HUMAN RIGHTS WATCH

Human Rights Watch Comments on the Notice of Proposed Rulemaking regarding Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities Proposed by the Department of Homeland Security

Introduction

Human Rights Watch submits these comments to the Department of Homeland Security (DHS) in response to its Notice of Proposed Rulemaking regarding Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities. Our comments address only the standards that apply to immigration detention facilities, and not those designed solely for holding facilities.

We commend the Department of Homeland Security for proposing comprehensive standards that, if fully implemented, should greatly reduce sexual abuse in facilities that confine immigration detainees. While we have concerns about some of the standards, we think as a whole they reflect a commitment to protect detainees from sexual abuse and to ensure that perpetrators are held accountable. The standards will apply to all immigration detainees, regardless of whether they are held in federal, state, local, or privately owned facilities, providing much needed uniformity in the protection against sexual abuse afforded to these uniquely vulnerable men, women, and children.

Ultimately, however, the protection of immigration detainees from sexual abuse will depend as much on the commitment of DHS to ensure immigration facilities fully incorporate the letter and spirit of PREA into their work as on the specific text of the final standards. We urge DHS to allocate sufficient staff and give them the authority and time to continually monitor the sexual abuse prevention and response policies and practices of the facilities in which immigration detainees are confined to ensure they reflect DHS's zero-tolerance goal. We also urge DHS to adopt a standard that would prevent Immigration and Customs Enforcement (ICE) or any other component of DHS from sending detainees to facilities that do not fully comply with the standards.

Because we believe prison rape is an inexcusable and unacceptable violation of human rights, Human Rights Watch has worked for years to draw the public's attention to its prevalence in the nation's confinement facilities—including those that confine immigration detainees—and to advocate for changes in policies and practices that would eliminate such abuse.[1] We strongly supported the National Prison Rape Elimination Act (PREA) unanimously passed by Congress in 2003 and were honored to have a staff member serve as a commissioner on the National Prison Rape Elimination Commission (the Commission) created by PREA.[2]

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[1] Human Rights Watch, *All too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: Human Rights Watch, 1996); Human Rights Watch, *No Escape: Male Rape in US Prisons* (New York: Human Rights Watch, 2001), http://www.hrw.org/legacy/reports/2001/prison/; Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention,* August 25, 2010, http://www.hrw.org/en/reports/2010/08/25/detained-and-risk-0.

[2] Jamie Fellner, senior advisor to the US Program of Human Rights Watch, served as a commissioner with the National Prison Rape Elimination Commission. She is the principal author of these comments.

PREA instructed the Commission to prepare an analysis of the causes and consequences of prison rape and to propose national standards to the attorney general, which it did in June 2009. The Department of Justice (DOJ) standards released on May 17, 2012 drew heavily on the Commission's work and reflect the goal of establishing an effective, zero-tolerance policy toward sexual abuse in confinement facilities. Human Rights Watch hailed the standards as offering landmark protection against sexual abuse and characterized the standards as a practical, feasible roadmap for officials on how to end the epidemic of prison rape.[3] The DOJ standards do not apply to DHS, but in a May 17, 2012 White House memorandum to the heads of executive departments and agencies, President Obama directed all agencies with federal confinement facilities (including DHS) "that are not already subject to the Department of Justice's final [PREA] rule to work with the Attorney General to propose, within 120 days of the date of this memorandum, any rules or procedures necessary to satisfy the requirements of PREA and to finalize any such rules or procedures within 240 days of their proposal." The standards proposed in this rule-making proceeding reflect the work DHS has done pursuant to the president's memorandum.

Immigration detention is the fastest-growing incarceration system in the US. In 2010, ICE had custody of over 400,000 people in about 250 detention facilities. Some were held in service processing centers operated directly by ICE and others in contract detention facilities managed by private companies, state and county jails under contract with ICE, or facilities run by the Federal Bureau of Prisons. Juvenile immigrant detainees are held in facilities operated by the US Department of Health and Human Services. While the average immigration detainee is detained 30 days, for some, detention can last years.

Immigration detainees deserve effective protection against sexual abuse, no less than any other person in confinement. Language and cultural barriers, histories of state-sanctioned abuse in their home countries, and a fear that reporting abuse will result in deportation all increase the likelihood that a non-citizen will not feel safe reporting sexual abuse and that perpetrators will not be held accountable. Unlike criminal defendants, immigration detainees have no right to an attorney, and as a result may not be aware of their right to be free from sexual abuse, nor whom to contact if they are sexually assaulted.

The known incidents and allegations of sexual abuse in immigration detention are serious and numerous. In its 2009 report to the attorney general, the National Prison Rape Elimination Commission documented widespread reports of sexual abuse in immigration facilities over the last 20 years.[4] In August 2010, Human Rights Watch released a report

[3] "US: New Prison Rape Standards Offer Landmark Protection," Human Rights Watch news release, May 17, 2012, http://www.hrw.org/news/2012/05/17/us-new-prison-rape-standards-offer-landmark-protection.

[4] National Prison Rape Elimination Commission, "Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails: Supplemental Standards for Facilities with

compiling incidents and allegations of assaults, abuses, and episodes of harassment that have emerged across the rapidly expanding national immigration detention system.[5] These included the assaults of five women detained at the Port Isabel Service Processing Center in Texas in 2008, when a guard entered each of their rooms in the infirmary, told them that he was operating under physician instructions, ordered them to undress, and touched intimate parts of their bodies.[6] In 2009, the Women's Refugee Commission released a report that documented incidents of sexual and physical abuse of unaccompanied children in immigration custody, including the repeated sexual assaults of children at the Away From Home Texas Sheltered Care Facility in Nixon, Texas.[7]

We commend DHS for proposing standards that for the most part are as strong as, and in some cases even stronger than, those adopted by DOJ. Indeed, the proposed DHS standards reflect the extensive prior work by the Commission and DOJ. In addition, by adopting the DOJ template with regard to the categorization of standards, DHS will enable more consistent treatment of immigration detainees who are often transferred between facilities; vastly different standards depending on the nature of the facility (for example, a local jail or privately operated detention center) would undercut the goal of PREA, as detainees cannot be expected to be aware of shifting rights depending on which facility they are in.

Nevertheless, there are a few important areas where DHS has proposed standards that will not protect detainees as effectively as DOJ standards and for which the weaker standards are not justified. In the interests of brevity, in the comments below we focus solely on aspects of the standards that we believe need to be revised to ensure that DHS adopts strong, feasible, and cost-effective standards to prevent, detect, and respond to all forms of sexual abuse of immigration detainees.

Comments on the Proposed Standards

§115.5 Definitions

Exigent circumstances: A number of restrictions and requirements in the proposed standards do not apply in "exigent circumstances," which DHS has defined as "temporary and unforeseen circumstances that require immediate action in order to combat a threat to

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Immigration Detainees," June 2009, http://www.ncjrs.gov/pdffiles1/226680.pdf (accessed January 15, 2013), pp. 174-188.

[5] Human Rights Watch, *Detained and at Risk*, August 25, 2010.

[6] Ibid., p. 8.

[7] Women's Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody*, February 2009, http://womensrefugeecommission.org/programs/detention/unaccompanied-children (accessed January 15, 2013).

the security or institutional order of a facility or a threat to the safety or security of any person." We believe as defined, facilities could use the "exigent circumstances" exemption far more frequently than we think DHS intends. Under the DHS definition, exigent circumstances would embrace minor "threats" to security, institutional order, or the safety or security of a person—for example, a detainee making a loud derogatory comment to staff. We recommend the definition be reworked to incorporate the notion of a temporary, unforeseen emergency because of a serious threat.

Facility: The definition of facility fails to extend coverage of these regulations to transportation between facilities, and the proposed regulations do not directly consider protections for detainees while in transit. As you are well aware, DHS detainees have been sexually assaulted while being transported. Considering that the transfer of detainees (between facilities or to facilitate removal) is a common, if often excessive, aspect of immigration detention, there should be a clear inclusion of PREA protections for detainees who are in transit.

Family unit: The definition of family unit excludes families where one member has a known history of criminal or delinquent activities. This definition could lead to the separation of a detained family where a parent was convicted of a non-violent offense many years ago or has committed an immigration-related crime, like illegal reentry. The definition could also lead to separation of a detained family for minor delinquent activity by a youth. Protection of the family unit needs to be paramount; any exceptions should be extremely narrow, and this "known history" exception is far too broad.

Holding facility: The definition of holding facility excludes temporary locations "such as U.S. Coast Guard vessels, hotel rooms, and conference rooms—temporarily or sporadically used to detain individuals for short periods of time during agency operations." Detainees held in such locations should not be denied the protections of PREA. We urge DHS to determine what protections under PREA are feasible for this type of confinement, acknowledging its temporary nature.

§115.12 Contracting with non-DHS entities for the confinement of detainees

The language in DHS's proposed regulation closely echoes a similar provision in the DOJ regulations. We believe that DHS's extensive use of non-federal facilities to house immigration detainees— namely state, local, and private facilities—may require modification to these standards. Nearly half of immigration detainees are held in private facilities. While we do not know the duration of all existing contracts, we are aware that some will be in effect for longer than a year. If DHS permits current, non-PREA compliant contracts to extend beyond one year, the agency will be permitting a huge loophole in the coverage of the standards. It is important for DHS to take steps to make sure that detainees held in facilities

covered by long-term existing contracts receive the immediate protection of the standards under the same terms as any other detainee.

§115.13 Supervision and monitoring

We welcome the standard's requirement in §115.13(a) that each facility "shall ensure that it maintains sufficient supervision of detainees." But the subsequent proposed standard, §115.13(b), "that each facility" develop and document comprehensive detainee supervision guidelines … and review those guidelines at least annually," is inadequate to direct facilities to take the necessary steps. We urge DHS to rewrite §115.13(b) to require each facility to develop and implement a concrete staffing and monitoring plan that it has determined to provide adequate supervision to protect detainees from sexual abuse. In addition, the standard should require that the annual review of staffing and video monitoring assess their effectiveness at keeping inmates safe in light of reported incidents of sexual abuse, identify the changes that may be necessary to improve their effectiveness, and then implement those changes.

We agree with DHS that determinations of the adequacy of detainee supervision must be facility specific; no one-size-fits-all formula would work. The DOJ's standard §115.13 is not inconsistent with such an individualized approach. DOJ does, however, require more than DHS's vague "guidelines." It requires a facility-specific staffing plan, the documentation and explanation of deviations from the plan, and an annual assessment to determine if adjustments in the plan are needed.

In its explanation of the provision, DHS indicates its intention that the requisite annual review provides such an assessment. But the text of the provision should be rewritten to better reflect this intention. We think the language used by DOJ is appropriate for this purpose. Moreover, we believe that DOJ's more comprehensive list of factors to be taken into account in such a plan, in its §115.13(a), is stronger than the factors enumerated by DHS. For example, DHS does not include, as DOJ did, findings of supervision inadequacies by courts or internal or external oversight bodies.

The weakness of standard 115.13 as currently drafted is by no means ameliorated by §115.13(d), which requires facilities to implement a policy and practice of unannounced rounds during day and night shifts. There is nothing affirmatively wrong with this provision; there is just no reason to believe it will have a significant impact. Such rounds are unlikely to catch misconduct as it occurs. And, because there is no requirement for how frequently such rounds are conducted (nor even a requirement as to where they are conducted), there is no reason to assume they will have much of a deterrent effect. Whether or not DHS keeps the requirement of unannounced rounds, it is important that it also add to §115.13 standards a requirement of regular security inspections that consistently and effectively monitor inmate

and staff activities at all times and throughout the facility —inspections that are not required but should be.

§115.14 Juvenile and family detainees

We agree with the general principle reflected in DHS's provision 115.14 that juvenile detainees should be detained in the least restrictive setting. But we think the provision fails to provide sufficient protection for juveniles with language in §115.14(b) that juveniles should be held "apart" from adult detainees (unless in presence of adult member of family unit) with sight, sound, and physical contact minimized. While DHS says that most juveniles in ICE detention are housed in family facilities, we believe greater restrictions and protections are required for juveniles placed in adult facilities that are not family facilities. While DHS says that its proposed standard is "aimed at preventing unsupervised contact with adults," the provision fails to clarify steps that must be taken to prevent such contact.

We urge DHS to rewrite the provision to ensure that juvenile detainees are not placed in housing units in non-family facilities in which the juveniles would have sight, sound, or physical contact with adults in common spaces, shower areas, or sleeping quarters. Outside of housing units, there should be sight and sound separation or direct staff supervision. We see no reason why the protections afforded in the DOJ standards should not be met—if not exceeded—in immigration detention facilities.

§115.15 Limits to cross-gender viewing and searches.

We strongly endorse the goal reflected in the proposed standard 115.15 of protecting the dignity and privacy of detainees by sharply limiting cross-gender staff viewing and searches. We are concerned, however, that the language used in the standard is not sufficiently stringent.

Proposed standard 115.15(c) and (e) prohibits cross-gender pat down searches of women detainees, cross-gender strip or visual body cavity searches by non-medical practitioners, and cross-gender viewing of detainees showering or performing bodily functions, except in "exigent" circumstances. However, as noted above in our discussion of the definition of exigent circumstances, we believe that if the definition is not narrowed to genuine emergencies, there will not be an appreciable reduction in cross-gender intrusions on detainee dignity and privacy. The exception for "exigent circumstances" could swallow the rule.

We note with appreciation that, unlike the DOJ standards, the DHS standard 115.15(b) provides some protection for male detainees from cross-gender pat searches. Such pat searches may only be conducted if "after reasonable diligence" male staff is not available to conduct the search. We believe "reasonable diligence" is far too vague and broad an exception to the rule. It is by no means clear what "reasonable" diligence would consist of in

a given situation. In addition, we are concerned that the language would *de facto* permit a facility to be staffed in such a way that male staff are frequently unavailable to pat search a male detainee. DHS needs to craft the standards in such a way that those who operate facilities have sufficient male and female staff to sharply limit cross-gender pat searching of men.

Standard 115.15(b) also permits cross-gender pat searches of male detainees in "exigent circumstances." As stated above, we believe this is a vague and overbroad exception that could have the practical effect of nullifying the benefits of the rule.

We believe §115.15(d) would be a strong and appropriate standard to protect detainees from being seen by staff while they are showering, performing bodily functions, or changing clothing if, in addition to narrowing the exception of "exigent circumstances" to genuine emergencies, the DHS also deleted from it the exception for viewing that is "incidental" to routine cell checks. That is an exception that comes perilously close to swallowing the rule. It gives facilities license to not do much, and then claim staff viewing is exempted as "incidental." There are numerous measures facilities can take to protect inmates' privacy and dignity during routine cell checks. They should be required to do so. The draft standard requires one—having staff of the opposite gender announce their presence on the floor before beginning to look into cells.

§115.17 Hiring and promotion decisions

We think the proposed standard will help protect detainees from abusive staff, contractors, or volunteers by reducing the risk of hiring or retaining individuals whose conduct has demonstrated a lack of personal commitment to PREA's goals. We do not understand why, however, the requirement of background investigations every five years is limited to "facility staff who may have contact with detainees and who work in immigration-only detention facilities." Many immigration detainees are held in facilities that also house non-immigration inmates. Staff in those facilities should not be exempted from periodically updated background investigations which DHS recognizes can help protect detainees.

We note that §115.17(g) specifically provides with regard to hiring and promotion that "if the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility and its staff." It is unclear to us why this provision exists only with regard to hiring and promotion and is not made applicable to all standards.

§115.31 Staff Training

This proposed standard is similar to that of the Department of Justice § 115.31 in establishing the obligation to train staff and employees who may have contact with immigration detainees. It helpfully enumerates components of that training pertaining to standards and

policies with regard to sexual abuse in immigration detainee facilities. We believe all the components of the DOJ standard are appropriate for facilities holding immigration detainees and we think they should be included in the DHS standard. For example, the DHS standard should—as DOJ did—require staff training on detainee rights to be free from retaliation for reporting sexual abuse; it should require the training to be tailored to the gender of those in the facility; and it should require refresher training every two years, and not just refresher information. In addition, we believe the DHS standard should also require staff and employees in facilities with immigration detainees to receive special training on how to discuss sex, sexual abuse, and sexual abuse policies and procedures with sensitivity to a culturally diverse population.

The proposed standard requires the initial training to be completed within one year of the effective date of the standards. We believe that at least for facilities operated by the agency, a six-month requirement would be both feasible and more appropriate.

§115.32 Volunteer and contractor training

The proposed standard does not establish a time limit by which such training should occur. It is unclear whether this was an inadvertent omission (it is an omission in the comparable DOJ standard as well) or whether DHS believes that, as of the date of publications of final standards, no contractors or volunteers should have contact with detainees if they have not been trained. The standard should be rewritten to remove any ambiguity.

§115.33 Detainee education

We agree with DHS that educating detainees about sexual abuse policies and protections is a crucial component of an effective zero-tolerance policy. We further agree with DHS that such education should be provided during the intake process. We note, however, that the proposed standard fails to address the education of current detainees who will not have received such information at the time of their intake. The standard should be modified to include a requirement that those detainees be provided the education within a specified period of the effective date of the DHS standards, a period which we believe should be as short as possible (such as one month).

The regulation also refers to an agency Detainee Handbook in §115.33(f) and states that information about reporting sexual abuse shall be included in the handbook. The handbook, which is prepared by the agency and not by the facility, may be the best means to convey important information detainees need to remain safe from sexual abuse during their detention. We believe the handbook should not just indicate how to report abuse, but also inform detainees of the agency's zero-tolerance policy toward sexual abuse, the policies related to sexual abuse prevention and response, and the detainees' rights and responsibilities related to sexual abuse, as well as how to contact the DHS Office of the Inspector General and Office of Civil Rights and Civil Liberties.

§115.34 Specialized training: Investigations

We think the proposed standard would be strengthened if it stated expressly that the specialized training for investigators includes techniques for interviewing sexual abuse victims, proper use of Miranda and Garrity warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required for administrative action or prosecutorial referral, as required in the comparable Department of Justice standard. DHS explains in its Notice of Proposed Rulemaking that ICE and Customs and Border Patrol (CBP) will be training investigators on sexual abuse investigations covering these elements (77 FR 73513). But it is not clear that DHS intends to ensure such training for persons responsible for investigations in state, local, or private facilities.

Adding components of appropriate specialized training into the standard will remove any doubt as to what such investigators will be required to do under the standards. In addition, the investigators who will be working on detainee claims of sexual abuse should receive training on cultural sensitivity, including appropriate terms and concepts to use when discussing sexual abuse with a culturally diverse population.

§115.35 Specialized training: Medical and mental health care

The proposed standard identifies the components of the specialized sexual abuse training the agency will provide to DHS or agency employees who are medical and mental health practitioners in immigration detention facilities. But it does not include a requirement that medical or mental health practitioners who are not DHS or agency employees but who work in immigration detention facilities receive similar specialized training. With regard to them, standard 115.35 states, "the agency will review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse." We believe the standard should be rewritten to make clear that all full- and part-time medical and mental health practitioners who provide services to immigration detainees should receive the requisite specialized training as spelled out in §115.35(b), as well as the training mandated under §115.31 for employees and §115.32 for contractors and volunteers. Left as is, the standard gives the impression that some facilities might be permitted to have medical or mental health staff that are less well-trained and less prepared to respond to sexual abuse situations. The requirement for specialized training should be uniform for all immigration detention facilities.

We also believe the regulation should require that medical and mental health care practitioners working with immigration detainees receive special training to enable them to be sensitive to culturally diverse populations, including appropriate terms and concepts to use when discussing sex and sexual abuse, and sensitivity and awareness regarding past trauma that may have been experienced by immigration detainees.

