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DEPARTMENT OF STATE

22 CFR Part 173

RIN 1400—AD50

[Public Notice 8703]

**Availability of Public Diplomacy Program Material within the United States**

**ACTION:** Interim final rule with request for comments.

**AGENCY:** Department of State.

**SUMMARY:** The Department of State (“Department”) is amending its regulations to implement Section 1078 of the National Defense Authorization Act of 2013. This statutory provision, which entered into effect on July 2, 2013, amends previous law to allow the Department and the Broadcasting Board of Governors (“BBG”) to make public diplomacy program material available within the United States, upon request, following the dissemination of such material abroad, and requires the Department to issue regulations implementing this change.

**DATES:** This interim final rule will become *[insert date of publication in the Federal Register]*.

The Department will accept comments on the interim final rule from the public until *[insert date 60 days from date of publication in the Federal Register]*.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Online:* Persons with access to the Internet may view this rule and provide comments by going to the regulations.gov Web site at: <http://www.regulations.gov>.

- *Mail (paper, disk, or CD-ROM submission):* Director, Office of Policy and Outreach, Bureau of International Information Programs, U.S. Department of State, State Annex 5 (SA-5), Floor 5, 2200 C Street, NW, Washington, D.C. 20522-0505.
- *E-mail:* IIP\_Inquiries@state.gov. You must include the RIN (1400-AD50) in the subject line of your message.

*Inspection of Public Comments:* All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business or financial information that is included in a comment. The Department of State will post all comments received before the close of the comment period at <http://www.regulations.gov>. You may search on the RIN for this rule, 1400-AD50.

**FOR FURTHER INFORMATION CONTACT:** Kim DeBlauw, Director, Office of Policy and Outreach, Bureau of International Information Programs, U.S. Department of State, SA-5, Floor 5, 2200 C Street, NW, Washington, D.C. 20522-0505; phone: (202) 632-9938; fax (202) 632-9901.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

Section 1078 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239 (“NDAA”), which entered into effect on July 2, 2013, amends and clarifies, respectively, section 501 of the United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1461; “the Smith-Mundt Act”) (“Section 501”), governing the domestic distribution of certain information about the United States, its people, and policies (“Program Material”) prepared for dissemination abroad; and section 208 of the Foreign Relations Authorization Act,

Fiscal Years 1986 and 1987 (22 U.S.C. 1461-1a) (“Section 208”), governing the creation of such material for the purpose of influencing domestic public opinion.

The revised Section 501 authorizes the use of public diplomacy funds for the preparation, dissemination and use of Program Material “intended for foreign audiences abroad.” With respect to Program Material disseminated abroad on or after July 2, the Department and/or the BBG may, upon request, make such material available within the United States, and both the Department and BBG must issue necessary regulations to establish procedures to maintain such material, for reimbursement of reasonable costs incurred in fulfilling requests for such material, and to ensure that persons seeking the release of such material have secured and paid for necessary U.S. rights and licenses. (The BBG published its interim final rule on July 2, 2013, with a final rule published on November 8, 2013 (78 FR 67025).)

The mission of U.S. public diplomacy is to support the achievement of U.S. foreign policy goals and objectives, advance national interests, and enhance national security by informing and influencing foreign publics, and by expanding and strengthening the relationship between the people and Government of the United States and citizens of the rest of the world. Public diplomacy outreach includes communications with foreign audiences abroad through Program Material prepared with, and efforts supported by, funds appropriated or otherwise made available for this purpose. Prior to the 2013 NDAA, such material could not be disseminated within the United States but could be available at the Department following its release abroad, upon request, for examination only to limited categories of requesters (*i.e.*, representatives of U.S. press associations, newspapers, magazines; research students and scholars; Members of Congress).

## **Regulatory Analysis**

### *Administrative Procedure Act*

The Department is of the opinion that this rulemaking is exempt from the notice-and-comment provisions of 5 U.S.C. 553 under the good cause exception of 5 U.S.C. 553(b). There is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to have this rule effective at the time of publication. Because one of the purposes of this rule and the law underlying this rule is to allow information dissemination outside of the Freedom of Information Act for Program Material, and because of the already-past effective date of the law, the intent of the law would be frustrated if the Department could not begin implementing this rule and responding to domestic requests for Program Material as soon as possible. Accordingly, the Department finds that normal public rulemaking procedures are impracticable and unnecessary, and that there is good cause under 5 U.S.C. 553(b)(B) and (d)(3) to exempt this rule from public rulemaking procedures and to implement this rule upon publication. Without prejudice to the Department's determination that there is good cause to exempt this rule from public rulemaking procedures, in the interests of transparency and public participation, the Department is publishing this rule as an interim final rule with a 60-day provision for public comment.

Furthermore, because this is a substantive rule that relieves restrictions imposed by previous versions of 22 U.S.C. 1461 and 1461-1a, the Department may implement this rule at the time of publication under 5 U.S.C. 553(d)(1). This rule does not require or prompt the public to take any action; rather, it functions to relieve the prohibition that prevented the Department from responding to requests for Program Material from the U.S. public, U.S. media entities, or other U.S. organizations. This rule benefits the public, media, and other organizations by allowing them to request and access the Department's Program Material, which previously could not be disseminated within the United States.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rulemaking is not a major rule as defined by 5 U.S.C. 804 for the purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete in domestic and export markets.

