

Department of Justice

§ 76.2

scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture, shall contain the required statement on its homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, "18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement."

(e) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

PART 76—RULES OF PROCEDURE FOR ASSESSMENT OF CIVIL PENALTIES FOR POSSESSION OF CERTAIN CONTROLLED SUBSTANCES

Sec.	
76.1	Purpose.
76.2	Definitions.
76.3	Basis for civil penalty.
76.4	Enforcement procedures.
76.5	Complaint.
76.6	Service and filing of documents.
76.7	Content of pleadings.
76.8	Time computations.
76.9	Responsive pleading—answer.
76.10	Motions and requests.
76.11	Notice of hearing.
76.12	Prehearing statements.
76.13	Parties to the hearing.
76.14	Separation of functions.
76.15	<i>Ex parte</i> communications.
76.16	Disqualification of a Judge.
76.17	Rights of parties.
76.18	Authority of the Judge.
76.19	Prehearing conferences.
76.20	Consent Order or settlement prior to hearing.
76.21	Discovery.
76.22	Exchange of witness lists, statements and exhibits.
76.23	Subpoenas.
76.24	Protective order.
76.25	Fees.
76.26	Sanctions.
76.27	The hearing and burden of proof.
76.28	Location of hearing.
76.29	Witnesses.
76.30	Evidence.
76.31	Standards of conduct.
76.32	Hearing room conduct.
76.33	Legal assistance.

76.34	Record of hearings.
76.35	Decision and Order of the Judge.
76.36	Administrative and judicial review.
76.37	Collection of civil penalties.
76.38	Deposit in the United States Treasury.
76.39	Compromise or settlement after Decision and Order of a Judge.
76.40	Records to be public.
76.41	Expungement of records.
76.42	Limitations.

AUTHORITY: 5 U.S.C. 301; 21 U.S.C. 844a, 875, 876; 28 U.S.C. 509, 510.; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 104-134, 110 Stat. 1321.

SOURCE: Order No. 1462-90, 56 FR 1089, Jan. 11, 1991, unless otherwise noted.

§ 76.1 Purpose.

This part implements section 6486 of the Anti-Drug Abuse Act of 1988 (the Act), 21 U.S.C. 844a. This part establishes procedures for imposing civil penalties against persons who knowingly possess a controlled substance for personal use that is listed in 21 CFR 1316.91(j)(2) in violation of 21 U.S.C. 844a and specifies the appeal rights of persons subject to a civil penalty pursuant to section 6486 of the Act.

§ 76.2 Definitions.

(a) *Act* means the Anti-Drug Abuse Act of 1988, Public Law 100-690.

(b) *Adjudicatory proceeding* means a judicial-type proceeding leading to the formulation of a final order.

(c) *Administrative Procedure Act* means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559.

(d) *Attorney General* means the Attorney General of the United States or his or her designee.

(e) *Department* means the United States Department of Justice.

(f) *Judge* means an Administrative Law Judge appointed pursuant to the provisions of 5 U.S.C. 3105.

(g) *Penalty* means the amount described in 28 CFR 76.3 and includes the plural of that term.

(h) The term *Personal Use Amount* means possession of controlled substances in circumstances where there is no other evidence of an intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance. Evidence of personal use amounts shall not include

§ 76.2

28 CFR Ch. I (7-1-08 Edition)

sweepings or other evidence of possession of amounts of a controlled substance for other than personal use. The following criteria shall be used to determine whether an amount of controlled substance in a particular case is in fact a personal use amount. The absence of any of the factors listed in paragraphs (h)(1) through (h)(5) of this section and the existence of the factor in paragraph (h)(6) of this section shall be relevant, although not necessarily conclusive, to establish that the possession was for personal use, and amounts in excess of those listed in paragraph (h)(6) of this section may be determined to be personal use amounts where circumstances indicate possession of the substance without an intent to distribute or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of the controlled substance.

(1) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug “cutting” agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(2) Other information indicating possession of a controlled substance with intent to distribute;

(3) The controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(4) The controlled substance is possessed under circumstances that indicate such a controlled substance is a sample intended for distribution in anticipation of a transaction involving large amounts, or is part of a larger delivery; or

(5) Statements by the possessor, or otherwise attributable to the possessor, including statements of co-conspirators, that indicate possession with intent to distribute.

