

National Construction Safety Team Act, shall be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report.”

Comment: One comment stated that the proposed regulations may conflict with and override New York City inspection and enforcement procedures. Provisions should be considered that prevent NIST from interfering with such activities.

Response: The Act and its implementing regulations pertain to the investigation into the technical causes of specific building failures and do not affect routine building inspections and enforcement activities by state or local government.

Comment: One comment stated that the requirements in the proposed regulations should include the sharing of information at all levels of City agencies, and not only by “law enforcement” and should include local police, fire, etc.

Response: NIST expects to work closely with state and local governments during NIST investigations of building failures.

Comment: One comment stated that although the proposed regulations permit parties to retain *copies* of documentary evidence taken by the Team, the proposed regulations do not address how parties may gain subsequent access to the original documentary evidence and/or material samples, which may be needed for the preparation of claims and defenses.

Response: The commenter apparently confuses the requirements for members of the public who are in possession of evidence with the requirements for investigation participants.

Section 270.313(c), which governs requests for documentary evidence from members of the public, specifically requires a request to be in writing and to include, among other items, “(4) A request that each person to whom the request is directed produce and permit inspection and copying of the documents and physical evidence in the possession, custody, or control of that person * * *.” Under this provision, members of the public who submit evidence to an investigation may keep the original and provide the Team a copy.

Section 270.310 governs evidence collected by investigation participants who are not NIST employees. It requires that such investigation participants transfer original evidence to NIST, and retain a copy of the evidence only if necessary to carry out their duties under the investigation. This requirement ensures that all evidence collected

during the course of an investigation be held in a central location for recordkeeping and chain of custody purposes.

Comment: One comment stated that credentialing should be determined in collaboration with local law enforcement.

Response: Credentialing must be accomplished in accordance with the laws and regulations governing Federal investigations.

Comment: One comment suggested that NIST address the issue of when an investigation is concluded and the Team’s authority dissolves.

Response: NIST plans to include a provision addressing this issue in its planned notice of proposed rulemaking setting forth the remaining procedures necessary to implement the Act.

Comment: One comment pointed out an inconsistency in the use of the terms “evidence” and “information” in § 270.310. The same commenter suggested a revision to § 270.312 to include both “evidence” and “information”.

Response: NIST agrees that the use of both “evidence” and “information” in § 270.310 is confusing. Section 270.310 has been revised to replace the word “information” with the word “evidence.” This revision eliminates the need for the suggested revision to § 270.312.

Comment: One comment identified an incorrect reference in § 270.314. The reference to § 270.312 should instead refer to § 270.313.

Response: NIST has corrected this error.

Comment: One comment suggested that the term “confidential information” be defined in the regulations.

Response: NIST has deleted the sentence in § 270.312 that contains the only reference in the regulation to “confidential information.” The receipt and release of information is addressed elsewhere in the regulation.

Comment: One comment suggested that § 270.313(b) be revised by adding a requirement that requests for responses to written questions include a “statement that the Director has established a Team, and that the Lead Investigator (name) has requested information.”

Response: NIST believes that the language of § 270.313(b)(1) is sufficient to make clear that the request is made under the authority of the Act.

Comment: One comment suggested that § 270.315 be revised by combining two of the factors the Director will consider in determining whether to issue a subpoena. Two of the factors NIST included in the interim final rule

are: (1) Whether the testimony, documentary, or physical evidence is required for an investigation being conducted pursuant to the Act; and (2) Whether the evidence is relevant to the purpose of the investigation. The commenter suggested combining these two factors to read: “(1) Whether the testimony, documentary, or physical evidence is relevant to an investigation being conducted pursuant to the Act.”

Response: NIST disagrees with the suggested revision. Whether evidence is relevant to an investigation is an important factor to consider; however, not all relevant evidence is necessarily required for an investigation. NIST will only issue subpoenas for relevant evidence that is required for an investigation.

Comment: One comment suggested that subpoenas either be signed by the General Counsel, in addition to the Director, or that subpoenas contain a statement that the General Counsel has concurred in the issuance of the subpoena. The commenter suggested that § 270.315(c)(5) be revised to reflect change.

Response: Neither of these suggested changes is necessary because the existing regulations require the concurrence of the General Counsel prior to issuance of a subpoena.

Comment: One comment suggested revising § 270.315(d)(2) by adding the words “return receipt requested”, to require that service of a subpoena will be by certified mail, return receipt requested, or delivery to the last known residence or business address of such person or agent.

Response: NIST agrees. Section 270.315(d)(2) has been revised to reflect the change.

Comment: One comment suggested paragraph (a) of § 270.323 repeat the words “request permission to” before “take action necessary, appropriate, and reasonable in light of the nature of the property to be inspected and to carry out the duties of the Team.”

Response: NIST disagrees. The paragraph is clear as it was originally written.

Additional Information

Executive Order 12866

This rule has been determined not to be significant under section 3(f) of Executive Order 12866.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.