting to other confinement facilities.

115.64 Responder duties.

115.65 Coordinated response.

115.66 Protection of detainees from contact with alleged abusers.

115.67 Agency protection against retaliation.

115.68 Post-allegation protective custody.

Investigations

115.71 Criminal and administrative investigations.

115.72 Evidentiary standard for administrative investigations.

115.73 Reporting to detainees.

Discipline

115.76 Disciplinary sanctions for staff.

115.77 Corrective action for contractors and volunteers.

115.78 Disciplinary sanctions for detainees.

Medical and Mental Care

115.81 Medical and mental health assessments; history of sexual abuse.

115.82 Access to emergency medical and mental health services.

115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

Data Collection and Review

115.86 Sexual abuse incident reviews.

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

115.87 Data collection.

115.88 Data review for corrective action.

115.89 Data storage, publication, and destruction.

Audits and Compliance

115.93 Audits of standards.

Additional Provisions in Agency Policies

115.95 Additional provisions in agency policies.

Subpart B – Standards for DHS Holding Facilities

Coverage

115.110 Coverage of DHS holding facilities.

Prevention Planning

115.111 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.

115.112 Contracting with non-DHS entities for the confinement of detainees.

115.113 Detainee supervision and monitoring.

115.114 Juvenile and family detainees.

115.115 Limits to cross-gender viewing and searches.

115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.

115.117 Hiring and promotion decisions.

115.118 Upgrades to facilities and technologies.

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Responsive Planning

115.121 Evidence protocols and forensic medical examinations.

115.122 Policies to ensure investigation of allegations and appropriate agency oversight.

Training and Education

115.131 Employee, contractor, and volunteer training.

115.132 Notification to detainees of the agency's zero-tolerance policy.

115.133 Reserved.

115.134 Specialized training: Investigations.

Assessment for Risk of Sexual Victimization and Abusiveness

115.141 Assessment for risk of victimization and abusiveness.

Reporting

115.151 Detainee reporting.

115.152 Reserved.

115.153 Reserved.

115.154 Third-party reporting.

Official Response Following a Detainee Report

115.161 Staff reporting duties.

115.162 Agency protection duties.

115.163 Reporting to other confinement facilities.

115.164 Responder duties.

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115.165 Coordinated response.

115.166 Protection of detainees from contact with alleged abusers.

115.167 Agency protection against retaliation.

Investigations

115.171 Criminal and administrative investigations.

115.172 Evidentiary standard for administrative investigations.

Discipline

115.176 Disciplinary sanctions for staff.

115.177 Corrective action for contractors and volunteers.

Medical and Mental Care

115.181 Reserved.

115.182 Access to emergency medical services.

Data Collection and Review

115.186 Sexual abuse incident reviews.

115.187 Data collection.

115.188 Data review for corrective action.

115.189 Data storage, publication, and destruction.

Audits and Compliance

115.193 Audits of standards.

Additional Provisions in Agency Policies

115.195 Additional provisions in agency policies.

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Subpart C – External Auditing and Corrective Action

Sec.

115.201 Scope of audits.

115.202 Auditor qualifications.

115.203 Audit contents and findings.

115.204 Audit corrective action plan.

115.205 Audit appeals.

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub. L. 107-296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

§ 115.5 General definitions.

For purposes of this part, the term—

Agency means the unit or component of DHS responsible for operating or supervising any facility, or part of a facility, that confines detainees.

Agency head means the principal official of an agency.

Contractor means a person who or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility.

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Detainee means any person detained in an immigration detention facility or holding facility.

Employee means a person who works directly for the agency.

Exigent circumstances means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person.

Facility means a place, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that was built or retrofitted for the purpose of detaining individuals and is routinely used by the agency to detain individuals in its custody. References to requirements placed on facilities extend to the entity responsible for the direct operation of the facility.

Facility head means the principal official responsible for a facility.

Family unit means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), none of whom has a known history of criminal or delinquent activity, or of sexual abuse, violence or substance abuse.

Gender nonconforming means having an appearance or manner that does not conform to traditional societal gender expectations.

Holding facility means a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) Under the control of the agency; and (2) primarily used for the short-

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term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, other agency, or other unit of the facility or agency.

Immigration detention facility means a confinement facility operated by or pursuant to contract with U.S. Immigration and Customs Enforcement (ICE) that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an Intergovernmental Service Agreement.

Intersex means having sexual or reproductive anatomy or chromosomal pattern that does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

Juvenile means any person under the age of 18.

Law enforcement staff means officers or agents of the agency or facility that are responsible for the supervision and control of detainees in a holding facility.

Medical practitioner means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A “qualified medical practitioner” refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

Mental health practitioner means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients

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within the scope of his or her professional practice. A “qualified mental health practitioner” refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

Pat-down search means a sliding or patting of the hands over the clothed body of a detainee by staff to determine whether the individual possesses contraband.

Security staff means employees primarily responsible for the supervision and control of detainees in housing units, recreational areas, dining areas, and other program areas of an immigration detention facility.

Staff means employees or contractors of the agency or facility, including any entity that operates within the facility.

Strip search means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person’s breasts, buttocks, or genitalia.

Substantiated allegation means an allegation that was investigated and determined to have occurred.

Transgender means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person’s assigned sex at birth.

Unfounded allegation means an allegation that was investigated and determined not to have occurred.

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Unsubstantiated allegation means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

Volunteer means an individual who donates time and effort on a recurring basis to enhance the activities and programs of the agency or facility.

§ 115.6 Definitions related to sexual abuse and assault.

For purposes of this part, the term—

Sexual abuse includes—

- (1) Sexual abuse and assault of a detainee by another detainee; and
- (2) Sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

Sexual abuse of a detainee by another detainee includes any of the following acts by one or more detainees, prisoners, inmates, or residents of the facility in which the detainee is housed who, by force, coercion, or intimidation, or if the victim did not consent or was unable to consent or refuse, engages in or attempts to engage in:

- (1) contact between the penis and the vulva or anus and, for purposes of this subparagraph, contact involving the penis upon penetration, however slight;
- (2) contact between the mouth and the penis, vulva or anus;
- (3) penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object;

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(4) touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person; or

(5) threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.

