

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 42

Aliens, Immigrants, Passports and visas.

Accordingly, for the reasons set forth in the preamble part 42 is amended as follows:

PART 42—[AMENDED]

1. The authority citation for part 42 continues to read as follows:

Authority: 8 U.S.C. 1104.

2. Revise paragraph (b) of § 42.67 to read as follows:

§ 42.67 Execution of application, registration, and fingerprinting.

* * * * *

(b) *Registration.* The alien shall be considered to be registered for the purposes of INA 221(b) and 203(g) upon the filing of Form DS-230, when duly executed, or the transmission by the Department to the alien of a notification of the availability of an immigrant visa, whichever occurs first.

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Dated: December 2, 2002.

Maura Harty,

*Assistant Secretary for Consular Affairs,
Department of State.*

[FR Doc. 02-31686 Filed 12-16-02; 8:45 am]

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DEPARTMENT OF JUSTICE**Bureau of Prisons****28 CFR Part 540**

[BOP-1009-F]

RIN 1120-AA15

Incoming Publications: Softcover Materials

AGENCY: Bureau of Prisons, DOJ.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) revises its regulations on incoming publications. The amendment provides that inmates in medium security, high security, and administrative institutions may receive softcover materials only from a publisher, book club, or bookstore. This amendment is necessary to reduce the amount of contraband introduced into Federal prisons through materials sent by mail. The presence of contraband in the prisons, including drugs, weapons, and escape-related materials pose grave dangers to staff, inmates and the public. We considered alternate solutions to the problem of intercepting contraband, such as the use of technological security devices or increased staffing, but determined that these options were impracticable. This rule change also allows the Unit Manager to make an exception to this requirement and to the existing similar requirement for hardcover publications and newspapers. We intend this rule change to strengthen security procedures designed to prevent introduction to contraband into Bureau institutions.

EFFECTIVE DATE: January 16, 2003.

ADDRESSES: Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT:

Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION: The Bureau amends its regulations on incoming publications (28 CFR part 540, subpart F). Regulations in 28 CFR 540.71 had allowed an inmate to receive paperback books and magazines from any source. A proposed rule was published in the **Federal Register** on January 18, 1994 (59 FR 2668). The proposed rule required that, in medium security, high security, and administrative institutions, only softcover publications from the publisher, book club, or book store would be permitted. Existing regulations already required this restriction on hardcover books and newspapers.

The proposed rule also provided for exceptions when a publication was no longer available from the publisher, book club, or bookstore. In such cases, the Unit Manager may require that the inmate provide written documentation that the publication is no longer available from these sources.

The proposed amendment was intended to simplify, and consequently strengthen, Bureau procedures designed

to prevent the introduction of contraband into Bureau institutions. Bureau regulations on inmate legal activities (28 CFR part 543, subpart B) which restated in § 543.11(d) the policy on receipt of incoming publications were also proposed to be revised in a conforming amendment.

The public comment period on the Bureau's proposed rule closed on March 21, 1994. Comments were received from approximately 187 commenters (approximately 176 submitting a form letter response). A summary of the issues raised by these comments and agency response follow.

The form letter stated that the proposed regulation discriminated against all prisoners, indigent prisoners, religious organizations and groups, legal organizations and groups, news organizations and groups, small and independent businesses and employees, and free enterprise. The form letter also claimed that the proposed regulation cut prisoners off from their local, national, and international community contact and ties; impaired First Amendment rights to religious freedom; impaired a right to read, learn, and mentally, emotionally and spiritually grow and progress; and inflicted severe economic additional hardships on the families and friends of inmates, and on the general national and international communities. Finally, the form letter claimed the proposed regulations were in violation of the Constitution (in particular, the First Amendment), and were in violation of the Geneva Convention, international treaties and agreements, and the Universal Declaration of Human Rights. No specifics were provided regarding the latter alleged violations.

As an initial response, the Bureau notes that the rule applies to inmates in medium security, high security, and administrative facilities only. As of September, 2002, approximately 51% of federal inmates were housed in minimum and low security institutions, and would therefore be unaffected by this amendment. Based upon a general reevaluation of security needs at all facilities, the Bureau is considering extending the restriction to minimum and low security level institutions. That amendment will be addressed in a new proposed rule.

In any case, the revised regulations do not stop inmates from maintaining local, national, and international community contact and ties. Rather, the regulations address how the contact may be maintained through the media of softcover materials. Further specific response is provided below in conjunction with responses to other individual commenters (including those

few form letters which contained additional comments).

