

7602(c) does not apply to contacts made during an investigation, or inquiry to determine whether to open an investigation, when the investigation or inquiry is—

(A) Made against a particular, identified taxpayer for the primary purpose of evaluating the potential for criminal prosecution of that taxpayer; and

(B) Made by an IRS employee whose primary duties include either identifying or investigating criminal violations of the law.

(ii) *Other criminal investigations.* Section 7602(c) does not apply to contacts which, if reported to the taxpayer, could interfere with a known pending criminal investigation being conducted by law enforcement personnel of any local, state, Federal, foreign or other governmental entity.

(5) *Governmental entities.* Section 7602(c) does not apply to any contact with any office of any local, state, Federal or foreign governmental entity except for contacts concerning the taxpayer's business with the government office contacted, such as the taxpayer's contracts with or employment by the office. The term *office* includes any agent or contractor of the office acting in such capacity.

(6) *Confidential informants.* Section 7602(c) does not apply when the employee making the contact has good cause to believe that providing either the pre-contact notice or the record of the person contacted would identify a confidential informant whose identity would be protected under section 6103(h)(4).

(7) *Nonadministrative contacts—(i) Explanation.* Section 7602(c) does not apply to contacts made in the course of a pending court proceeding.

(ii) *Examples.* The following examples illustrate this paragraph (f)(7):

Example 1. An attorney for the Office of Chief Counsel needs to contact a potential witness for an upcoming Tax Court proceeding involving the 1997 and 1998 taxable years of the taxpayer. Section 7602(c) does not apply because the contact is being made in the course of a pending court proceeding.

Example 2. While a Tax Court case is pending with respect to a taxpayer's 1997 and 1998 income tax liabilities, a revenue agent is conducting an examination of the taxpayer's excise tax liabilities for the fiscal year ending 1999. Any third-party contacts made by the revenue agent with respect to the excise tax liabilities would be subject to the requirements of section 7602(c) because the Tax Court proceeding does not involve the excise tax liabilities.

Example 3. A taxpayer files a Chapter 7 bankruptcy petition and receives a discharge. A revenue officer contacts a third party in order to determine whether the taxpayer has

any exempt assets against which the IRS may take collection action to enforce its federal tax lien. At the time of the contact, the bankruptcy case has not been closed. Although the bankruptcy proceeding remains pending, the purpose of this contact relates to potential collection action by the IRS, a matter not before or related to the bankruptcy court proceeding.

(g) *Effective Date.* This section is applicable on December 18, 2002.

David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

Pamela F. Olson,

Assistant Secretary of the Treasury.

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 540

[BOP-1064-F]

RIN 1120-AA59

Incoming Publications: Nudity and Sexually Explicit Material or Information

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, we finalize our interim final rule which implemented a statutory provision prohibiting the Bureau of Prisons (Bureau) from using appropriated funds to “distribute or make available any commercially published information or material” that features nudity or is sexually explicit. We now publish this rule as a final rule and further clarify that “commercially published information or material” includes photographs or other pictorial depictions.

DATES: This rule is effective on December 18, 2002.

ADDRESSES: Rules Unit, 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:

History of This Rule

The Fiscal Year 1997 Omnibus Budget Act (Pub. L. 104-208) first required that we use no funds available to the Bureau “to distribute or make available any commercially published information or

material to a prisoner when it is made known to [us] that such information or material is sexually explicit or features nudity.”

On November 6, 1996, we published procedures implementing this provision in the Act as an interim final rule (61 FR 57568). The rule, effective December 1, 1996, became 28 CFR 540.70-540.72.

Within the two months after publishing this rule, we received six comments from individuals challenging the constitutionality of the statutory provisions underlying these rules on First Amendment grounds. The commenters generally argued that denying inmates access to information or material that is sexually explicit or features nudity violated their constitutional right to freedom of speech and communication.

Before we could respond to these comments, a group of inmates and publishers promptly challenged the constitutionality of the policy implemented by these rules in the case of *Amatel v. Reno*, 975 F. Supp. 365 (D.D.C. 1997). On August 12, 1997, the court in *Amatel* issued a nationwide preliminary injunction prohibiting us from using these procedures. We then suspended application of these rules.