Sexual abuse of a detainee by a staff member, contractor, or volunteer includes any of the following acts, if engaged in by one or more staff members, volunteers, or contract personnel who, with or without the consent of the detainee, engages in or attempts to engage in:

(1) contact between the penis and the vulva or anus and, for purposes of this subparagraph, contact involving the penis upon penetration, however slight;

(2) contact between the mouth and the penis, vulva, or anus;

(3) penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(4) intentional touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(5) threats, intimidation, harassment, indecent, profane or abusive language, or other actions or communications, aimed at coercing or pressuring a detainee to engage in a sexual act;

(6) repeated verbal statements or comments of a sexual nature to a detainee;

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(7) any display of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, or

(8) unnecessary or inappropriate visual surveillance of a detainee.

Subpart A – Standards for Immigration Detention Facilities

Coverage

§ 115.10 Coverage of DHS immigration detention facilities.

This subpart covers ICE immigration detention facilities. Standards set forth in Subpart A are not applicable to Department of Homeland Security (DHS) holding facilities.

Prevention Planning

§ 115.11 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide Prevention of Sexual Abuse Coordinator (PSA Coordinator) with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its immigration detention facilities.

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(c) Each facility shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the facility's approach to preventing, detecting, and responding to such conduct. The agency shall review and approve each facility's written policy.

(d) Each facility shall employ or designate a Prevention of Sexual Abuse Compliance Manager (PSA Compliance Manager) who shall serve as the facility point of contact for the agency PSA Coordinator and who has sufficient time and authority to oversee facility efforts to comply with facility sexual abuse prevention and intervention policies and procedures.

§ 115.12 Contracting with non-DHS entities for the confinement of detainees.

(a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with these standards.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

§ 115.13 Detainee supervision and monitoring.

(a) Each facility shall ensure that it maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

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(b) Each facility shall develop and document comprehensive detainee supervision guidelines to determine and meet the facility's detainee supervision needs, and shall review those guidelines at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, the facility shall take into consideration the physical layout of each facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

(d) Each facility shall conduct frequent unannounced security inspections to identify and deter sexual abuse of detainees. Such inspections shall be implemented for night as well as day shifts. Each facility shall prohibit staff from alerting others that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

§ 115.14 Juvenile and family detainees.

(a) In general, juveniles should be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

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(b) The facility shall hold juveniles apart from adult detainees, minimizing sight, sound, and physical contact, unless the juvenile is in the presence of an adult member of the family unit, and provided there are no safety or security concerns with the arrangement.

(c) In determining the existence of a family unit for detention purposes, the agency shall seek to obtain reliable evidence of a family relationship.

(d) The agency and facility shall provide priority attention to unaccompanied alien children as defined by 6 U.S.C. 279(g)(2), including transfer to a Department of Health and Human Services Office of Refugee Resettlement facility within 72 hours, except in exceptional circumstances, in accordance with 8 U.S.C. 1232(b)(3).

(e) If a juvenile has been convicted as an adult of crime related to sexual abuse, the agency shall provide the facility and the Department of Health and Human Services Office of Refugee Resettlement with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in a Department of Health and Human Services Office of Refugee Resettlement facility.

§ 115.15 Limits to cross-gender viewing and searches.

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at immigration detention facilities.

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(b) Cross-gender pat-down searches of male detainees shall not be conducted unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances.

(c) Cross-gender pat-down searches of female detainees shall not be conducted unless in exigent circumstances.

(d) All cross-gender pat-down searches shall be documented.

(e) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. Facility staff shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(f) All strip searches and visual body cavity searches shall be documented.

(g) Each facility shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(h) The facility shall permit detainees in Family Residential Facilities to shower, perform bodily functions, and change clothing without being viewed by staff, except in exigent

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circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement.

(i) The facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's gender. If the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, learning that information as part of a broader medical examination conducted in private, by a medical practitioner.

(j) The agency shall train security staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and existing agency policy, including consideration of officer safety.

§ 115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.

(a) The agency and each facility shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and

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impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency and facility shall ensure that any written materials related to sexual abuse are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency or facility is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency and each facility shall take steps to ensure meaningful access to all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency and each facility shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for a detainee interpreter, and the agency determines that such interpretation is appropriate. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse.

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§ 115.17 Hiring and promotion decisions.

(a) An agency or facility shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) An agency or facility considering hiring or promoting staff shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. Agencies and facilities shall also impose upon employees a continuing affirmative duty to disclose any such misconduct. The agency, consistent with law, shall make its best efforts to contact all prior institutional employers of an applicant for employment, to obtain information on substantiated allegations of sexual abuse or any resignation during a pending investigation of alleged sexual abuse.

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(c) Before hiring new staff who may have contact with detainees, the agency or facility shall conduct a background investigation to determine whether the candidate for hire is suitable for employment with the facility or agency, including a criminal background records check. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each staff member and the facility's conclusions. The agency shall conduct an updated background investigation every five years for agency employees who may have contact with detainees. The facility shall require an updated background investigation every five years for those facility staff who may have contact with detainees and who work in immigration-only detention facilities.

(d) The agency or facility shall also perform a background investigation before enlisting the services of any contractor who may have contact with detainees. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each contractor and the facility's conclusions.

(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

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(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility and its staff.

§ 115.18 Upgrades to facilities and technologies.

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the facility or agency, as appropriate, shall consider the effect of the design, acquisition, expansion, or modification upon their ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in an immigration detention facility, the facility or agency, as appropriate, shall consider how such technology may enhance their ability to protect detainees from sexual abuse.

Responsive Planning

§ 115.21 Evidence protocols and forensic medical examinations.

(a) To the extent that the agency or facility is responsible for investigating allegations of sexual abuse involving detainees, it shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally appropriate for juveniles, where applicable.

