

12 FAM 030

ACCOUNTABILITY REVIEW BOARD (ARB)

(CT:DS-114; 08-11-2005)
(Office of Origin: M/P)

12 FAM 031 GENERAL PROVISIONS

12 FAM 031.1 Objective

(CT:DS-75; 05-07-2001)

The ARB process is a mechanism to foster more effective security of U.S. missions and personnel abroad by ensuring a thorough and independent review of security-related incidents. Through its investigations and recommendations, the Board seeks to determine accountability and promote and encourage improved security programs and practices. In addition, the Board mechanism enhances the integrity of the visa issuing process by determining accountability in certain instances in which terrorist acts in the United States are committed by aliens.

12 FAM 031.2 Responsibilities

(CT:DS-57; 03-26-1997)

A Board shall be convened for the express purpose of investigating only that incident or those incidents specified by the Secretary. A Board shall examine the facts and circumstances surrounding the incident or incidents, and shall make written findings in accordance with 12 FAM 035.

12 FAM 031.3 Definitions

(CT:DS-114; 08-11-2005)

The following are definitions of words commonly used by the ARB:

Act: The Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended.

ARB: Accountability Review Board.

Board: Accountability Review Board established under either Title III of the Act (22 U.S.C. 4831) or Section 140(c).

COM: Chief of a U.S. mission.

Committee: The ARB Permanent Coordinating Committee.

Consular officer: Any individual authorized to issue visas pursuant to Section 101(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(9), and the Department's regulations under 22 CFR 40.1(d).

Days: Calendar days.

DCI: The Director of Central Intelligence.

Department: The Department of State.

Government: The U.S. Government.

Incident: A security related incident or a visa incident.

Individual: As defined in Section 303(a)(1)(B) of the Act (22 U.S.C. 4833 (a) (1) (B))

Party: Any person invited, subpoenaed or otherwise required to participate in any investigation, hearing or other official activity of a Board.

Records of a Board: Refer to documents and information, in any form, which are utilized or produced by a Board and which a Board believes should be included in its official records.

Representative: A lawyer appearing at the witness's expense, or a lawyer who represents solely the interests of the witness testifying before an ARB. U.S. Government lawyers who are obliged to represent the interests of their employer agencies are not "exclusive representatives" for purposes of these regulations.

Secretary: The Secretary of State.

Section 140(c): Section 140(c) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, *Public Law* 103-236, as amended by Section 1(d) of *Public Law* 103-415 (October 25, 1994) (8 U.S.C. 1182 note).

Security related incident: A case of serious injury, loss of life, or significant destruction of property at or related to a U.S. Government mission abroad, or a case of a serious breach of security involving intelligence activities or a foreign government directed at a U.S. mission abroad (other than a facility or installation subject to the control of a U.S. area military commander).

Visa incident: A terrorist act causing serious injury, loss of life, or significant destruction of property in the United States when there is probable cause to believe that an alien participated in the act, and when the alien was issued a visa contrary to applicable visa lookout procedures established by the Department.

12 FAM 032 ORGANIZATION

12 FAM 032.1 ARB Permanent Coordinating Committee

(CT:DS-102; 09-09-2004)

- a. **Purpose:** The Committee shall, as quickly as possible after an incident occurs, review the available facts and recommend to the Secretary to convene or not convene a Board. (Due to the 1999 revision of the law requiring the Secretary to convene a Board not later than 60 days after the occurrence of an incident, with only one additional 60 day period, the Committee should meet within 30 days of the incident, if enough information is available.) In addition, on a yearly basis, the Committee shall meet to review the ARB process, existing policies and procedures, and ensure that any necessary changes are effected.
- b. **Membership:** The Committee shall be composed of the following members:
 - (1) The Director of the Office of Management Policy (M/P), who shall chair the Committee;
 - (2) The Senior Deputy Assistant Secretary for Diplomatic Security;
 - (3) The Senior Deputy Assistant Secretary for Intelligence and Research;
 - (4) The Coordinator for Counterterrorism;
 - (5) The senior deputy assistant secretary (or secretaries, as appropriate), of the relevant regional bureau(s);
 - (6) One representative designated by and representing the DCI; and
 - (7) The Deputy Assistant Secretary for Visa Services.
- c. **Other participants:** As a result of the State-Justice Memorandum of Understanding (MOU), dated September 20, 2001, the Department of Justice has been invited to attend PCC meetings. Also, as determined by the Chairperson, representatives of other offices and agencies may be invited to work with the Committee.

