



6450-01-P

DEPARTMENT OF ENERGY

48 CFR Parts 902, 909, 916, 917, 922, 925, 931, 936, 942, 952, and 970

RIN 1991-AC00

Acquisition Regulation: Technical and Administrative Changes to Department of Energy Acquisition Regulation

AGENCY: Office of Acquisition Management, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting as final, a rule amending the Department of Energy Acquisition Regulation (DEAR) to make technical and administrative changes to the DEAR, including changes to conform to the Federal Acquisition Regulation (FAR), remove out-of-date coverage, update references, and correct minor errors and omissions.

DATES: *Effective Date:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This final rule is applicable to solicitations issued on or after the effective date.

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I. Background.

The DEAR has outdated citations and minor errors of a technical nature. The

objective of this final rule is to update the outdated citations and correct the errors and omissions in the existing DEAR to conform to the FAR. None of these changes are substantive or of a nature to cause any significant expense for DOE or its contractors.

II. Summary of Comments and Responses

DOE published a proposed rule at 80 FR 15737 on March 25, 2015; DOE did not receive any comments in response to the proposed rule. DOE made one change in the final rule in part 916. In the proposed rule, DOE proposed to change the title of the NNSA Task Order Ombudsman in Section 916.505, paragraph (b)(6)(i). However, DOE determined that because NNSA gets this authority from the delegations to the Senior Procurement Executive and Head of the Contracting Activity, it is not necessary to include it in the DEAR. Therefore, DOE has removed it from the final rule.

III. Section-by-Section Analysis

DOE amends the DEAR as follows:

PART 902-DEFINITIONS OF WORDS AND TERMS

1. Section 902.101, paragraph (2), is revised to change the title of the National Nuclear Security Administration (NNSA) Senior Procurement Executive (SPE).

PART 909-CONTRACTOR QUALIFICATIONS

2. Section 909.403, paragraphs (1) and (2), are revised to change the title of the NNSA SPE.

PART 916-TYPES OF CONTRACTS

3. Section 916.505, paragraph (b)(6)(i), DOE proposed to change the title of the NNSA Task Order Ombudsman. However, DOE decided to remove the identification of the NNSA Task Order Ombudsman in the final rule because the delegations to the Senior

Procurement Executive and the Head of the Contracting Activity allow NNSA to designate a task and delivery order ombudsman.

PART 917-SPECIAL CONTRACTING METHODS

4. Section 917.602, paragraph (a), is revised to remove language that is no longer needed in the DEAR.

PART 922-APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

5. Section 922.804 is no longer needed in the DEAR and is removed.

PART 925-FOREIGN ACQUISITION

6. Section 925.103, paragraph (a), is revised to correct the CFR reference.

7. Section 925.1001, paragraph (b), is revised to change the title of the NNSA SPE.

PART 931-CONTRACT COST PRINCIPLES AND PROCEDURES

8. Section 931.205-18, paragraph (c)(2), is deleted in its entirety and replaced with a new paragraph (c).

PART 936-CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

9. Section 936.202-70 is no longer needed in the DEAR and is removed.

PART 942-CONTRACT ADMINISTRATION AND AUDIT SERVICES

10. Section 942.705-3 is revised to update the circular number and remove the paragraph numbering.

PART 952-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Section 952.204-2, paragraph (j), is revised to inform contractors of the format for submitting Foreign Ownership, Control or Influence (FOCI) information. Paragraph (h)(2)(vi), is revised to remove Contractor requirement for submitting in writing information to the head of the cognizant local DOE Security Office concerning each

uncleared applicant or uncleared employee who is selected for a position requiring an access authorization.

12. Section 952.204-73, paragraph (a), is revised to inform contractors of the format for submitting FOCI information.

13. Section 952.236-72 is no longer needed in the DEAR and is removed.

14. Section 952.250-70, paragraph (d)(1), is revised to raise the threshold as required by the Energy Policy Act of 2005.

PART 970-DOE MANAGEMENT AND OPERATING CONTRACTS

15. Section 970.5215-3 is revised to update the Order number.

16. Section 970.5223-1 is revised to correct the prescription.

17. Section 970.5244-1, paragraph (f) is revised to reflect threshold increase in 48 CFR

28.102-2. Paragraph (g) is revised to reflect the threshold increase in DOE's class deviation for DEAR 970.5244-1.

18. Section 970.5245-1, Alternate I, paragraph (j)(3), is revised to update the Order number and to add language that clarifies the sentence.

IV. Procedural Requirements

A. Review Under Executive Order 12866 and 13563.

This regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this final rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued

on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that this final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a

reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Review Under Executive Order 12988.

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the United States Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or if it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act.

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s Web site at <http://www.energy.gov/gc/office-general-counsel>.

This final rule is to amend the DEAR to make technical and administrative changes as described in the summary. These changes are technical/minor in nature; therefore, DOE certifies that this rule would not have a significant economic impact on small entities because no substantive rights or obligations are altered by the amendment. Consequently, DOE did not prepare a regulatory flexibility analysis for this rulemaking.