On September 15, 1998, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's preliminary injunction. *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (rehearing *en banc* denied Dec. 23, 1998). They further appealed to the U.S. Supreme Court, which denied certiorari on June 24, 1999, *Amatel v. Reno*, 119 S. Ct. 2392 (1999).

Amatel upheld the apparent constitutionality of this statutory provision. By lifting the injunction, the U.S. Court of Appeals in *Amatel* allowed us to reimplement the policy mandated by statute through these rules.

What We Are Doing Now

In this rule, we finalize 28 CFR 540.70 through 540.72, as originally published in 1996 (61 FR 57568). We also amend § 540.72(b)(1) to clarify that “commercially published information or material” includes photographs or other pictorial depictions in response to a recent trend towards receipt of such prohibited materials. These photographs often arrive as commercially published information or material and are, therefore, prohibited by this rule. Although our previous definition of commercially published information or material did not explicitly include photographs or pictorial depictions, that prohibition is certainly implicit.

The Fiscal Year 1997 Omnibus Budget Act (Pub. L. 104-208) (1997 Budget Act)

prohibited us from using authorized funds to “distribute or make available any commercially published information or material” (emphasis added) if it is “sexually explicit or features nudity”. This effectively requires us to prohibit dissemination in our institutions of this type of material. We do not have the discretion to allow inmates to receive the information or material that the statute prohibits. We therefore interpret this provision to prohibit mailroom intake processing of this type of material.

The prohibition in the 1997 Budget Act was later repeated in section 615 of the Fiscal Year 2000 Omnibus Budget Act (Pub. L. 106–113) and section 614 of the D.C. Appropriations Act for Fiscal Year 2001 (Pub. L. 106–553). Currently, the prohibition is found in section 614 of the Department of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations Act 2002 (P.L. 107–77)(2002 Budget Act). We therefore clarify in our regulation that “commercially published information or material” includes photographs or pictorial depictions.

Although photographs and pictorial depictions that are “sexually explicit” or feature nudity are implicitly banned by the aforementioned statutory prohibitions, this clarification is necessary because inmates and members of the public misread our previous rule, which did not explicitly mention photographs and pictorial depictions. A recent trend involves inmates receiving sexually explicit or nude photographs from apparently commercial photography studios or from individual members of the public attempting to set up a form of paid correspondence through which inmates would buy photographs that were sexually explicit or featured nudity.

Inmates and members of the general public have the misapprehension that this type of “paid correspondence” (soliciting payment for photographs that are sexually explicit or feature nudity) is not prohibited by either (1) the general restriction in 28 CFR 540.12(a) on correspondence that threatens the security, discipline and good order in an institution; or (2) our rule in 28 CFR 540.72(b)(1) defining “commercially published information or material” prohibited under section 614 of the 2002 Budget Act.

The general restriction in 28 CFR 540.12(a), which allows Wardens to “establish and exercise controls to protect individuals, and the security, discipline, and good order of the institution” encompasses the Bureau’s discretion to reject photographs featuring nudity and explicit sexuality

from non-commercial sources, such as an inmate’s wife or girlfriend. Such personal photographs typically cause disciplinary problems among inmates and compromise institution security and good order. However, the “paid correspondence” incidents described above could be viewed as commercial correspondence which, arguably, could be thought beyond the reach of the Warden’s controls on personal correspondence.

Likewise, it was argued that the restrictions on commercial correspondence did not apply to this form of “paid correspondence” because it was not explicitly encompassed in the previous rule. 28 CFR 540.72(b)(1) defined “commercially published information or material” under the statutory prohibition as: “any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items.”

This definition represented the Bureau’s efforts to encompass all “material” featuring nudity or explicit sexuality contemplated by the statute. Although we believed our definition of commercially published information or material was sufficiently inclusive, inmates and members of the public have misinterpreted this definition as not applicable to photographs or pictorial depictions that are sexually explicit or featuring nudity. This rule change is therefore necessary to explicitly clarify that the statutory prohibition in section 614 of the 2002 Budget Act of all “commercially published information or material” that is “sexually explicit or features nudity” includes photographs and pictorial depictions. We intend this change to eliminate current misunderstanding of the statute by inmates and the general public.

Inmates are allowed to possess material that is “sexually explicit or features nudity” if that material was in their possession before this interim final rule became effective on December 1, 1996. Other regulations prohibit inmates from receiving sexually explicit materials during visits or through personal mail. Similarly, inmates may not receive, through the mail or otherwise, any materials which threaten the safety, security, good order of the institution, or violates criminal laws. Such materials are prohibited by the

these rules, and the rules on inmate correspondence, part 540, subpart B.