12 FAM 032.2 The Board

(CT:DS-114; 08-11-2005)

- a. **Membership:** See Section 302(a) of the Act, 22 U.S.C. 4832.
- b. **Background of members:** Members should possess expertise *that* will contribute to the work of the Board, e.g., knowledge, experience or training in areas such as foreign affairs, law, security, embassy construction, intelligence, and other areas appropriate to the Board's work. In the case of a Board convened pursuant to a visa incident, at

least one Board member should have had extensive experience as a consular officer and consular manager. Only in exceptional circumstances should Board members be current employees of the U.S. Government.

- c. **Term of appointment:** A member's term shall begin upon the convening of the Board by the Secretary and shall coincide with the duration of the Board's mandate.
- d. **Security clearances:** Members and staff must have the appropriate and necessary security clearances from the Department of State and, as necessary, from other departments and agencies, before being granted access to classified information.
- e. **Inability to serve:** Should a member be unable to continue serving after appointment, the Secretary may relieve that person from duty on the Board and appoint a replacement member or, in the case of the member appointed by the DCI, the DCI may relieve that member and appoint a replacement.

12 FAM 032.3 ARB Staff

(CT:DS-114; 08-11-2005)

- a. **ARB Staff Officer:** The Director of the Office of Management Policy (M/P) shall appoint a member of the M/P staff to be the ARB Staff Officer. The ARB Staff Officer will:
 - (1) Oversee the ARB process and ensure that all policies and procedures relating to the ARB are adequate and up-to-date;
 - (2) Serve as the institutional memory and primary point of contact within the Department for ARB matters;
 - (3) Maintain all permanent files, rules, procedures, rosters, libraries, etc., for the ARB; and
 - (4) Carry out ARB related staff work for the Committee.
- b. **ARB Executive Secretary:** When a Board is convened, M/P will name an Executive Secretary to coordinate and facilitate the work of that Board. The Executive Secretary will normally be a senior Foreign Service officer or a retired senior Foreign Service officer. The tenure of the Executive Secretary will normally coincide with the tenure of the Board.
- c. **Experts, consultants and support staff:** As determined by the Board, the Department shall provide the necessary experts, consultants and support staff to enable the Board to carry out its duties effectively and efficiently. S/S-EX will provide a full-time dedicated administrative support coordinator (detailee or WAE) to assist the Executive Secretary of the ARB, as formalized in Administrative Notice No. *05-02*, dated *February 22, 2005*.

12 FAM 032.4 Assignment, Hiring, and Contracting Mechanisms

(CT:DS-102; 09-09-2004)

The full-time Administrative Support Coordinator appointed by S/S-EX will work with the appropriate offices in the Department such as S/S-EX, *DGHR*, A/OPR, etc., and shall be responsible for overseeing and coordinating the mechanisms to assign, hire and/or contract for the personnel and services required by a Board. The Coordinator will also ensure that all such personnel receive the necessary security clearances prior to assuming their duties.

12 FAM 032.5 ARB Facilities, Services, and Supplies

(CT:DS-114; 08-11-2005)

- a. As set forth in S/S-EX Administrative Notice No. *05-02* dated *February 22, 2005*, S/S-EX shall be responsible for providing a Board with necessary and appropriate office space, equipment, service, passes and permits, supplies and such other logistical support as a Board may require.
- b. S/S-EX shall budget and provide funding for ARB expenses.
- c. The ARB Staff Officer, as appropriate, shall coordinate the needs of a Board with the Administrative Support Coordinator in S/S-EX.