D. Review Under the Paperwork Reduction Act.

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Existing burdens associated with the collection of certain contractor data under the DEAR have been cleared under OMB control number 1910-4100, with an expiration date of December 31, 2017.

E. Review Under the National Environmental Policy Act.

DOE has concluded that promulgation of this final rule falls into a class of actions which would not individually or cumulatively have significant impact on the human

environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this final rule is categorically excluded from NEPA review because the amendments to the DEAR are strictly procedural (categorical exclusion A6). Therefore, this final rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132.

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order requires agencies to have an accountability process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.

On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined the final rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995.

The Unfunded Mandates Reform Act of 1995 (Public Law 104–4) generally requires a Federal agency to perform a written assessment of costs and benefits of any rule imposing a Federal mandate with costs to State, local or tribal governments, or to the private sector, of \$100 million or more. This rulemaking does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999.

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking or policy that may affect family well-being. This rulemaking will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 13211.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of

any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This final rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review Under the Treasury and General Government Appropriations Act, 2001.

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review under Executive Order 13609.

Executive Order 13609 of May 1, 2012, "Promoting International Regulatory Cooperation," requires that, to the extent permitted by law and consistent with the principles and requirements of Executive Order 13563 and Executive Order 12866, each Federal agency shall:

(a) If required to submit a Regulatory Plan pursuant to Executive Order 12866, include in that plan a summary of its international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations, with an explanation of how these activities advance the purposes of Executive Order 13563 and this order;

(b) Ensure that significant regulations that the agency identifies as having significant international impacts are designated as such in the Unified Agenda of Federal Regulatory and Deregulatory Actions, on RegInfo.gov, and on Regulations.gov;

(c) In selecting which regulations to include in its retrospective review plan, as required by Executive Order 13563, consider:

(i) Reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners, consistent with section 1 of this order, when stakeholders provide adequate information to the agency establishing that the differences are unnecessary; and

(ii) Such reforms in other circumstances as the agency deems appropriate; and

(d) For significant regulations that the agency identifies as having significant international impacts, consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan.

DOE has reviewed this final rule under the provisions of Executive Order 13609 and determined that the rule complies with all requirements set forth in the order.

L. Approval by the Office of the Secretary of Energy.

Issuance of this final rule has been approved by the Office of the Secretary of Energy.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 48 CFR Parts 902, 909, 916, 917, 922, 925, 931, 936, 942, 952 and 970

Government procurement.

Issued in Washington, D.C. on July 7, 2016.

John R. Bashista
Director
Office of Acquisition Management
Department of Energy

Joseph Waddell
Senior Procurement Executive and
Deputy Associate Administrator
National Nuclear Security
Administration
Office of Acquisition and
Project Management

For the reasons set out in the preamble, the Department of Energy amends chapter 9 of title 48 of the Code of Federal Regulations as set forth below.

Title 48--Federal Acquisition Regulations System

1. The authority citation for parts 902, 903, 916, 917, 922, 925, 931, 936 and 942 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

PART 902--DEFINITIONS OF WORDS AND TERMS

902.101 [Amended]

2. Section 902.101 is amended in the definition of “Senior Procurement Executive” by removing “Director, Office of Acquisition and Supply Management” and adding in its place “Deputy Associate Administrator for Acquisition and Project Management”.

PART 909--CONTRACTOR QUALIFICATIONS

909.403 [Amended]

3. Section 909.403 is amended in paragraphs (1) and (2) by removing “Director, Office of Acquisition and Supply Management” and adding in its place “Deputy Associate Administrator for Acquisition and Project Management”.

PART 916--TYPES OF CONTRACTS

916.505 [Amended]

4. Section 916.505 is amended in paragraph (b)(6)(i) by removing the second sentence.

PART 917--SPECIAL CONTRACTING METHODS

917.602 [Amended]

5. Section 917.602 is amended in paragraph (a) by removing ", Deputy Secretary or Under Secretary".

PART 922--APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITION

922.804 [Removed and Reserved]

6. Section 922.804 is removed and reserved.

PART 925--FOREIGN ACQUISITION

7. Section 925.103 is amended by removing paragraph (a) and revising paragraph (b)(2).

The revision reads as follows:

925.103 Exceptions.

(b) *Nonavailability*—(2)(i) *Individual determinations*. Contracting officers may make the determination required by 48 CFR 25.103(b)(2)(i), provided such determination is factually supported in writing. If the contract is estimated to exceed \$1 million, the Head of the Contracting Activity must approve the determination.

(ii) Proposals to add an article to the list of nonavailable articles at 48 CFR 25.104, with appropriate justifications, must be submitted for approval by the Senior Procurement Executive and submission to the appropriate council.

925.1001 [Amended]

8. Section 925.1001 is amended in paragraph (b) by removing “Director, Office of Acquisition and Supply Management” and adding in its place “Deputy Associate Administrator for Acquisition and Project Management”.