(6) The amounts do not exceed the following:

(i) One gram of a mixture or substance containing a detectable amount of heroin;

(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which

cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (h)(6)(ii) (A) through (C) of this section;

(iii) $\frac{1}{10}$ gram of a mixture or substance described in paragraph (h)(6)(ii) of this section which contains cocaine base;

(iv) $\frac{1}{10}$ gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture or substance containing a detectable amount of marijuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(i) *United States Attorney* means the United States Attorney in the federal district in which the alleged violation occurred, or his or her designees, or an Assistant Attorney General.

(j) *Commencement of proceeding* is the service upon a respondent of a Notice of Intent to Assess a Civil Penalty.

(k) *Complainant* means the United States.

(l) *Complaint* means the formal document initiating adjudicatory proceedings.

(m) *Consent Order* means any written document containing a specified remedy or other relief agreed to by all parties and entered as an order by the Judge.

(n) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission.

(o) *Motion* means an oral or written request, made by a person or party, for some action by a Judge.

Department of Justice

§ 76.4

(p) *Order* means the whole or any part of a final procedural or substantive disposition of a matter by the Judge.

(q) *Party* includes the United States of America and any person named as a respondent.

(r) *Respondent* means any person alleged in a Notice of Intent to Assess a Civil Penalty or Complaint under 28 CFR 76.4 and 76.5 to be liable for a civil penalty under 28 CFR 76.3.

§ 76.3 Basis for civil penalty.

(a) Any individual who knowingly possesses a controlled substance that is listed in §76.2(h) in violation of 21 U.S.C. 844a shall be liable to the United States for a civil penalty in an amount of not to exceed \$10,000 for each such violation occurring before September 29, 1999, and not to exceed \$11,000 for each such violation occurring on or after September 29, 1999.

(b) The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this part or to prosecute the individual criminally. However, if a decision is made to assess a civil penalty, the income and net assets of an individual shall be considered in determining the amount of a penalty under this part.

(c) A civil penalty may not be assessed under this part if the individual previously was convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(d) A civil penalty may not be assessed on an individual under this part on more than two separate occasions.

(e) A civil penalty under this part may be assessed by the Attorney General only after an order has been issued on the record and after an opportunity for a hearing has been given in accordance with 5 U.S.C. 554. The Attorney General by and through the United States Attorney having jurisdiction over the matter shall provide written notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a re-

quest for the hearing before the expiration of the thirty (30) day period beginning on the date such notice is served.

[Order No. 1462-90, 56 FR 1089, Jan. 11, 1991, as amended by Order No. 2249-99, 64 FR 47103, Aug. 30, 1999]

§ 76.4 Enforcement procedures.

(a) *Commencement of proceedings.* If the United States Attorney's office having jurisdiction over the matter determines that a person has violated section 6486 of the Act, the proceeding to assess a civil penalty under section 6486 of the Act shall be commenced by the United States Attorney issuing a Notice of Intent to Assess Civil Penalty. Service of this Notice shall be accomplished pursuant to 28 CFR 76.6.

(b) *Notice of intent to assess a civil penalty.* The Notice of Intent to Assess Civil Penalty (Notice) will contain a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law, the statutory and regulatory provisions alleged to have been violated, and the amount of penalty for which the respondent could be liable. The Notice will advise the respondent of the following, in addition to any other specific information determined by the United States Attorney to be necessary:

(1) That the respondent has the right to representation by counsel, but not at government expense;

(2) That any statement given during the course of the proceeding may be used against the person in this or any other proceeding, including any criminal prosecution;

(3) That a respondent may be able to assert a privilege, such as the privilege against self-incrimination;

(4) That failure to file a response to the allegations listed in the Notice within thirty (30) days of the date of service may result in the entry of a non-appealable final order assessing a penalty in an amount to be determined by the Attorney General;

(5) That the respondent has the right to request an adjudicatory proceeding, including a hearing, before a Judge pursuant to 5 U.S.C. 554-557 and this part, and that such request, in accordance with paragraph (c) of this section,