12 FAM 033 CONVENING, SELECTING, AND TERMINATING A BOARD

12 FAM 033.1 Convening a Board

(CT:DS-114; 08-11-2005)

- a. **Written decision:** The decision to convene a Board shall be made by the Secretary, in writing, and shall set forth the names of the Board's Chairperson and members, the purposes and jurisdiction of the Board (as established in Section 304 of the Act or, as appropriate, Section 140(c)) and its duration. The decision may be published in the Federal Register, or other similar document, if deemed appropriate by the Secretary.
- b. **Deadlines for convening a Board:** The Secretary shall decide whether or not to convene a Board not later than 60 days after the occurrence of an incident, except that such 60-day period may be extended for one

additional 60-day period if the Secretary determines that the additional period is necessary for the convening of the Board.

- c. **Delays:** The Secretary may delay the convening of a Board, if, after consultation with the chairman of the Select Committee on Intelligence of the Senate and the chairman of the Permanent Select Committee on Intelligence of the House of Representatives, the Secretary determines that the establishment of a Board would compromise intelligence sources or methods. The Secretary shall promptly advise the chairmen of such committees of each determination to delay the establishment of a Board.
- d. **Security related incidents:**
- (1) A Board shall be convened with respect to a security related incident if, and only if, the following two determinations are made; provided, however, that if these determinations are made, a Board need not be convened if the Secretary also determines that the case clearly involves only causes unrelated to security:
 - (a) That the incident involved serious injury, loss of life, or significant destruction of property or a serious breach of security involving intelligence activities of a foreign government; and
 - (b) That the incident occurred at or related to a U.S. Government mission abroad (other than a facility or installation subject to the control of a U.S. area military commander).
 - (2) The Secretary of State is not required to convene a Board in the case of an incident that involves any facility, installation, or personnel of the Department of Defense (*DOD*) with respect to which the Secretary has delegated operational control of security functions abroad to the Secretary of Defense pursuant to section 106 of the Act. In any such case, the Secretary of Defense shall conduct an appropriate inquiry and report the findings and recommendations of such inquiry, and the action taken with respect to such recommendations, to the Secretary of State and Congress.
- e. **Visa incidents:** A Board shall be convened with respect to a visa incident if, and only if, the following three determinations are made:
- (1) That the incident involved a terrorist act causing serious injury, loss of life, or significant destruction of property in the United States;
 - (2) That there is probable cause to believe that a specifically identified alien was a participant in the terrorist act; and
 - (3) That the alien was issued a visa on or after May 1, 1996; that the alien's name was at the time of visa issuance included in the Department's Automated Visa Lookout System (*AVLOS*); and that the visa was issued as a result of a failure by the consular officer to

adhere to the procedures required to be followed by the inclusion of the name in such visa lookout system.

- f. **Notification to Congress:** Whenever the Secretary convenes a Board, the Secretary shall promptly inform the chairman of the Committee on Foreign Relations of the Senate and the Speaker of the House of Representatives:
- (1) That a Board has been convened;
 - (2) The membership of the Board; and
 - (3) Other appropriate information about the Board.

12 FAM 033.2 Selection, Appointment, and Compensation of Members

(CT:DS-102; 09-09-2004)

- a. **Selection:** The ARB Staff Officer shall maintain a list of potential members and at the Committee's yearly meeting the list will be reviewed and updated. If the Committee recommends that the Secretary convene a Board, it will forward a list of potential Board members to the Secretary for approval. The Committee will coordinate its activities in this area with the DCI's representative.
- b. **Appointment:** Members selected by the Secretary and the DCI for appointment to a Board will, as necessary, be processed for employment purposes by S/S-EX.
- c. **Compensation:** Members who are not Federal officers or employees, unless they waive compensation, shall be paid (per the statute) at a rate not to exceed the maximum rate of basic pay payable for level GS 15, Step 10 of the General Schedule (5 U.S.C. 5332) for each day (including travel time) during which they are engaged in the actual performance of Board duties. Members who are Federal officers or employees shall receive no additional pay by reason of service on a Board.

12 FAM 033.3 Timeframe of a Board

(CT:DS-39; 08-15-1994)

- a. **Initiating activities:** A Board shall begin its work within a reasonable period of time following the Secretary's decision to convene the Board.
- b. **Ample time:** A Board shall be given ample time to conduct its investigations and write its report.
- c. **Extension of time:** Should a Board decide that the time allotted for its work is insufficient, it may apply, in writing, to the Secretary for an extension of time.

- d. **Termination:** A Board's authority shall terminate on the date set forth in the Secretary's order convening the Board, or on such date as is subsequently set by the Secretary.

12 FAM 034 BOARD POWERS AND PROCEDURES

12 FAM 034.1 Powers of a Board and Chairperson

(CT:DS-57; 03-26-1997)

- a. **Board powers:** In accordance with Section 303 of the Act, the Board shall have the power should it find it necessary to use it:
- (1) With respect to any individual to:
 - (a) Administer oaths and affirmations;
 - (b) Require that depositions be given and interrogatories be answered; and
 - (c) Require the attendance and presentation of testimony and evidence by such individual.
 - (2) With respect to persons not included under the Act's definition of individual to:
 - (a) Administer oaths and affirmations; and
 - (b) Require that depositions be given and interrogatories be answered.
 - (3) Determine Board procedures for hearings, investigations and other such activities of the Board;
 - (4) Issue subpoenas, where necessary and in accordance with Section 303(a)(3) of the Act; and
 - (5) Make findings and recommendations as provided in Section 304 of the Act, or, as appropriate, Section 140(c).
- b. **Powers of the Chairperson:** The Board Chairperson shall have the power to:
- (1) Regulate the course and conduct of Board activities, including but not limited to holding hearings and controlling their course and conduct; and
 - (2) Designate another member to act in his or her stead in case of temporary absence.

12 FAM 034.2 Board Procedures

12 FAM 034.2-1 Investigations

(CT:DS-75; 05-07-2001)

- a. **Venue:** The Board may conduct its investigations, including hearings, within the United States or abroad. When appropriate and cost effective, the Board will make every reasonable effort to take sworn testimony within the continental United States (CONUS).
- b. **Use of investigative personnel:** The Board may use, subject to the concurrence of the sending office and/or agency, personnel from such entities as the Bureau of Diplomatic Security (DS) or the Office of the Inspector General (OIG) to assist its investigative activities.
- c. **Noninterference with other authorities:** The Department will notify the Department of Justice (DOJ) of any decision by the Secretary to convene an Accountability Review Board shortly after such a decision is made. The Board shall carry out its activities in a manner that does not interfere with or compromise the work of duly authorized authorities, such as law enforcement, security, intelligence or diplomatic activities, either U.S. or foreign.
- d. **Clearance requirement abroad:** Prior to undertaking any Board activities outside the United States, the Board must obtain the concurrence of the chief of mission (COM) or the Deputy Secretary of State and, if deemed appropriate by the COM or the Deputy Secretary, of the host government to such activities.
- e. **Conduct of activities abroad:** Any Board activities undertaken abroad must be conducted in a manner consistent with local law and custom, as determined by the COM or the Department. Activities abroad will be closed to the public unless the Board desires they be open and the COM or the Department concurs.

12 FAM 034.2-2 Evidence

(CT:DS-39; 08-15-1994)

The Board may accept any evidence determined by the Chairperson to be relevant and material to the investigation. The Federal Rules of Evidence are not applicable to the Board.

12 FAM 034.2-3 Witness Rights

(CT:DS-75; 05-07-2001)

- a. **Representation:**

- (1) Any person appearing before or meeting with the Board or a member(s) of the Board or responding to written questions issued by the Board, whether acting voluntarily or by subpoena and whether sworn or unsworn, is entitled to be accompanied and advised by an exclusive representative at the person's expense consistent with 12 FAM 031.3. Foreign and Civil Service employee witnesses may be represented by the appropriate representation (e.g., the American Foreign Service Association—AFSA). Except to the extent that their presence is required by the DCI for the purpose of protecting sources and methods, the Board may bar from ARB proceedings government lawyers who are not the exclusive representatives of persons appearing before or meeting with the Board;
- (2) An employee assigned domestically who is notified to appear as a witness by the Board will, if the employee so requests, be granted 72 hours in order to obtain representation. Should the employee desire additional time, a written request for such time may be made to the Chairperson; and
- (3) An employee assigned abroad who is notified to appear as a witness by the Board, and who wishes to be represented by someone other than an exclusive representative, may submit a written request to the Chairperson, requesting a reasonable amount of time to obtain such representation. The amount of time granted by the Chairperson will depend on such factors as the scope of the ARB process; the limits of the employee's expected testimony, and the feasibility of obtaining counsel at that location.

b. Advising:

- (1) Witnesses responding to or appearing before the Board or a member(s) of the Board must be given reasonable written notice of the proceeding's time, place and nature. They must also be advised, in writing, of the authority under which the proceeding is being conducted and the purpose(s) to which the information they give may be used. Finally, the witnesses are to be advised of their legal right to refuse to answer self-incriminating questions and of their right to have counsel present; and
- (2) The Department shall notify post employees concerning their rights in connection with ARB investigations prior to the arrival of the ARB investigative team at post.

c. Travel expenses:

- (1) Subpoenaed witnesses shall be paid the same fee and mileage allowances that are paid subpoenaed witnesses in the courts of the United States;

- (2) The Department will pay the travel and per diem expenses, at U.S. Government rates, for one exclusive representative to travel to the location abroad, whenever an ARB conducts activities abroad involving employees; and
 - (3) Travel expenses of a representative of a witness other than the witness' exclusive representative shall be the responsibility of that witness.
- d. **Presentations:** Subject to 12 FAM 034.2-2, a witness shall have the opportunity to bring to the Board's attention, areas of inquiry, material, and the names of additional potential witnesses.

12 FAM 034.2-4 Confidentiality and Safeguarding of Classified Information

(CT:DS-75; 05-07-2001)

- a. **Adopting procedures:** (See 22 U.S.C. 4833.) Such procedures must ensure the protection of classified information and administrative confidentiality of testimony affecting personal privacy or ongoing criminal investigations. In addition, the Board will take care to protect Sensitive But Unclassified (SBU) information, such as security policies and procedures.
- b. **DCI role:** DCI will establish the level of protection and standards required for intelligence information, including appointing a representative, as necessary, to attend Board activities where classified intelligence information might be utilized.

12 FAM 034.2-5 Classification Authority

(CT:DS-57; 03-26-1997)

The Board does not have original classification authority. The Director of M/P will exercise classification authority for materials originating from Board activities.

12 FAM 034.2-6 Records

(CT:DS-39; 08-15-1994)

Records pertaining to Board activities and proceedings shall be kept by the ARB Staff Officer and the DCI in accordance with Section 303(c) of 22 U.S.C. 4833.

12 FAM 035 FINDINGS AND RECOMMENDATIONS

12 FAM 035.1 Findings

(CT:DS-57; 03-26-1997)

- a. **Examination:** A Board shall examine the facts and circumstances surrounding the security related incident or a visa incident.
- b. **Written submission:** In its report to the Secretary, a Board shall make written findings, which may be classified, as necessary.

12 FAM 035.2 Recommendations

12 FAM 035.2-1 Program Recommendations

(CT:DS-39; 08-15-1994)

- a. See the Act (Line 4834(b)).
- b. **Confidentiality:** In its program recommendations, the Board shall take care to safeguard classified information and afford such information the required measure of protection. In addition, any sections of such recommendations affecting personal privacy or ongoing law enforcement investigations shall receive appropriate confidentiality and other applicable protections necessary under law.