PART 931--CONTRACT COST PRINCIPLES AND PROCEDURES

9. Section 931.205-18 is revised to read as follows:

931.205-18 Independent research and development (IR&D) and bid and proposal (B&P) costs.

(c) In addition to all the other FAR requirements for allowability of IR&D costs, costs for IR&D are allowable under DOE contracts to the extent: they are not otherwise unallowable; and they have potential benefit or relationship to the DOE program. The term "DOE program" encompasses the DOE total mission and its objectives. In addition to all the other FAR requirements for allowability of B&P costs, costs for B&P are allowable under DOE contracts to the extent they are not otherwise unallowable.

PART 936--CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

936.202-70 [Removed and Reserved]

10. Section 936.202-70 is removed and reserved.

PART 942--CONTRACT ADMINISTRATION AND AUDIT SERVICES

942.705-3 [Amended]

11. Section 942.705-3 is amended by:

- a. Removing the paragraph designation “(a)(2)”;
- and
- b. Removing “A-88” and adding in its place “A-21”.

PART 952--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

13. Section 952.204-2 is amended by:

- a. Revising the section heading;
- b. Revising the clause heading and clause date; and
- c. Revising paragraphs (h)(2)(vi) introductory text and (j)(1).

The revisions read as follows:

952.204-2 Security requirements.

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SECURITY REQUIREMENTS ((INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER))

* * * * *

(h) * * *

(2) * * *

(vi) The Contractor must maintain a record of information concerning each uncleared applicant or uncleared employee who is selected for a position requiring an access authorization. Upon request only, the following information will be furnished to the head of the cognizant local DOE Security Office:

* * * * *

(j) *Foreign ownership, control, or influence.* (1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Standard Form (SF) 328, *Certificate Pertaining to Foreign Interests*, executed prior to award of this contract. The Contractor will submit the Foreign Ownership, Control or Influence (FOCI) information in the format directed by DOE. When completed the Contractor must print and sign one copy of the SF 328 and submit it to the Contracting Officer. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice, shall also be furnished concurrently to the Contracting Officer.

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14. Section 952.204-73 is amended by revising the date of the clause and paragraph (a)(1) to read as follows:

952.204-73 Facility clearance.

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FACILITY CLEARANCE ([[INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]])

* * * * *

(a) *Use of Certificate Pertaining to Foreign Interests, Standard Form 328.* (1) The contract work anticipated by this solicitation will require access to classified information

or special nuclear material. Such access will require a Facility Clearance for the Contractor's organization and access authorizations (security clearances) for Contractor personnel working with the classified information or special nuclear material. To obtain a Facility Clearance the Contractor must submit the Standard Form 328, Certificate Pertaining to Foreign Interests, and all required supporting documents to form a complete Foreign Ownership, Control or Influence (FOCI) Package. The Contractor will submit the Foreign Ownership, Control or Influence (FOCI) information in the format directed by DOE. When completed the Contractor must print and sign one copy of the SF 328 and submit it to the Contracting Officer.

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952.236-72 [Removed and Reserved]

15. Section 952.236-72 is removed and reserved.

952.250-70 [Amended]

16. Section 952.250-70 is amended by:

- a. Revising the date of the clause; and
- b. Removing in paragraph (d)(1), "\$100 million" and adding in its place "\$500 million".

The revision reads as follows:

952.250-70 Nuclear hazards indemnity agreement.

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NUCLEAR HAZARDS INDEMNITY AGREEMENT ((INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER))

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PART 970--DOE MANAGEMENT AND OPERATING CONTRACTS

17. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

970.5215-3 [Amended]

18. Section 970.5215-3, paragraphs (c)(1)(i) and (c)(2)(i) are amended by removing “DOE Order 225.1A” and adding in its place “DOE Order 225.1B, or successor version”.

970.5223-1 [Amended]

19. Section 970.5223-1 is amended by removing “970.2303-3(b)” in the clause introductory text and adding in its place, “970.2303-3(a)”.

20. Section 970.5244-1 is amended by:

- a. Revising the clause date;
- b. Removing in paragraphs (f)(1) and (2) “\$100,000” and adding in its place “\$150,000”;
and
- c. Removing in paragraph (g) “\$100,000” in both occurrences and adding in each place “\$500,000”.

The revision reads as follows:

970.5244-1 Contractor purchasing system.

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CONTRACTOR PURCHASING SYSTEM ((INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER))

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21. Section 970.5245-1 is amended by:

- a. Revising the clause date;
- b. Revising Alternate I heading and date; and
- c. Removing in Alternate I paragraph (j)(3) “Major System Acquisition or Major Project” and adding in its place “Major System Project” and removing “DOE Order 4700.1” and adding in its place “DOE Order 413.3B, or successor version”.

The revisions read as follows:

970.5245-1 Property.

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PROPERTY ((INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER))

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Alternate I ((INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER)).

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