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 Director of the Bureau of Prisons has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not 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. Under Executive Order 13132, this rule does not have sufficient federalism implications for which we would prepare a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This rule is about 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 cause State, local and tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take action under 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 section 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 want to make Bureau documents easier to read and understand. If you can suggest how to improve the clarity of these regulations, call or write to Sarah Qureshi at the address or telephone number listed above.

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 amend 28 CFR part 540 as follows.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

1. The authority citation for 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.

§ 540.72 [Amended]

2. Amend § 540.72 by adding “photograph or other pictorial depiction,” before “or similar document” in paragraph (b)(1).

[FR Doc. 02–31660 Filed 12–17–02; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 541

[BOP–1083–I]

RIN 1120–AA78

Inmate Discipline: Prohibited Acts: Change in Code Numbers for Agency Tracking Purposes Only

AGENCY: Bureau of Prisons, Justice.

ACTION: Interim final rule.

SUMMARY: This document makes a minor change to a recently published Bureau of Prisons (Bureau) final rule on inmate discipline regarding violations of the Bureau’s telephone policy. Before we published the final rule, our prohibited acts code number 406 referred to minor mail *and* telephone infractions (in the

existing low moderate severity level category prohibited act). When we published our final rule, we wished to distinguish minor mail infractions from minor telephone infractions, so we created a new code number, 497, for minor telephone infractions. Code number 406, therefore, covered only minor mail infractions. However, if we use the code number 406 in the Bureau’s computer tracking system, that code number will retrieve both mail *and* telephone minor infractions, instead of *only* the mail infractions covered by the code number 406. For clarity, therefore, we reserve code number 406 and assign the code number 410 to the prohibited act covering minor mail infractions. This correction, while maintaining the language of 406, as published in the previous rule, only changes the number of that prohibited act to 410. We make this change to be able to more accurately track specific telephone-related acts using code number 497 only or mail-related prohibited acts using code number 410 only.

DATES: *Effective:* December 18, 2002.

Comments: Comments by February 18, 2003.

ADDRESSES: Send comments to the Rules Unit, 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 makes this minor correction to its final rule published on October 6, 2000 (64 FR 59724), on inmate discipline regarding violations of the telephone policies.

Why Are We Making This Rule Change?

Before we published the October 6th final rule, our prohibited acts code number 406 referred to minor mail *and* telephone infractions (in the existing low moderate severity level category prohibited act).

When we published the October 6th final rule, we wished to distinguish minor mail infractions from minor telephone infractions, so we created a new code number, 497, for minor telephone infractions. Code number 406, therefore, covered only minor mail infractions.

However, if we use the code number 406 in the Bureau’s computer tracking system, that code number will retrieve both mail *and* telephone minor infractions, instead of *only* the mail infractions covered by the code number 406.

For clarity, therefore, we reserve code number 406 and assign the code number 410 to the prohibited act covering minor mail infractions. This correction, while maintaining the language of 406, as published in the previous rule, only changes the number of that prohibited act to 410. We make this change to be able to more accurately track specific telephone-related acts using code number 497 only or mail-related prohibited acts using code number 410 only.

Why Are We Making This Change as an Interim Final Rule?

The Administrative Procedure Act (5 U.S.C. 553) allows exceptions to notice-and-comment rulemaking for “(A) interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

This rulemaking is exempt from normal notice-and-comment procedures because it is a minor clarification of currently existing Bureau policy. We are modifying our rule to enable us to more accurately track specific prohibited acts using original prohibited act code numbers in our computer tracking system. The language of the prohibited act remains the same, only the code number that refers to it changes.

Because this change reflects current Bureau policy and is a minor clarification of current agency procedure and practice, we find that normal notice-and-comment rulemaking is unnecessary. We are, however, allowing the public to comment on this rule change by publishing it as an interim final rule.

Where To Send Comments

You can send written comments on this rule to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

We will consider comments received during the comment period before taking final action. We will try to consider comments received after the end of the comment period. In light of comments received, we may change the rule.

We do not plan to have oral hearings on this rule. All the comments received remain on file for public inspection at the above address.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive