NATIONAL SECURITY ARCHIVE

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January 25, 2021

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Submitted via the Federal eRulemaking Portal: http://www.regulations.gov as per instructions in
the Federal Register notice, **RIN 3095-AB99**

**RE: The National Archives and Records Administration proposed rule concerning Federal
Records Management: Digitizing Permanent Records and Reviewing Records Schedules
Agency/Docket Numbers:
FDMS No. NARA-20-0006
NARA-2021-001**

Dear Mr. Ferriero,

The National Security Archive writes to ask that the National Archives and Records
Administration (NARA) reconsider its pending rule revising 36 CFR part 1236, Electronic
Records Management, which adds a new subpart establishing standards for digitizing permanent
paper and photographic records, including paper and photographs contained in mixed-media
records.

The National Security Archive appreciates the out-sized responsibility NARA has ensuring
agencies' records management practices comply with current rules regarding physical and digital
records, as well as the growing challenges NARA has managing the incoming tsunami of digital
records.

Nonetheless, the Archive remains particularly concerned that this rule change - coupled with
inadequate oversight of agencies' record retention schedules - would gravely impact the
preservation of historical paper records. **It is our view that the original paper records are
worth preserving - for a myriad of reasons, including but not limited to legal and
evidentiary purposes, and that more recent records that are born digital require more
oversight than the proposed rule allows for.**

As you are aware, the proposed rule change in question comes on the heels of 2019's "Transition
to Electronic Records" memorandum, which NARA issued jointly with OMB and that requires
all agencies to manage *all* their permanent records electronically by December 31, 2022. Taken

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together, the memorandum and rule change beg several important questions that the Federal Register notice does not adequately address. These issues include:

- How much oversight will NARA have of the digitization process to ensure it is carried out properly and that all digital records will include all relevant metadata?
  - The proposed rule change states that it "also provides agencies with guidance necessary to proceed with projects for digitizing and disposing of original source permanent records." **Guidance is one thing, but effective and timely oversight is another.**
  - NARA's oversight of agency compliance with previous rules regarding email preservation - as well as its capacity to review and catch problematic agency record retention schedules - raises concerns that NARA's approach in this instance will be relatively hands-off, and that spot checks for individual agency compliance will be few and far between.
- What happens to physical records after they have been digitized? Will agencies have free reign to dispose of them?
- Will there be backups of digitized files if they become corrupted?
- Will the lack of funding for such a mandate produce unintended consequences? The impending deadline of the 2019 memo, coupled with this new rule change, raises the possibility that some agencies will choose the quickest and cheapest digitization process over long-term archival requirements.
- Who will ensure that the agencies do not disrupt the file/office arrangement of the records so that future researchers can fully assess their context and importance? If agencies produce huge dumps of scanned records without the necessary data on the provenance of particular records (which could be incorporated in the metadata), it would be a tremendous setback to historical research. Accomplishing this task successfully will require appropriately trained people at the agencies and NARA, with a variety of technical and subject area skills.
- Will NARA and the agencies have the trained staff needed to closely monitor and implement digitization programs? Paper records often have handwritten comments on them that are often as important as the typewritten text. Who will ensure that the standards are exacting enough to ensure that the whole of such records will be fully digitized?

The research community is already at a disadvantage when agencies like the CIA are allowed to deem important historical records as "temporary" and are therefore allowed to be destroyed 30 years after their creation. The Agency already deems as "temporary" files: its employees' official actions in countries other than the United States; investigative files from the offices of the Inspector General, Security, and Counterintelligence; files about CIA assets that the CIA itself does not deem as "significant;" and CIA investigations into alleged unauthorized releases of classified information. It is also allowed to destroy declassification referrals files it has

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deemed "temporary" after 30 years. FOIA and Declassification requests to NARA (sometimes for CIA records) occasionally take longer than 20 years to be completed. Declassification referral "paper trails" also *do* have research value to find and request re-review of documents, even if they are not needed anymore for CIA business purposes.

It is reasonable to believe that if agencies like the CIA are unwilling to even treat important records as permanent, these same agencies are unlikely to dedicate the resources that would be required to digitize their permanent historical records in a way that does not destroy any forensic evidence. The same could be true of non-intelligence agencies that might decide to treat important records as "temporary" rather than digitize them. This points to another problem with the rule: **it creates a substantial unfunded mandate for which most agencies do not have the resources.** Besides the problem of CIA temporary records, the CIA and other intelligence agencies have huge backlogs of sensitive records stretching back as far as the 1940s that would need to be digitized. Although it is unlikely that the CIA would destroy precious records from its founding years, the mandate to digitize might lead the Agency to keep important historical records indefinitely and never turn them over to NARA.

These concerns are not arbitrary. In 2017, for example, the Department of State released its long-awaited *Foreign Relations of the United States* documentary history of the 1953 Iranian Coup. But key portions were missing, due to the CIA's destruction of records with insufficient oversight by NARA. As the National Security Archive's Malcolm Byrne has <u>written</u>:

> "A source note to the volume explains that CIA officers destroyed a large number of records in the early 1960s as part of a routine 'office purge,' and allegedly in the belief that a backup file existed. In fact, a microfilm set had been made and some of the cables in this collection were transcribed from it several years ago originally for use in the 1989 FRUS volume.
>
> Where is that backup set now? The source note provides the answer in what may be the most inexplicable statement in the entire volume: 'The microfilm was later destroyed in accordance with a National Archives approved records schedule.' How many other irreplaceable files about other historically significant or controversial intelligence operations have met the same 'approved' fate?"

This example points to the compounding problems of inadequate records retention schedules and insufficient oversight of agency adherence to current rules - much less proposed ones. Given the inability - or unwillingness - of certain agencies to properly maintain their physical records, our faith that they will be able or willing to transfer these crucial documents into the appropriate digital format is negligible.

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The proposed rule also raises concerns from a cybersecurity perspective. As the rule states, "These technical digitizing standards apply to both unclassified and classified national security records. **However, this rulemaking does not address other standards specific to classified information, such as classified-specific metadata or acquiring secure equipment. These subjects do not fall under our records management authority and are outside the scope of this regulation."** (emphasis added) This caveat raises substantial concerns about the security of the actual tools of digitization, transmission, storage (scanners, cameras, servers, etc.) which appear to be outside the scope of the review.

The proposed rule also requires that "when digitization and image processing are complete and when you determine that the records are no longer in active use and no longer subject to changes that would alter a checksum, you must generate checksums, record them as technical metadata in a record-keeping system for each image file, and use them to monitor electronic records for corruption or alteration." This begs the following questions, at a minimum:

- Which message digest algorithm should be used or not used? Would the type (MD5, SHA-1, SHA-256, etc) change based on the document's classification status?
- Agencies are advised to use the checksums generated by the algorithm "to monitor electronic records for corruption or alteration." How frequently should agencies run this reconciliation? Do the results need to be reported?

As Executive Order 13526 states, "No information may remain classified indefinitely;" and therefore NARA must guard that no previously secret, historically valuable, information is improperly destroyed.

For these reasons, the National Security Archive requests that NARA reconsider its pending rule revising 36 CFR part 1236. It would be better if NARA tasks the National Academy of Sciences to work with a few representatives of historical organizations and archival experts to develop a plan of action and a budget proposal to put digitization on a sure footing. Thank you for your consideration of these comments.

Lauren Harper

National Security Archive
Director of Public Policy