(b) The agency and each facility developing an evidence protocol referred to in (a), above, shall consider how best to utilize available community resources and services to provide valuable

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expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs. Each facility shall establish procedures to make available, to the full extent possible, outside victim services following incidents of sexual abuse; the facility shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall provide these services by making available a qualified staff member from a community-based organization, or a qualified agency staff member. A qualified agency staff member or a qualified community-based staff member means an individual who has received education concerning sexual assault and forensic examination issues in general. The outside or internal victim advocate shall provide emotional support, crisis intervention, information, and referrals.

(c) Where evidentiarily or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the facility shall arrange for an alleged victim detainee to undergo a forensic medical examination by qualified health care personnel.

(d) As requested by a victim, the presence of his or her outside or internal victim advocate, including any available victim advocacy services offered by a hospital conducting a forensic exam, shall be allowed for support during a forensic exam and investigatory interviews.

(e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency or the facility shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

§ 115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

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(a) The agency shall establish an agency protocol, and shall require each facility to establish a facility protocol, to ensure that each allegation of sexual abuse is investigated by the agency or facility, or referred to an appropriate investigative authority. The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse.

(b) The agency shall ensure that the agency and facility protocols required by paragraph (a) include a description of responsibilities of the agency, the facility, and any other investigating entities; and require the documentation and maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse.

(c) The agency shall post its protocols on its website; each facility shall also post its protocols on its website, if it has one, or otherwise make the protocol available to the public.

(d) Each facility protocol shall ensure that all allegations are promptly reported to the agency as described in subsection (e) and (f) below, and, unless the allegation does not involve potentially criminal behavior, are promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. A facility may separately, and in addition to the above reports and referrals, conduct its own investigation.

(e) When a detainee, prisoner, inmate, or resident of the facility in which an alleged detainee victim is housed is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as the appropriate ICE Field Office Director, and, if it is potentially criminal, referred to an appropriate law enforcement agency having jurisdiction for investigation.

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(f) When a staff member, contractor, or volunteer is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as to the appropriate ICE Field Office Director, and to the local government entity or contractor that owns or operates the facility. If the incident is potentially criminal, the facility shall ensure that it is promptly referred to an appropriate law enforcement agency having jurisdiction for investigation.

(g) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(h) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided access to U nonimmigrant visa information.

Training and Education

§ 115.31 Staff training.

(a) The agency shall train, or require the training of, all employees who may have contact with immigration detainees, and all facility staff, to be able to fulfill their responsibilities under these standards, including training on:

(1) the agency's and the facility's zero-tolerance policies for all forms of sexual abuse;

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- (2) the right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse;
- (3) definitions and examples of prohibited and illegal sexual behavior;
- (4) recognition of situations where sexual abuse may occur;
- (5) recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing and responding to such occurrences;
- (6) how to avoid inappropriate relationships with detainees;
- (7) how to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees;
- (8) procedures for reporting knowledge or suspicion of sexual abuse; and
- (9) the requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current facility staff, and all agency employees who may have contact with immigration detention facility detainees, shall be trained within one year of the effective date of these standards, and the agency or facility shall provide refresher information every two years.

(c) The agency and each facility shall document that staff that may have contact with immigration facility detainees have completed the training.

§ 115.32 Volunteer and contractor training.

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

(a) The facility shall ensure that all volunteers and contractors who have contact with detainees have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with detainees, but all volunteers and contractors who have contact with detainees shall be notified of the agency's and the facility's zero-tolerance policies regarding sexual abuse and informed how to report such incidents.

(c) Each facility shall receive and maintain written confirmation that contractors and volunteers who may have contact with immigration facility detainees have completed the training.

§ 115.33 Detainee education.

(a) During the intake process, each facility shall ensure that the detainee orientation program notifies and informs detainees about the agency's and the facility's zero-tolerance policies for all forms of sexual abuse and includes (at a minimum) instruction on:

- (1) prevention and intervention strategies;
- (2) definitions and examples of detainee-on-detainee sexual abuse, staff-on-detainee sexual abuse and coercive sexual activity;
- (3) explanation of methods for reporting sexual abuse, including to any staff member, including a staff member other than an immediate point-of-contact line officer (e.g., the compliance manager or a mental health specialist), the DHS Office of Inspector General, and the Joint Intake Center;

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- (4) information about self-protection and indicators of sexual abuse;
 - (5) prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings; and
 - (6) the right of a detainee who has been subjected to sexual abuse to receive treatment and counseling.
- (b) Each facility shall provide the detainee notification, orientation, and instruction in formats accessible to all detainees, including those who are limited English proficient, deaf, visually impaired or otherwise disabled, as well as to detainees who have limited reading skills.
- (c) The facility shall maintain documentation of detainee participation in the intake process orientation.
- (d) Each facility shall post on all housing unit bulletin boards the following notices:
- (1) the DHS-prescribed sexual assault awareness notice;
 - (2) the name of the Prevention of Sexual Abuse Compliance Manager; and
 - (3) the name of local organizations that can assist detainees who have been victims of sexual abuse.
- (e) The facility shall make available and distribute the DHS-prescribed "Sexual Assault Awareness Information" pamphlet.
- (f) Information about reporting sexual abuse shall be included in the agency Detainee Handbook made available to all immigration detention facility detainees.

§ 115.34 Specialized training: Investigations.

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(a) In addition to the general training provided to all facility staff and employees pursuant to § 115.31, the agency or facility shall provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into allegations of sexual abuse at immigration detention facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency and facility must maintain written documentation verifying specialized training provided to investigators pursuant to this subsection.

§ 115.35 Specialized training: Medical and mental health care.

(a) The agency shall provide specialized training to DHS or agency employees who serve as full- and part-time medical practitioners or full- and part-time mental health practitioners in immigration detention facilities where medical and mental health care is provided.

(b) The training required by this section shall cover, at a minimum, the following topics:

(1) how to detect and assess signs of sexual abuse;

(2) how to respond effectively and professionally to victims of sexual abuse,

(3) how and to whom to report allegations or suspicions of sexual abuse, and

(4) how to preserve physical evidence of sexual abuse. If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse, in facilities where medical staff may be assigned these activities.