§115.42 Use of assessment information

In §115.41, DHS proposes a strong requirement that facilities assess all detainees at intake to identify those likely to be sexual victims or sexual aggressors, and in §115.42, DHS mandates use of the results from the risk assessment to make individualized housing, recreation, and other detainee assignments that will ensure the safety of each detainee.

We believe, however, that DHS should also require facilities to house immigration detainees separately from inmates. Immigration detainees are a particularly vulnerable group in confinement settings. It is not appropriate to house any immigration detainees with general population inmates. If detainees are housed in a facility with inmates, they should be assigned to cells or areas of the facility that allow for no unsupervised contact between detainees and inmates.

We commend DHS for establishing a separate provision, §115.42(b), for placement and housing decisions regarding transgender or intersex detainees, to respond to their unique needs and heightened vulnerability to sexual abuse. The reports of the Commission as well as prison rape surveys by the federal Bureau of Justice Statistics also establish clearly that gays, lesbians, and bisexual individuals also have a markedly higher risk of being sexually abused while in custody. We urge DHS to modify §115.42(b) to include gay, lesbian, bisexual, and other gender-nonconforming individuals as well.

§115.43 Protective custody

We endorse the DHS decision to limit the use of protective custody for vulnerable detainees, restricting the situations in which it can be used and the conditions of detention. DHS has also sought to limit the length of time it can be imposed—providing that "ordinarily" it should not exceed 30 days and that supervisory staff should review the assignment of protective custody weekly during the 30-day period and every 10 days thereafter.

We are concerned that the term "ordinarily" is too broad and could create an unwarranted loophole in the protection intended by the standard. We urge DHS to more clearly and narrowly restrict the extension of protective custody beyond 30 days.

Because DHS contracts with many different types of facilities for the confinement of immigration detainees and some of those facilities may succumb to the temptation of keeping vulnerable detainees in segregation as the easiest way to address the risk of abuse, we believe the proposed standard should have an additional provision to guard against excessively long and unnecessary segregation. We propose that DHS require any facility housing an immigration detainee in administrative segregation for more than 30 days to notify the appropriate agency supervisor, who will then be tasked with conducting a prompt review of the necessity for such segregation and with working with the facility to establish an alternative housing situation.

§115.51 Detainee reporting

We welcome DHS's recognition that detainees should have the ability to report sexual abuse to an outside entity not affiliated with the facility. The regulation should additionally specify that detainees should be able to make free, preprogrammed calls to the DHS Office of the Inspector General and the DHS Office for Civil Rights and Civil Liberties. We think it would be helpful to spell out that the facility must provide phone numbers, access to a phone, and a mailing address to contact their consular officials.

DHS should also adopt a standard that it will not remove from the country, or transfer to another facility, immigration detainees who report or make a grievance regarding sexual abuse before the investigation of that abuse is completed, except at the detainee's request.

§115.52 Grievances

We appreciate DHS's decision to draft grievance requirements that are succinct and that set out crucial substantive provisions, including §115.52(b), which does not impose a time limit on when a detainee may submit a grievance regarding sexual abuse.

However, we suggest that §115.52(c) regarding emergency or time-sensitive grievances is too open-ended, as it does not set out any criteria for the kinds of written procedures facilities should develop and implement. While DHS clearly sought to give facilities flexibility with regard to its emergency grievance procedures, we urge DHS to (1) provide some guidance as to what those procedures should accomplish, and (2) require that the procedures be subject to approval by the agency.

While we welcome the requirement in §115.52(e) for a response to the grievance within five days, there is no provision regarding the length of time for response to any appeal of the facility response to the grievance. The time for response to appeal should be specified in the regulations and should be no longer than 30 days.

Given that many detainees will not be familiar with prison or jail grievance policies and forms, and may not be able to find someone to assist them, we believe DHS should mandate that no grievance regarding sexual abuse should be denied because the detainee failed to follow requirements regarding how to properly fill out and submit a formal grievance. If the substance of the grievance is conveyed, the facility should be required to respond to it on the merits.

DHS should also require facilities provide it with a copy of all grievances and their dispositions so that it can monitor the facilities appropriately.

Finally, as noted above, DHS should adopt a standard that the agency will not remove from the country or transfer to another facility any immigration detainee who reports or makes a grievance about sexual abuse before the investigation or response to the grievance is completed, except at the detainee's request.