*Unfunded Mandates Reform Act of 1995*

This rulemaking will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million in any 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.

*Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments*

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

*Regulatory Flexibility Act/Executive Order 13272: Small Business*

The Department hereby certifies that these regulatory changes will not have a significant impact upon small businesses.

*Executive Order 13563 and Executive Order 12866*

The Department is publishing this rulemaking in response to a statutory requirement that will make more information available to the public; therefore, the benefits of the rulemaking outweigh any costs. The Department does not consider this rulemaking to be a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, as amended by Executive Order 13563. The Department has reviewed this rulemaking to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders.

#### *Executive Order 12988*

The Department has reviewed this rulemaking in light of sections 3(a) and (b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

#### *Executive Orders 12372 and 13132*

This rulemaking will 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. Executive Order 12372, regarding intergovernmental consultation on federal programs and activities, does not apply to this rulemaking.

#### *Paperwork Reduction Act*

This rulemaking contains no new information collections subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

#### **List of Subjects in 22 CFR Part 173**

Broadcasting, Communications, Education, Foreign relations, Freedom of information, Information, Publications, Records, Radio.

Accordingly, 22 CFR chapter I, subchapter R, is amended by adding a new part 173 as follows:

**PART 173 – AVAILABILITY OF PUBLIC DIPLOMACY PROGRAM MATERIAL IN THE UNITED STATES**

Sec.

173.1 Purpose and scope.

173.2 Definitions.

173.3 Availability of program material.

173.4 Terms of use and other compliance.

173.5 Fees.

**Authority:** the United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1461, *et seq.*); Section 1078 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239.

**§ 173.1 Purpose and scope.**

This part contains the rules that the Department follows for responding to requests for the release within the United States of public diplomacy program material generated pursuant to the U.S. Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1431, *et seq.*; “the Smith-Mundt Act”). It is the Department’s policy to make its program material available on its public website or via third-party platforms whenever doing so is consistent with the Department’s mission and all statutory authorities, prohibitions, contractual obligations, principles, and standards. Requests for program material that is not available on

the Department's public website or via third-party platforms must be submitted under the Freedom of Information Act (the "FOIA") pursuant to the FOIA provisions of 22 CFR part 171, subpart B.

**§ 173.2 Definitions.**

For the purposes of this part,

- (a) *Program material* shall mean information about the United States, its people and policies, intended for foreign audiences abroad, that the Department prepares or assists in preparing using public diplomacy funds and disseminates to foreign audiences outside of the United States pursuant to the Smith-Mundt Act and Section 208 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (22 U.S.C. 1461-1a), as amended. Program Material includes, but is not limited to, electronic journals, pamphlets, books, maps, posters, videos, presentations, photos, games, curricula and other teaching materials, and certain social media and web-based interactive technology content produced in Washington, D.C., as well as such materials and content produced at U.S. embassies abroad.
- (b) *Request* shall mean any attempt to access the Department's Program Material, including through the Department's public websites and third-party platforms, or through a direct inquiry to a Department official in connection with a speech or other engagement.
- (c) *Requester* shall mean any private person or entity that requests that the Department make Program Material available within the United States.

**§ 173.3 Availability of program material.**

- (a) The Department makes Program Material available to Requesters electronically through Department websites and/or various third-party platforms, where such material has been disseminated to audiences abroad. Once Program Material is published, it remains available in digital format until removed or archived by the Department at its discretion (*see* paragraph(c) of this section). For access to such Program Material, Requesters may visit [www.state.gov/r](http://www.state.gov/r).
- (b) As a general matter, Program Material published both electronically and in hard copy will be made available electronically through Department websites and/or various third-party platforms, although the Department reserves the right to make Program Material available in hard copy at its sole discretion. To the extent a Requester seeks Program Material that is not made available online through Department websites or third-party platforms, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR part 171,sSubpart B.
- (c) The Department will remove Program Material from Department and third-party websites when it deems such material no longer relevant to the Department’s public diplomacy mission. The Department will also remove Program Material when required by licensing agreements with third-party copyright holders. To the extent a Requester seeks Program Material that has been removed for whatever reason, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR Part 171, Subpart B.
- (d) Once Program Material has been removed from the Department’s website or third-party platforms, a determination will be made as to whether it is a permanent Department record under the Department’s applicable Records Disposition Schedule (“RDS”).

Permanent records will be transferred in their entirety to the National Archives and Records Administration (“NARA”) according to the RDS; *see* 36 CFR 1256.98 for information about how to request Department Program Material that has been transferred to NARA. Material designated as “temporary” under the applicable RDS will be destroyed once it has been removed from the Department or third-party sites.

**§ 173.4 Terms of use and other compliance.**

Requesters and users of Department websites, or third-party websites containing Program Material, are responsible for complying with the Terms of Use applicable to any such site. Requesters are also solely responsible for complying with any applicable statutes governing the use of such material and securing appropriate licenses for use of such material, if required.

**§ 173.5 Fees.**

- (a) The Department will make Program Material available online (*i.e.*, in digital format) at no cost.
- (b) The Department may collect a fee for reimbursement of the reasonable costs incurred to fulfill requests for Program Material not available online. Such requests, including fees applicable thereto, shall be governed by part 171, subpart B of this subchapter.

Dated April 14, 2014.  
Richard Stengel  
Under Secretary for Public Diplomacy and Public Affairs

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