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Assessment for Risk of Sexual Victimization and Abusiveness

§ 115.41 Assessment for risk of victimization and abusiveness.

(a) The facility shall assess all detainees on intake to identify those likely to be sexual aggressors or sexual victims and shall house detainees to prevent sexual abuse, taking necessary steps to mitigate any such danger. Each new arrival shall be kept separate from the general population until he/she is classified and may be housed accordingly.

(b) The initial classification process and initial housing assignment should be completed within twelve hours of admission to the facility.

(c) The facility shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

- (1) whether the detainee has a mental, physical, or developmental disability;
- (2) the age of the detainee;
- (3) the physical build and appearance of the detainee;
- (4) whether the detainee has previously been incarcerated;
- (5) the nature of the detainee's criminal history;
- (6) whether the detainee has any convictions for sex offenses against an adult or child;
- (7) whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- (8) whether the detainee has self-identified as having previously experienced sexual victimization; and
- (9) the detainee's own concerns about his or her physical safety.

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(d) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the facility, in assessing detainees for risk of being sexually abusive.

(e) The facility shall reassess each detainee's risk of victimization or abusiveness between 60 and 90 days from the date of initial assessment, and at any other time when warranted based upon the receipt of additional, relevant information or following an incident of abuse or victimization.

(f) Detainees shall not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (c)(1), (c)(7), (c)(8), or (c)(9) of this section.

(g) The facility shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the detainee's detriment by staff or other detainees or inmates.

§ 115.42 Use of assessment information.

(a) The facility shall use the information from the risk assessment under section 115.41 to inform assignment of detainees to housing, recreation and other activities, and voluntary work. The agency shall make individualized determinations about how to ensure the safety of each detainee.

(b) When making assessment and housing decisions for a transgender or intersex detainee, the facility shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's health and safety. The facility shall consult a medical

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or mental health professional as soon as practicable on this assessment. The facility should not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee; a detainee's self-identification of his/her gender and self-assessment of safety needs shall always be taken into consideration as well. The facility's placement of a transgender or intersex detainee shall be consistent with the safety and security considerations of the facility, and placement and programming assignments for each transgender or intersex detainee shall be reassessed at least twice each year to review any threats to safety experienced by the detainee.

(c) When operationally feasible, transgender and intersex detainees shall be given the opportunity to shower separately from other detainees.

§ 115.43 Protective custody.

(a) The facility shall develop and follow written procedures consistent with the standards in this Subpart A for each facility governing the management of its administrative segregation unit. These procedures, which should be developed in consultation with the ICE Enforcement and Removal Operations Field Operations Director having jurisdiction for the facility, must document detailed reasons for placement of an individual in administrative segregation.

(b) Use of administrative segregation by facilities to protect vulnerable detainees shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, as a last resort. The facility should assign such detainees to administrative

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segregation for protective custody only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(c) Facilities that place detainees in administrative segregation for protective custody shall provide those detainees access to programs, visitation, counsel and other services available to the general population to the maximum extent practicable.

(d) Facilities shall implement written procedures for the regular review of all detainees held in administrative segregation, as follows:

(1) a supervisory staff member shall conduct a review within 72 hours of the detainee's placement in administrative segregation to determine whether segregation is still warranted; and

(2) a supervisory staff member shall conduct, at a minimum, an identical review after the detainee has spent seven days in administrative segregation, and every week thereafter for the first 30 days, and every 10 days thereafter.

Reporting

§ 115.51 Detainee reporting.

(a) The agency and each facility shall develop policies and procedures to ensure that detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents. The agency and each facility shall also provide instructions on how detainees may contact their consular official, the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and the facility shall inform the detainees of, at least

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one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Facility policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

§ 115.52 Grievances.

(a) The facility shall permit a detainee to file a formal grievance related to sexual abuse at any time during, after, or in lieu of lodging an informal grievance or complaint.

(b) The facility shall not impose a time limit on when a detainee may submit a grievance regarding an allegation of sexual abuse.

(c) The facility shall implement written procedures for identifying and handling time-sensitive grievances that involve an immediate threat to detainee health, safety, or welfare related to sexual abuse.

(d) Facility staff shall bring medical emergencies to the immediate attention of proper medical personnel for further assessment.

(e) The facility shall issue a decision on the grievance within five days of receipt.

(f) To prepare a grievance, a detainee may obtain assistance from another detainee, the housing officer or other facility staff, family members, or legal representatives. Staff shall take reasonable steps to expedite requests for assistance from these other parties.

§ 115.53 Detainee access to outside confidential support services.

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(a) Each facility shall utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention, counseling, investigation and the prosecution of sexual abuse perpetrators to most appropriately address victims' needs. The facility shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers or, if local providers are not available, with national organizations that provide legal advocacy and confidential emotional support services for immigrant victims of crime.

(b) Each facility's written policies shall establish procedures to include outside agencies in the facility's sexual abuse prevention and intervention protocols, if such resources are available.

(c) Each facility shall make available to detainees information about local organizations that can assist detainees who have been victims of sexual abuse, including mailing addresses and telephone numbers (including toll-free hotline numbers where available). If no such local organizations exist, the facility shall make available the same information about national organizations. The facility shall enable reasonable communication between detainees and these organizations and agencies, in as confidential a manner as possible.

§ 115.54 Third-party reporting.

Each facility shall establish a method to receive third-party reports of sexual abuse in its immigration detention facilities and shall make available to the public information on how to report sexual abuse on behalf of a detainee.

Official Response Following a Detainee Report

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§ 115.61 Staff reporting duties.

(a) The agency and each facility shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in a facility; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The agency shall review and approve facility policies and procedures and shall ensure that the facility specifies appropriate reporting procedures, including a method by which staff can report outside of the chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's and facility's written policies and procedures.

(c) Apart from such reporting, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to help protect the safety of the victim or prevent further victimization of other detainees or staff in the facility, make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

§ 115.62 Protection duties.