§115.61 Staff reporting duties

We recommend one small but important modification to this section. Reference to retaliation in §115.61(a) should be rewritten to embrace not just detainees or staff who reported such an incident, but also detainees or staff who provide information about the incident (for example, who may have provided information to investigators).

§115.66 Protection of detainees from contact with alleged abusers

We strongly support the goal of this standard to separate staff, contractors, or volunteers who may have engaged in sexual abuse from contact with detainees. We are concerned, however, that collective bargaining agreements may interfere with implementation of this goal. We note that DOJ included in its PREA standards §115.66(a), a requirement regarding collective bargaining agreements, and we simply seek to raise the question with DHS of whether a similar provision should be included for the protection of immigration detainees.

§115.67 Agency protection against retaliation

Fear of retaliation often prevents detainees and staff from reporting or cooperating in the investigation of sexual abuse, frustrating zero-tolerance policies. The DHS proposed policy is strong, but would be stronger if it included additional language, such as was included in the DOJ standard 115.67, regarding the use of multiple protection measures (for example, housing changes or transfers for abusers).

§115.68 Post-allegation protective custody

We agree that detainees who have alleged sexual abuse should not be held for longer than five days in any type of administrative segregation. However, the exceptions DHS proposes to the five-day rule include "unusual circumstances." We believe DHS should identify the types of circumstances that might warrant prolonged protective custody. We are also concerned that vulnerable detainees may "request" protective custody for longer than five days at the "suggestion" of the facility or because they are not aware of their rights.

As an added safeguard against unnecessarily long periods of post-allegation protective custody, we believe DHS should add to §115.68 a requirement that any facility housing an immigration detainee in administrative segregation for more than five days must notify an appropriate agency supervisor, who will then be tasked with conducting a prompt review of the necessity for such segregation and with working with the facility to establish an

alternative housing situation or to enable some form of temporary release (if the detainee is not subject to mandatory detention).

§115.71 Criminal and administrative investigations

We urge revision to §115.71(a) to clarify that all allegations of sexual abuse are to be investigated, including third-party and anonymous reports. We also recommend cross-reference to §115.34 regarding the requisite qualifications for the investigators.

§115.81 Medical and mental health assessments; history of sexual abuse

We support the requirement in this regulation of referral for health or mental health evaluations within two or three days following the assessment indicating prior sexual abuse. We nevertheless think the goal of this provision would be strengthened by the removal of the vague language that the referral is "subject to the circumstances surrounding the indication," which is currently included in §115.81(a). DHS should either remove the qualification or elucidate what sorts of circumstances might eliminate need for immediate referral.

§115.86 Sexual abuse incident reviews

We recommend that DHS mandate involvement of upper-level facility officials in the review and that it dictate specific issues (such as adequacy of staffing levels) that must be addressed in the review, to avoid skimpy reviews. We also recommend that the department set a specific time (for example, within 30 days of conclusion of a sexual abuse investigation) within which the review must be completed; absent such a fixed time period, the incident reviews may be delayed long past the point of utility. We also recommend that the annual review conducted by each facility, assessing and improving sexual abuse intervention, prevention, and response efforts, should be available to the public on the facility's website, if it has one, as well as on the agency's website.

We also urge DHS to require all facilities with which it contracts for the detention of immigration detainees, whether public or private, to comply immediately with the requirements of §115.86. The incident reviews and the annual review will not only provide information vital to the protection of detainees, it will enable DHS to assess current patterns of abuse and to identify which policies or practices need to be strengthened or changed overall.

§115.87 Data collection

The requirement of §115.87(a) for the maintenance of sexual abuse case records should be extended immediately to all facilities, private or public, with whom the agency has contracted for the confinement of detainees. Immediate applicability of the incident review

and data collection requirements of §115.86 and §115.87 is essential to usefully detect possible sexual abuse patterns, as is required in §115.87(d) and in §115.88. Making the requirement immediately applicable to all facilities would prevent what could otherwise be a considerable lag time before the agency acquires the information it needs to analyze detainee sexual abuse incidents.