Some commenters stated that this rule would discriminate against the indigent and create severe economic hardships, not only on indigent inmates, but also on their families, who would not be able to send material which the family had acquired initially for their own use.

The Bureau believes that this concern ignores other resources available to inmates and other avenues of recirculating softcover materials. For example, inmates retain access to a variety of reading materials in the institution's library. Inmates and their families can mitigate the presumed severe economic impact: Books sent to the inmate by family from a publisher, bookstore, or book club could be mailed by the inmate back to family or friends after the inmate has finished with the book. General limitations on inmate personal property preclude an inmate from amassing a large library of reading materials. Ordinarily the inmate would need to dispose of excess personal material such as books. Mailing the books back to family or friends accomplishes both purposes.

Even so, we believe that the Bureau's need to maintain a secure facility free from contraband outweighs any presumed economic hardship or inconvenience experienced by families or by inmates with relation to the minimal cost of mailing materials to family. The Bureau is mandated, in 18 U.S.C. 4042(a)(3), to provide for the protection and discipline of those in our custody. This statutory mandate compels us to limit the introduction of contraband, which may endanger the health, safety, and security of inmates and Bureau employees, despite minimal costs or inconveniences to the inmate, family or friends.

One commenter expressed concern that, because of specific assessments and/or fines, many inmates would not be able to afford magazine subscriptions or would have to make choices in the expenditure of their available funds.

If this is meant to imply that the inmate's only recourse is to solicit magazines from family and friends, the Bureau's response is that the revised regulations do not preclude family and friends from responding to such requests by initiating subscriptions under the inmate's name. With respect to the inmate's having to make choices on the expenditure of his or her funds, the Bureau notes that such decisions are not unique to inmates, but are an ordinary practice for all responsible persons.

With respect to the general comment that the proposed rule was

unconstitutional (based on perceived violations of various amendments), the Bureau disagrees, noting that the revised regulations are a rational means of achieving a legitimate correctional management goal (namely, to preserve internal order and discipline and to maintain institutional security) and that the inmate has other means to obtain similar information.

More specifically, one commenter argued that the proposed rule violates the First Amendment rights of non-prisoners to mail what they choose. We believe that security considerations support the proposed restrictions on what inmates may receive in medium security, high security, and administrative facilities. As noted above, the Bureau believes that security needs at minimum and low security institutions may warrant similar restrictions, and that will be the subject of a separate proposed rulemaking.

The same commenter felt that the proposal is unconstitutionally over-inclusive. The restrictions that the proposed amendment creates, however, are not "unnecessarily broad." The amendment does not totally ban incoming softcover materials; it merely restricts the sources that these materials may come from, in the same manner as is done for hardcover materials and newspapers.

With respect to commenters who suggested that the proposed rule impermissibly violated the First Amendment right to religious freedom or discriminated against religious organizations and groups, the Bureau disagrees. The rule is content neutral. Inmates are still entitled to the same publications as before the proposed rule; we only change the means of obtaining these publications.

One commenter suggested that the proposed rule violates the Constitution on equal protection grounds. The commenter felt the "the proposed rule is discriminatory by denying equal opportunity" to those low and minimum security inmates who are incarcerated in administrative facilities. The Bureau believes that the nature of administrative facilities requires procedural regulation based on the highest common denominator of inmates at the facility. The dedication of monetary and staff resources to allow for differentiation between security levels of inmates at any one administrative institution would be impracticable. Placement in an administrative facility is ordinarily a temporary assignment.

Other commenters further alleged that the rule is unconstitutional on the grounds of Fifth Amendment due

process. However, the amendment poses neither a procedural nor a substantive due process violation. The rulemaking's comment period provided the public, including inmates, with an opportunity to voice their comments and concerns about the proposed rule. The inmate retains further due process protection through use of the administrative remedy program (28 CFR part 542).

Commenters argued that the proposed rule will deny them "the right to read, learn and mentally, spiritually, and emotionally grow and progress." The Bureau disagrees. Inmates still retain the opportunity to obtain the material; the means of access have been limited for security reasons.

As stated above, the goal of the Bureau is to maintain security within the facilities free from contraband. Under the new rule, inmates are still permitted to read the same types of publications that they have been allowed to read before the proposed rule. Additionally, inmates can always "read, learn and mentally, spiritually and emotionally grow and progress" in the facility's library, which serves as an additional resource. Inmates are also provided with educational programs within the facility.

Several commenters questioned the Bureau's motives for issuing the amendment. In particular, a commenter suggested that the Bureau may be attempting to control "the free flow of ideas through prison walls." Another commenter felt that "the rule is aimed more at controlling the political content of the information that inmates receive rather than controlling the introduction of contraband." The Bureau emphasizes that this regulation operates in a content-neutral fashion and is not part of any attempt to control the content of the materials coming into Bureau correctional facilities.

A third commenter suggested that the rule is partly motivated by the book publishers' "pushing for the sale of a new book rather than have a used one passed on to prisoners" from outside sources. The Bureau's action is based on security concerns and has not been spurred by the interests of book publishers.

Some commenters argued that the proposed rule was overly restrictive. One commenter claimed the motivation behind this rule was "a Bureau desire to re-allocated staff resources" without regard for the impact upon inmates and the general public. This commenter felt that the interest of the public in allowing inmates to receive softcover publications outweighed the interest of the Bureau to re-allocate staff resources.

The Bureau believes that the revised regulations properly balance security needs of the higher rated institutions and the inmate population, given the limitations of budgetary constraints. The current restrictions on sources for hardcover materials have functioned effectively to reduce the risk of contraband entering the institution. In contrast, the lack of restrictions on softcover materials has become problematic. For example, at one high security institution, over the course of a year approximately 25 softcover materials received at the institution contained contraband. In most instances, the contraband was drug-related.

It is important to note that the presence of even minute quantities of drug contraband pose serious problems to the security, discipline, and good order of a correctional institution. Through this rulemaking, extend to softcover materials procedures that have proven effective for hardcover materials.

As for the question of reallocating staff time, one anticipated benefit is a reduction in the amount of time taken to process contraband which enters that institution by minimizing the likelihood that contraband will be mailed into the institution. Staff will continue to examine all mail (including softcover materials from a publisher, book store, or book club) for contraband.

Several commenters felt that the threat of contraband from soft cover materials should be addressed through use of "high tech security features" or revised mail room procedures. The Bureau believes reliance upon "high tech security features" is not practicable in this instance, given the limitations of budget and available technology.

Staff currently examine all mail both manually and with x-ray scanners. While these scanners are effective for identifying metallic contraband, they are not effective for paper contraband or for organic contraband such as drugs. The cost of devices designed to detect drugs ranges from \$36,000 to over \$100,000 per unit, depending upon the type of device selected. No one type of device is technically suitable for all of the various types of drug contraband. Consequently, an institution may need more than one of these devices. The Bureau currently operates 107 institutions; 54 of these institutions are medium security level or higher and consequently are covered under the revised regulations. The minimum cost to purchase just one of these devices for each of these 54 institutions ranges from 1.9 to 5.4 million dollars. Additional costs for supplies. The appreciable length of time needed to conduct tests

with these devices is yet another consideration which leads the Bureau to determine that the proposed restriction of sources is the more reasonable solution for minimizing the possible introduction of contraband to the institution through softcover materials.

One commenter recommended the use of dogs for intercepting drugs. The Bureau notes that extensive use of dogs for this purpose entails costs of maintenance and handling, and even so may not provide adequate security against the wide range of possible contraband.

One commenter speculated that softcover material offered less opportunity than hardbound material for the transmission of contraband. In actuality, softcover material poses different opportunities for such transmission. The presence of numerous advertising or subscription inserts in a magazine complicates a search for certain types of contraband.

One commenter, apparently assuming that the problem could be addressed through efficiencies in operation, recommended processing softcover material on alternate days. The daily volume of mail is sufficiently high that efficiencies effected through the suggested change for processing mail would be negligible.

Commenters were also concerned that the new rule would leave institution mail staff with nothing to do. While the revised procedure should greatly reduce the likelihood that contraband will enter the institutions through such mail, staff must continue to monitor incoming publications. As one commenter noted, under the revised provision, Bureau staff would have to verify the legitimacy of the sender. The amount of time saved by the procedure can be devoted to these or other duties.

There are a variety of other concerns raised by commenters regarding perceived inconveniences of the rule. One commenter was concerned that reading materials in foreign languages will be difficult to obtain. Other commenters state that old manuscripts, books, and other publications cannot be readily obtained from publishers. One commenter worried that inmates whose friends and families live in small towns will be especially burdened, because many small towns do not have bookstores that offer a wide variety of reading materials.

While the bureau acknowledges that some inconveniences may result from this rule, book clubs do offer a wide variety of reading material, typically at a reduced cost, and are available to everyone regardless of location. Furthermore, reading material in foreign

languages is available in most bookstores. The interests of the Bureau to maintain security and order outweigh the minor inconveniences that some inmates may experience.

Some commenters objected to the rule, stating that it would be too difficult to receive certain publications which they speculated would not be readily available from authorized sources. The Bureau notes that the rule contains an exception provision which allows the Unit Manager to authorize the receipt of publications from other sources if the publication is no longer available from the publisher, book club, or bookstore. One commenter argued that approved exceptions by the Unit Manager would be difficult to obtain. The Bureau expects that the use of the exception provision will be adequate for the purpose, and further adjustments to the exception provision can be made if the need becomes apparent.

One commenter argued that most softcover books, and magazines were purchased by family and friends at stores which do not provide mailing services. The Bureau believes this comment is highly speculative. Regardless, the Bureau contends that adequate choice exists for individuals purchasing softcover material (as is already the case for hardcover material).

Some commenters expressed concern that inmates would not be able to receive books from bookstores which ship by United Parcel Service (UPS) because prison addresses contain post office box numbers. These commenters stated that UPS does not deliver to post office box addresses. This has not proven to be a problem in the past with the delivery of hardcover materials from bookstores. Bureau facilities do receive deliveries from UPS and other package carriers.

One commenter assumed that books purchased from a used bookstore would not be acceptable. This, however, is not the case. A used bookstore could be the agent for mailing softcover material to an inmate.

Several commenters suggest that the proposed rule is inconsistent with the goals of rehabilitation. They feel that the rule impairs inmate education and self-improvement. The Bureau disagrees. While the rule places limitations, for reasons of security, on how certain material may be obtained, it is not intended to cut off total access to such material. Furthermore, the Bureau itself offers educational programs for inmates, including a mandatory literacy program with a GED standard and, in certain circumstances, post-secondary education programs.

The education department of the Bureau is responsive, to the extent that its budget allows, to inmate requests for library materials. The budget for an institution's education department covers education programming and library operations (including acquisitions). The statement by one commenter that institution libraries have no funds for acquisition of books is not generally true. This commenter stated that surplus books are donated by inmates to the institution's library and, based upon the assumption that fewer books would be sent into the institution, the amendment would result in fewer books being donated.

One commenter is concerned that the proposed rule change will adversely affect the inmate's ability to receive legal materials. The new rule will not significantly affect the inmate's ability to receive legal materials. Legal reference materials are available to inmates through the institution's law library. Purchasing legal reference materials from outside sources should not be problematic because they may be procured in the same manner as other softcover or hardcover publications.

The commenter expressed a concern that this rule would prevent his receiving softcover legal materials from his attorney. First, this rule does not govern correspondence and mail sent by attorneys to their clients. We have rules governing legal mail in 28 CFR 540.19. Secondly, this rule would only apply if an inmate receives softcover materials from the attorney. It would not prevent an inmate from receiving legal documents from his/her attorney of record or materials such as books from the institution's law library or directly from a publisher, book club or bookstore.

The proposed conforming amendment to the regulations on inmate legal activities (28 CFR 543.11) which restated the policy on receipt of incoming publications is not longer necessary because those provisions were replaced by a cross-reference in an amendment published on January 31, 1997 (62 FR 4890).

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This 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. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, as required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Sarah Qureshi, Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First St., NW., Washington, DC 20534; telephone (202) 307-2105.

List of Subjects in 28 CFR Part 540

Prisoners.

Kathleen Hawk Sawyer,
Director, Bureau of Prisons.

Under the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons, we revise 28 CFR part 540 as follows:

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

The authority citation for 28 CFR part 540 is revised to read as follows:

Authority: 5 U.S.C. 301, 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Revise paragraph (a) of § 540.71 to read as follows:

§ 540.71 Procedures.

(a)(1) At all Bureau institutions, an inmate may receive hardcover publications and newspaper only from the publisher, from a book club, or from a bookstore.

(2) At medium security, high security, and administrative institutions, an inmate may receive softcover publications (for example, paperback books, newspaper, clippings, magazines, and other similar items) only from the publisher, from a book club, or from a bookstore.

(3) At minimum security and low security institutions, an inmate may receive softcover publications (other than newspapers) from any source.

(4) The Unit Manager may make an exception to the provisions of paragraphs (a)(1) and (2) of this section of the publication is no longer available from the publisher, book club, or bookstore. The Unit Manager shall require that the inmate provide written documentation that the publication is no longer available from these sources. The approval or disapproval of any request for an exception is to be documented, in writing, on an Authorization to Receive a Package form which will be used to secure the item.

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