If an agency employee or facility staff member has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

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§ 115.63 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency or facility whose staff received the allegation shall notify the appropriate office of the facility where the alleged abuse occurred.

(b) The notification provided in paragraph (a) shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency or facility shall document that it has provided such notification.

(d) The agency or facility office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards and reported to the appropriate ICE Field Office Director.

§ 115.64 Responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first security staff member to respond to the report, or his or her supervisor, shall be required to:

(1) separate the alleged victim and abuser;

(2) preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) if the abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) if the sexual abuse occurred within a time period that still allows for the collection of

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physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify security staff.

§ 115.65 Coordinated response.

(a) Each facility shall develop a written institutional plan to coordinate actions taken by staff first responders, medical and mental health practitioners, investigators, and facility leadership in response to an incident of sexual abuse.

(b) Each facility shall use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(c) If a victim of sexual abuse is transferred between DHS immigration detention facilities, the sending facility shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(d) If a victim is transferred from a DHS immigration detention facility to a non-DHS facility, the sending facility shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

§ 115.66 Protection of detainees from contact with alleged abusers.

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Staff, contractors, and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

§ 115.67 Agency protection against retaliation.

Staff, contractors, and volunteers, and immigration detention facility detainees, shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force. For at least 90 days following a report of sexual abuse, the agency and facility shall monitor to see if there are facts that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any detainee disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. DHS shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

§ 115.68 Post-allegation protective custody.

(a) The facility shall take care to place detainee victims of sexual abuse in a supportive environment that represents the least restrictive housing option possible (e.g., protective custody), subject to the requirements of § 115.43.

(b) Detainee victims shall not be held for longer than five days in any type of administrative segregation, except in unusual circumstances or at the request of the detainee.

(c) A detainee victim who is in protective custody after having been subjected to sexual abuse shall not be returned to the general population until completion of a proper re-assessment,

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taking into consideration any increased vulnerability of the detainee as a result of the sexual abuse.

Investigations

§ 115.71 Criminal and administrative investigations.

(a) If the facility has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the facility shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS, and the assigned criminal investigative entity.

(c) The facility shall develop written procedures for administrative investigations, including provisions requiring:

(1) preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(2) interviewing alleged victims, suspected perpetrators, and witnesses;

(3) reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

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(4) assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

(5) an effort to determine whether actions or failures to act at the facility contributed to the abuse; and

(6) documentation of each investigation by written report, which shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(7) retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years.

Such procedures shall govern the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The agency shall review and approve the facility policy and procedures for coordination and conduct of internal administrative investigations with the assigned criminal investigative entity to ensure non-interference with criminal investigations.

(e) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(f) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

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§ 115.72 Evidentiary standard for administrative investigations.

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

§ 115.73 Reporting to detainees.

The agency shall, when the detainee is still in immigration detention, or where otherwise feasible, following an investigation into a detainee's allegation of sexual abuse, notify the detainee as to the result of the investigation and any responsive action taken.

Discipline

§ 115.76 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or for violating agency or facility sexual abuse policies.

(b) The agency shall review and approve facility policies and procedures regarding disciplinary or adverse actions for staff and shall ensure that the facility policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under the

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definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1) - (4) and (7) - (8).

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each facility shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

§ 115.77 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who has engaged in sexual abuse shall be prohibited from contact with detainees. Each facility shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer. Such incidents shall also be reported to law enforcement agencies, unless the activity was clearly not criminal.

(b) Contractors and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

(c) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in sexual abuse, but have violated other provisions within these standards.

§ 115.78 Disciplinary sanctions for detainees.

(a) Each facility shall subject a detainee to disciplinary sanctions pursuant to a formal

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disciplinary process following an administrative or criminal finding that the detainee engaged in sexual abuse.

(b) At all steps in the disciplinary process provided in paragraph (a), any sanctions imposed shall be commensurate with the severity of the committed prohibited act and intended to encourage the detainee to conform with rules and regulations in the future.

(c) Each facility holding detainees in custody shall have a detainee disciplinary system with progressive levels of reviews, appeals, procedures, and documentation procedure.

(d) The disciplinary process shall consider whether a detainee's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(e) The facility shall not discipline a detainee for sexual contact with staff unless there is a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

Medical and Mental Care

§ 115.81 Medical and mental health assessments; history of sexual abuse.

(a) If the assessment pursuant to § 115.41 indicates that a detainee has experienced prior sexual victimization or perpetrated sexual abuse, staff shall ensure, subject to the circumstances

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surrounding the indication, that the detainee is immediately referred to a qualified medical or mental health practitioner for medical and/or mental health follow-up as appropriate.

(b) When a referral for medical follow-up is initiated, the detainee shall receive a health evaluation no later than two working days from the date of assessment.

(c) When a referral for mental health follow-up is initiated, the detainee shall receive a mental health evaluation no later than 72 hours after the referral.

§ 115.82 Access to emergency medical and mental health services.

(a) Detainee victims of sexual abuse in immigration detention facilities shall have timely, unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under medical or mental health professional standards.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) Each facility shall offer medical and mental health evaluation and, as appropriate, treatment to all detainees who have been victimized by sexual abuse while in immigration detention.

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(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Detainee victims of sexually abusive vaginal penetration by a male abuser while incarcerated shall be offered pregnancy tests. If pregnancy results from an instance of sexual abuse, the victim shall receive timely and comprehensive information about lawful pregnancy-related medical services and timely access to all lawful pregnancy-related medical services.

(e) Detainee victims of sexual abuse while detained shall be offered tests for sexually transmitted infections as medically appropriate.

(f) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(g) The facility shall attempt to conduct a mental health evaluation of all known detainee-on-detainee abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

Data Collection and Review

§ 115.86 Sexual abuse incident reviews.

(a) Each facility shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded,

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prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) Each facility shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts. The results and findings of the annual review shall be provided to the agency PSA Coordinator.

§ 115.87 Data collection.