§115.88 Data review for corrective action

We believe strongly that if undertaken in a responsible and objective manner, the required review and analysis will play a major role in the protection of detainees from sexual abuse and will provide a vital contribution to the agency's ability to objectively assess policies and practices of individual facilities as well as facilities as a whole.

As noted above, we believe the agency cannot carry out its required analysis if it is not able to review data from all the facilities in which immigration detainees are confined.

§115.89 Data storage, publication, and destruction

We recommend the following changes to this standard: First, that DHS mandate a minimum period of years, preferably 10 years, during which the data collected pursuant to §115.87 must be retained.

Second, §115.89(b) requires making available to the public aggregated sexual abuse data from facilities under its direct control and from any private agencies. We believe data from state and local public facilities in which immigration detainees are confined should also be made publicly available.

Third, the requirement of data publication in §115.89(b) is conditioned on "existing agency information disclosure policies and processes." We urge DHS to review those policies and processes to ensure that they are consistent with legitimate public interest in this data and, indeed, with the unique importance of public access (and the goals of transparency and accountability) in the arena of sexual abuse. To the extent existing disclosure policies and processes impede or delay access to sexual abuse data, for reasons that are not connected to legitimate security concerns, we urge DHS to establish separate procedures pursuant to these standards.

§115.93/115.201-205 External auditing and corrective action

DHS has developed standards requiring thorough, objective, and competent audits of facilities holding immigration detainees. Regular audits by qualified independent auditors of agency compliance with PREA standards are crucial to preventing and responding to prison rape. There is no other mechanism for oversight that will reliably inform the agency, facilities, legislative bodies, and the public of the extent to which facilities are complying with the

agency's PREA standards and protecting immigration detainees from sexual abuse. Audits provide the agency with objective feedback from skilled reviewers on the performance of its facilities and the facilities with which it contracts, helping the agency understand if deficiencies exist in its policies and practices and providing a basis for developing corrective steps. Audits—as well as publication of agency data and corrective action plans, as required by the proposed standards—will increase the transparency of immigration detention operations and enhance agency and facility accountability for the safe detention of immigration detainees. Indeed, because of the closed nature of confinement facilities, regular audits may be even more important than for many other public institutions.

If audits are to serve their purposes effectively, they must also be conducted periodically and regularly; an audit of every facility every three years is, we believe, sufficiently frequent to be meaningful without being so frequent as to be onerous. We note that the cost calculations undertaken for the Department of Justice did not indicate that audits every three years would impose significant additional costs.

We strongly object to audits that would be random or only for cause. Random audits do not satisfy the objectives for audits noted above. Every facility needs the oversight, transparency, accountability, and feedback provided by audits. Audits only conducted "for cause" fail for similar reasons. No agency will be perfect; auditing provides benefits even to facilities that are doing a good job. The benefits from audits should not be limited only to those with the worst performance. In addition, the idea of audits for cause raises a host of questions: what would constitute "for cause," who would decide that facilities are out of compliance, and what information would they have on which to make that decision. We do not object, however, to audits "for cause" in addition to regularly scheduled audits. If DHS chooses not to adopt a mandatory three year schedule for audits, there are other possibilities that retain the benefits of regular audits. For example, the standards could—and in our judgment should—require every agency to have a full audit within the first three years after the PREA standards take effect. If the agency has an extremely high score on that audit, such as being 90 percent compliant, then perhaps the subsequent audit three years later could be a more streamlined version of the audit, focusing on compliance with certain designated standards as well as on the ones in which its prior compliance was weaker. If an agency scores extremely low on that first audit, it should be required to develop a remediation plan and be subject to a full audit again within 18 months.

We think the requirement for a corrective action plan for facilities that do not meet the standards is wholly appropriate, as without it there would be no guarantee the facility would respond to the need to improve its performance.

We do not have specific suggestions for change in the proposed audit standards. However, we think the agency should adopt a standard that prevents it from housing immigration detainees in facilities which do not substantially comply in all material ways with most of the

PREA standards and which fail to successfully implement a corrective action plan for those standards.