12 FAM 035.2-2 Personnel Recommendations

(CT:DS-57; 03-26-1997)

- a. **Requirement:** See the Act (Line 4834(c)).
- b. **Standard for determination:** See the Act.
- c. **Confidentiality:** In its personnel recommendations, the Board shall take care to safeguard classified information and afford such information the required measure of protection. In addition, any sections of such recommendations affecting personal privacy or ongoing law enforcement investigations shall receive appropriate confidentiality and other applicable protections necessary under law.
- d. **Signatures and dissent:** Each personnel recommendation shall be signed by all members, thus signifying their support for and agreement with the recommendation. In cases where a member dissents from part or all of such a recommendation, that member shall submit written dissenting views. Any such dissenting views shall be attached to the

recommendation and shall be signed by the dissenting member.

- e. **Notification of the head of agency or instrumentality:** The Board shall send a separate notification on each individual who is the subject of a personnel recommendation to the head of agency or instrumentality concerned. Such notification shall contain, at a minimum:
- (1) The Board's findings of reasonable cause, together with all relevant evidence supporting such findings;
 - (2) The Board's recommendations concerning investigatory or disciplinary action; and
 - (3) Any dissenting views.
- f. **Notification of the individual:** The Board shall send notification to each individual who is the subject of a personnel recommendation. Such notification shall contain, at a minimum, a covering statement informing the individual that:
- (1) The Board is acting pursuant to Section 304(c) of the Act or as the case may be, Section 140(c);
 - (2) The report does not represent the initiation of disciplinary or other adverse action against the individual; and
 - (3) The decision to initiate disciplinary or other adverse action against the individual rests with the individual's employing agency, or other competent authority.

12 FAM 036 REPORTS

12 FAM 036.1 Types of Reports

(CT:DS-114; 08-11-2005)

Section 304 of the Act envisages three types of reports *that* generally will also be appropriate under Section 140(c):

- (1) A Board's report to the Secretary on its findings and any program recommendations;
- (2) The Secretary's report to the Congress on any program recommendations and the actions taken on them; and
- (3) Report(s) to the Congress by the head(s) of the concerned agency(ies) or instrumentality(ies) on any personnel recommendations.

12 FAM 036.2 The Board's Report to the Secretary

(CT:DS-39; 08-15-1994)

- a. **Content:** The Board's Report to the Secretary shall include the Board's findings, any program recommendations and, regardless of agency or instrumentality concerned, any personnel recommendations. The report shall be based upon a consideration of the entire record of information obtained by the Board.
- b. **Confidentiality:** In its Report to the Secretary, the Board shall take care to safeguard classified information and afford it the measure of protection required. In addition, sections of the Report affecting personal privacy or ongoing law enforcement investigations shall receive appropriate confidentiality and other applicable protections required under law.
- c. **Signatures and dissent:** All members shall sign the Board's report and thereby signify their support for and agreement with the report. In cases where a member dissents from any of the findings or recommendations, that member shall submit written dissenting views. Any such dissenting views shall be attached to the Board's report and shall be signed by the dissenting member.

12 FAM 036.3 Reports to Congress

(CT:DS-75; 05-07-2001)

- a. **Program recommendations:** The Secretary shall, not later than 90 days after the receipt of a Board's program recommendations, submit a report to the Congress on each such recommendation and the action taken with respect to that recommendation.
- b. **Personnel recommendations:** The head of the Federal agency or instrumentality receiving a report from a Board that contains a finding of reasonable cause under Section 304(c) of the Act or Section 140(c) shall, not later than 30 days after receiving that finding, transmit to the Congress a report specifying:
 - (1) The nature of the case and a summary of the evidence transmitted by the Board; and
 - (2) The decision by the Federal agency or instrumentality to take disciplinary or other appropriate action against that individual or the reasons for deciding not to take disciplinary action or other action with respect to that individual.
- c. **Distribution of copies of reports on personnel recommendations:** A copy of each personnel recommendation report to the Congress shall be sent to the Secretary, except that this is not required when the Secretary is the head of the individual's agency or instrumentality. In addition, a copy of such a report shall be sent to the individual concerned, provided that doing so does not violate the employing agency's own procedures or

regulations.

12 FAM 037 THROUGH 039 UNASSIGNED