(a) Each facility shall maintain all case records associated with claims of sexual abuse, including incident reports, investigative reports, offender information, case disposition, medical and counseling evaluation findings, and recommendations for post-release treatment, if necessary, and/or counseling in accordance with these standards and applicable agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an ongoing basis, the PSA Coordinator shall work with relevant facility PSA Compliance Managers and DHS entities to share data regarding effective agency response methods to sexual abuse.

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(c) On a regular basis, the PSA Coordinator shall prepare a report for ICE leadership compiling information received about all incidents or allegations of sexual abuse of detainees in immigration detention during the period covered by the report, as well as ongoing investigations and other pending cases.

(d) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing, and for each incident found to be substantiated, information concerning:

(1) the date, time, location, and nature of the incident;

(2) the demographic background of the victim and perpetrator (including citizenship, age, and gender);

(3) the reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);

(4) any injuries sustained by the victim;

(5) post-report follow up responses and action taken by the facility (e.g., housing placement/custody classification, medical examination, mental health counseling, etc.); and

(6) any sanctions imposed on the perpetrator.

(e) Upon request, the agency shall provide all data described in this section from the previous calendar year to the Office for Civil Rights and Civil Liberties no later than June 30.

§ 115.88 Data review for corrective action.

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(a) The agency shall review data collected and aggregated pursuant to § 115.87 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

- (1) identifying problem areas;
- (2) taking corrective action on an ongoing basis; and
- (3) preparing an annual report of its findings and corrective actions for each immigration detention facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its website.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

§ 115.89 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.87 are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from immigration detention facilities under its direct control and from any private agencies with which it contracts available

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to the public at least annually on its website consistent with existing agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

Audits and Compliance

§ 115.93 Audits of standards.

(a) During the three-year period starting on **[INSERT DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF THE STANDARDS]**, and during each three-year period thereafter, the agency shall ensure that each of its immigration detention facilities is audited at least once.

(b) The agency may request an expedited audit if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

(c) Audits under this section shall be conducted pursuant to §§ 115. 201–205 of Subpart C.

(d) Audits under this section shall be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

Additional Provisions in Agency Policies

§ 115.95 Additional provisions in agency policies.

The regulations in Subpart A establish minimum requirements for agencies and facilities. Agency and facility policies may include additional requirements.

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Subpart B – Standards for DHS Holding Facilities.

Coverage

§ 115.110 Coverage of DHS holding facilities.

Subpart B covers all DHS holding facilities. Standards found in Subpart A of this Part are not applicable to DHS facilities except ICE immigration detention facilities.

Prevention Planning

§ 115.111 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide PSA Coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its holding facilities.

§ 115.112 Contracting with non-DHS entities for the confinement of detainees.

(a) An agency that contracts for the confinement of detainees in holding facilities operated by non-DHS private or public agencies or other entities, including other government agencies, shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with these standards.

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(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

(c) To the extent an agency contracts for confinement of holding facility detainees, all rules in this subpart that apply to the agency shall apply to the contractor, and all rules that apply to staff or employees shall apply to contractor staff.

§ 115.113 Detainee supervision and monitoring.

(a) The agency shall ensure that each facility maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

(b) The agency shall develop and document comprehensive detainee supervision guidelines to determine and meet each facility's detainee supervision needs, and shall review those supervision guidelines and their application at each facility at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, agencies shall take into consideration the physical layout of each holding facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

§ 115.114 Juvenile and family detainees.

(a) In general, juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect

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the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

(b) Unaccompanied juveniles shall be held separately from adult detainees.

§ 115.115 Limits to cross-gender viewing and searches.

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at DHS holding facilities.

(b) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. An agency shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(c) All strip searches and visual body cavity searches shall be documented.

(d) The agency shall implement policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement under medical supervision. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

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(e) The agency and facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's gender. If the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records (if available), or, if necessary, learning that information as part of a broader medical examination conducted in private, by a medical practitioner.

(f) The agency shall train law enforcement staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and existing agency policy, including consideration of officer safety.

§ 115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that any written materials related to sexual abuse are provided

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in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for a detainee interpreter, and the agency determines that such interpretation is appropriate. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse is not appropriate in matters relating to allegations of sexual abuse.

§ 115.117 Hiring and promotion decisions.

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(a) The agency shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) When the agency is considering hiring or promoting staff, it shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(c) Before hiring new employees who may have contact with detainees, the agency shall require a background investigation to determine whether the candidate for hire is suitable for employment with the agency. The agency shall conduct an updated background investigation for agency employees every five years.

(d) The agency shall also perform a background investigation before enlisting the services of any contractor who may have contact with detainees.

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(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility.

§ 115.118 Upgrades to facilities and technologies.

(a) When designing or acquiring any new holding facility and in planning any substantial expansion or modification of existing holding facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in a holding facility, the agency shall consider how such technology may enhance the agency's ability to protect detainees from sexual abuse.

Responsive Planning

§ 115.121 Evidence protocols and forensic medical examinations.

(a) To the extent that the agency is responsible for investigating allegations of sexual abuse in its holding facilities, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings

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and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally appropriate for juveniles, where applicable.

(b) In developing the protocol referred to in (a), above, the agency shall consider how best to utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs.

(c) Where evidentiarily or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the agency shall arrange for or refer the alleged victim detainee to a medical facility to undergo a forensic medical examination.

(d) If, in connection with an allegation of sexual abuse, the detainee is transported for a forensic examination to an outside hospital that offers victim advocacy services, the detainee shall be permitted to use such services to the extent available, consistent with security needs.

(e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

§ 115.122 Policies to ensure investigation of allegations and appropriate agency oversight.

(a) The agency shall establish a protocol to ensure that each allegation of sexual abuse is investigated by the agency, or referred to an appropriate investigative authority.

(b) The agency protocol shall be developed in coordination with DHS investigative entities; shall include a description of the responsibilities of both the agency and the investigative entities; and shall require the documentation and maintenance, for at least five years, of all

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reports and referrals of allegations of sexual abuse. The agency shall post its protocol on its website, redacted if appropriate.

(c) The agency protocol shall ensure that each allegation is promptly reported to the Joint Intake Center and, unless the allegation does not involve potentially criminal behavior, promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. The agency may separately, and in addition to the above reports and referrals, conduct its own investigation.

(d) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(e) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided access to U nonimmigrant visa information.

Training and Education

§ 115.131 Employee, contractor, and volunteer training.

(a) The agency shall train, or require the training of all employees, contractors, and volunteers who may have contact with holding facility detainees, to be able to fulfill their responsibilities under these standards, including training on:

- (1) the agency's zero-tolerance policies for all forms of sexual abuse;
- (2) the right of detainees and employees to be free from sexual abuse, and from retaliation for reporting sexual abuse;
- (3) definitions and examples of prohibited and illegal sexual behavior;

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- (4) recognition of situations where sexual abuse may occur;
- (5) recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences;
- (6) procedures for reporting knowledge or suspicion of sexual abuse;
- (7) how to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees; and
- (8) the requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current employees, contractors and volunteers who may have contact with holding facility detainees shall be trained within two years of the effective date of these standards, and the agency shall provide refresher information, as appropriate.

(c) The agency shall document that employees who may have contact with detainees have completed the training and receive and maintain for at least five years confirmation that contractors and volunteers have completed the training.

§ 115.132 Notification to detainees of the agency's zero-tolerance policy.

The agency shall make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.

§ 115.133 Reserved.

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§ 115.134 Specialized training: Investigations.

(a) In addition to the training provided to employees, DHS agencies with responsibility for holding facilities shall provide specialized training on sexual abuse and effective cross-agency coordination to agency investigators who conduct investigations into allegations of sexual abuse at holding facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency must maintain written documentation verifying specialized training provided to agency investigators pursuant to this subsection.

Assessment for Risk of Sexual Victimization and Abusiveness

§ 115.141 Assessment for risk of victimization and abusiveness.

(a) Before placing any detainees together in a holding facility, agency staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) All detainees who may be held overnight with other detainees shall be assessed to determine their risk of being sexually abused by other detainees or sexually abusive toward other detainees; staff shall ask each such detainee about his or her own concerns about his or her physical safety.

(c) The agency shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

(1) whether the detainee has a mental, physical, or developmental disability;

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- (2) the age of the detainee;
 - (3) the physical build and appearance of the detainee;
 - (4) whether the detainee has previously been incarcerated;
 - (5) the nature of the detainee's criminal history; and
 - (6) whether the detainee has any convictions for sex offenses against an adult or child;
 - (7) whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
 - (8) whether the detainee has self-identified as having previously experienced sexual victimization; and
 - (9) the detainee's own concerns about his or her physical safety.
- (d) If detainees are identified pursuant to the assessment under this section to be at high risk of victimization, staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.
- (e) The facility shall implement appropriate controls on the dissemination of sensitive information provided by detainees under this Section.

Reporting

§ 115.151 Detainee reporting.

- (a) The agency shall develop policies and procedures to ensure that the detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff

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neglect or violations of responsibilities that may have contributed to such incidents, and shall provide instructions on how detainees may contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and shall inform the detainees of, at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Agency policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

§ 115.152 Reserved.

§ 115.153 Reserved.

§ 115.154 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse in its holding facilities. The agency shall make available to the public information on how to report sexual abuse on behalf of a detainee.

Official Response Following a Detainee Report

§ 115.161 Staff reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that

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occurred to any detainee; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. Agency policy shall include methods by which staff can report misconduct outside of their chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's written policies and procedures.

(c) Apart from such reporting, the agency and staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

§ 115.162 Agency protection duties.

When an agency employee has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

§ 115.163 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency that received the allegation shall notify the appropriate office or the agency where the alleged abuse occurred.

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(b) The notification provided in paragraph (a) shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The agency office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards.

§ 115.164 Responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first law enforcement staff member to respond to the report, or his or her supervisor, shall be required to:

(1) separate the alleged victim and abuser;

(2) preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) if the sexual abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) if the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

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(b) If the first staff responder is not a law enforcement staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify law enforcement staff.

§ 115.165 Coordinated response.

(a) The agency shall develop a written institutional plan and use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(b) If a victim of sexual abuse is transferred between DHS holding facilities, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(c) If a victim is transferred from a DHS holding facility to a non-DHS facility, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

§ 115.166 Protection of detainees from contact with alleged abusers

Agency management shall consider whether any staff, contractor, or volunteer alleged to have perpetrated sexual abuse should be removed from duties requiring detainee contact pending the outcome of an investigation, and shall do so if the seriousness and plausibility of the allegation make removal appropriate.

§ 115.167 Agency protection against retaliation.

Agency employees shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force.

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Investigations

§ 115.171 Criminal and administrative investigations.

(a) If the agency has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the facility shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS and the assigned criminal investigative entity.

(c) The facility shall develop written procedures for administrative investigations, including provisions requiring:

(1) preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(2) interviewing alleged victims, suspected perpetrators, and witnesses;

(3) reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

(4) assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

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(5) documentation of each investigation by written report, which shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(6) retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years. Such procedures shall establish the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The departure of the alleged abuser or victim from the employment or control of the agency shall not provide a basis for terminating an investigation.

(e) When outside agencies investigate sexual abuse, the agency shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

§ 115.172 Evidentiary standard for administrative investigations.

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

Discipline

§ 115.176 Disciplinary sanctions for staff.

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(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or violating agency sexual abuse policies.

(b) The agency shall review and approve policy and procedures regarding disciplinary or adverse action for staff and shall ensure that the policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1) - (4) and (7) - (8).

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each agency shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

§ 115.177 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer suspected of perpetrating sexual abuse shall be prohibited from contact with detainees. The agency shall also consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in sexual abuse, but have

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violated other provisions within these standards. The agency shall be responsible for promptly reporting sexual abuse allegations and incidents involving alleged contractor or volunteer perpetrators to an appropriate law enforcement agency as well as to the Joint Intake Center or another appropriate DHS investigative office in accordance with DHS policies and procedures. The agency shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

(b) Contractors and volunteers suspected of perpetrating sexual abuse may be removed from all duties requiring detainee contact pending the outcome of an investigation, as appropriate.

Medical and Mental Care

§ 115.181 Reserved.

§ 115.182 Access to emergency medical services.

(a) Detainee victims of sexual abuse in holding facilities shall have timely, unimpeded access to emergency medical treatment.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

Data Collection and Review

§ 115.186 Sexual abuse incident reviews.

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

(a) The agency shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The agency shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) The agency shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts.

§ 115.187 Data collection.

(a) The agency shall maintain all agency case records associated with claims of sexual abuse, in accordance with these standards and applicable agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data available, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which

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investigation is ongoing, and for each incident found to be substantiated, such information as is available to the PSA Coordinator concerning:

- (1) the date, time, location, and nature of the incident;
 - (2) the demographic background of the victim and perpetrator (including citizenship, age, and gender);
 - (3) the reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);
 - (4) any injuries sustained by the victim;
 - (5) post-report follow up responses and action taken by the agency (e.g., supervision, referral for medical or mental health services, etc.); and
 - (6) any sanctions imposed on the perpetrator.
- (c) The agency shall maintain, review, and collect data as needed from all available agency records.
- (d) Upon request, the agency shall provide all such data from the previous calendar year to the PSA Coordinator and to the Office for Civil Rights and Civil Liberties no later than June 30.

§ 115.188 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

- (1) identifying problem areas;

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(2) taking corrective action on an ongoing basis; and

(3) preparing an annual report of its findings and corrective actions for the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its website.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

§ 115.189 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.187 are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from holding facilities under its direct control and from any private agencies with which it contracts available to the public at least annually on its website consistent with agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

Audits and Compliance

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

§ 115.193 Audits of standards.

(a) Within three years of [INSERT DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF THE STANDARDS], the agency shall ensure that each of its immigration holding facilities that houses detainees overnight is audited. For any such holding facility established after [INSERT DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF THE STANDARDS], the agency shall ensure that the facility is audited within three years . Audits of new holding facilities as well as holding facilities that have previously failed to meet the standards shall occur as soon as practicable within the three-year cycle; however, where it is necessary to prioritize, priority shall be given to facilities that have previously failed to meet the standards.

(1) Audits required under paragraph (a) of this section shall:

(A) include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (a)(1)(B) of this section,

(B) be conducted pursuant to §§ 115. 201–205 of Subpart C, and

(C) be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

(b) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to be low-risk, based on its physical characteristics and passing its most recent audit, is audited at least once every five years.

(1) Audits required under paragraph (b) of this section shall:

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(A) include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (b)(1)(B) of this section,

(B) be conducted pursuant to §§ 115. 201–205 of Subpart C, and

(C) be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

(c) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to not be low-risk, based on its physical characteristics or not passing its most recent audit, is audited at least once every three years.

(1) Audits required under paragraph (c) of this section shall:

(A) include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted by paragraph (c)(1)(B) of this section,

(B) be conducted pursuant to §§ 115. 201–205 of Subpart C, and

(C) be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

Additional Provisions in Agency Policies

§ 115.195 Additional provisions in agency policies.

The regulations in Subpart B establish minimum requirements for agencies. Agency policies may include additional requirements.

Subpart C—External Auditing and Corrective Action

§ 115.201 Scope of audits.

The following is the text of the proposed rule that the Secretary signed on December 6, 2012, and that the Department has sent to the Federal Register for publication. The Federal Register will publish the official version of this document.

(a) The agency shall develop and issue an instrument that is coordinated with the DHS Office for Civil Rights and Civil Liberties, which will provide guidance on the conduct of and contents of the audit;

(b) The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(c) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(d) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(e) The agency shall provide the auditor with relevant documentation to complete a thorough audit of the facility.

(f) The auditor shall retain and preserve all documentation (including, *e.g.*, videotapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the agency upon request.

(g) The auditor shall interview a representative sample of detainees and of staff, and the facility shall make space available suitable for such interviews.

(h) The auditor shall review a sampling of any available videotapes and other electronically available data that may be relevant to the provisions being audited.

(i) The auditor shall be permitted to conduct private interviews with detainees.

(j) Detainees shall be permitted to send confidential information or correspondence to the auditor.

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(k) Auditors shall attempt to solicit input from community-based or victim advocates who may have insight into relevant conditions in the facility.

(l) All sensitive but unclassified information provided to auditors will include appropriate designations and limitations on further dissemination. Auditors will be required to follow all appropriate procedures for handling and safeguarding such information.

§ 115.202 Auditor qualifications.

(a) An audit shall be conducted by entities or individuals outside of the agency that have relevant audit experience.

(b) All auditors shall be certified by the agency and the agency shall develop and issue procedures regarding the certification process, which shall include training requirements.

(c) No audit may be conducted by an auditor who has received financial compensation from the agency being audited (except for compensation received for conducting other audits, or other consulting related to detention reform) within the three years prior to the agency's retention of the auditor.

(d) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits or other consulting related to detention reform.

§ 115.203 Audit contents and findings.

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the facility under review.

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(b) Audit reports shall state whether facility policies and procedures comply with relevant standards.

(c) For each of these standards, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable detainee or staff information from their reports, but shall provide such information to the agency upon request.

(f) The agency shall ensure that the auditor's final report is published on the agency's website if it has one, or is otherwise made readily available to the public. The agency shall redact any sensitive but unclassified information (including law enforcement sensitive information) prior to providing such reports publicly.

§ 115.204 Audit corrective action plan.

(a) A finding of "Does Not Meet Standard" with one or more standards shall trigger a 180-day corrective action period.

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(b) The auditor and the agency, with the facility if practicable, shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the facility does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance.

§ 115.205 Audit appeals.

(a) A facility may lodge an appeal with the agency regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor's final determination.

(b) If the agency determines that the facility has stated good cause for a re-evaluation, the facility may commission a re-audit by an auditor mutually agreed upon by the agency and the facility. The facility shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

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Janet Napolitano,
Secretary of Homeland Security.