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Civil Aeronautics Board
Civil Service Commission
Commodity Credit Corporation
Consumer and Marketing Service
Defense Department
Federal Aviation Administration
Federal Communications Commission
Federal Maritime Commission
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1949–1963

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PART 213—EXCEPTED SERVICE

Department of Commerce

Section 213.3314 is amended to show that one position of Confidential Assistant to the Director, Bureau of the Census, is excepted under Schedule C during the 1970 Decennial Census period. Effective on publication in the FEDERAL REGISTER, paragraph (d) is added to § 213.3314 as set out below.

§ 213.3314 **Department of Commerce.**

* * * * *

(d) *Bureau of the Census.* (1) During the 1970 Decennial Census period, one Confidential Assistant to the Director.

(5 U.S.C. 3301, 3302, E.O. 10577; 3 CFR 1954–1958 Comp., p. 218)

UNITED STATES CIVIL SERVICE COMMISSION,
[SEAL] JAMES C. SPRY,
Executive Assistant to the Commissioners.

[F.R. Doc. 69-13208; Filed, Nov. 4, 1969; 8:49 a.m.]

PART 213—EXCEPTED SERVICE

Interstate Commerce Commission

Section 213.3322 is amended to show that one position of Secretary to the Congressional Liaison Officer is in Schedule C. Effective on publication in the FEDERAL REGISTER, paragraph (f) is added to § 213.3322 as set out below.

§ 213.3322 **Interstate Commerce Commission.**

* * * * *

(f) One Secretary to the Congressional Liaison Officer.

(5 U.S.C. 3301, 3302, E.O. 10577; 3 CFR 1954–1958 Comp., p. 218)

UNITED STATES CIVIL SERVICE COMMISSION,
[SEAL] JAMES C. SPRY,
Executive Assistant to the Commissioners.

[F.R. Doc. 69-13209; Filed, Nov. 4, 1969; 8:50 a.m.]

Title 7—AGRICULTURE

Chapter II—Food and Nutrition Service, Department of Agriculture

PART 225—SPECIAL FOOD SERVICE PROGRAM FOR CHILDREN

Appendix—Second Apportionment of the Special Food Service Program for Children Funds Pursuant to the National School Lunch Act, Fiscal Year 1969

Amendments of reapportionment for the States and total as listed below:

A second apportionment pursuant to section 13, National School Lunch Act, as amended, food assistance and nonfood assistance funds available for fiscal year 1969 and through September 30, 1969, was published in the FEDERAL REGISTER on August 2, 1969 (34 F.R. 12623). The second apportionment is amended for the States and total listed as follows:

State	*Total Apportionment*
Indiana	$92,597
Maine	38,247
Pennsylvania	32,240
Texas	420,000
Trust Territory	11,000
Total	8,396,297

(Sec. 13, 82 Stat. 117; 42 U.S.C. 1761)

Dated: October 30, 1969.

HOWARD P. DAVIS,
Acting Administrator.

[F.R. Doc. 69-13204; Filed, Nov. 4, 1969; 8:49 a.m.]

Chapter VIII—Agricultural Stabilization and Conservation Service (Sugar), Department of Agriculture

SUBCHAPTER H—DETERMINATION OF WAGE RATES

PART 863—SUGARCANE; FLORIDA

Fair and Reasonable Wage Rates

Pursuant to the provisions of section 301(c)(1) of the Sugar Act of 1948, as amended (herein referred to as "act"), after investigation and consideration of the evidence obtained at the public hearing held in Belle Glade, Fla., on July 1, 1969, the following determination is hereby issued:

Sec.
863.28 Requirements.
863.29 Applicability of wage requirements.
863.30 Payment of wages.
863.31 Evidence of compliance.
863.32 Subterfuge.
863.33 Claim for unpaid wages.
863.34 Failure to pay all wages in full.
863.35 Checking compliance.

AUTHORITY: §§ 863.28 to 863.35 issued under secs. 301, 403, 61 Stat. 929, as amended, 932; 7 U.S.C. 1131, 1153.

§ 863.28 **Requirements.**

A producer of sugarcane in Florida shall be deemed to have complied with the wage provisions of the act if all persons employed on the farm in production, cultivation, or harvesting work, as provided in § 863.29, shall have been paid in accordance with the following:

(a) *Wage rates.* All such persons shall have been paid in full for all such work and shall have been paid wages in cash therefor at rates required by existing legal obligations, regardless of whether those obligations resulted from an agreement (such as a labor union agreement) or were created by State or Federal legislative action, or at rates as agreed upon between the producer and the worker, whichever is higher, but not less than the following, which shall become effective on November 10, 1969, and shall remain in effect until amended, superseded, or terminated.

(1) *Work performed on a time basis.*

Class of Worker	*Rate per hour*
(i) Tractor drivers and principal operators of mechanical harvesting and loading equipment	$1.90
(ii) All other workers, including those employed to assist in the operation of mechanical harvesting and loading equipment such as harvester cutter blade operators	$1.65

(2) *Workers 14 and 15 years of age and full-time students when employed on a time basis.* For workers 14 and 15 years of age and, where the Secretary of Labor has by certificate or order provided for the employment of full-time students 14 years of age or older on a part-time basis (not to exceed 20 hours in any workweek during the time school is in session) or on a part-time or full-time basis during school vacations, the rate shall be not less than 85 percent of the applicable hourly rate for the class of worker prescribed in subparagraph (1) of this paragraph. (The act provides that the employment of workers under 14 years of age, or the employment of workers 14 and 15 years of age for more than 8 hours per day, will result in a deduction from Sugar Act payments to the producer.)

(3) *Apprentice operators of tractors and mechanical harvesting and loading equipment when employed on a time basis.* The hourly wage rate for a learner or apprentice, who is being trained as a tractor driver or the principal operator of mechanical harvesting or loading equipment, shall be not less than $1.65. The training period for such workers shall not exceed 6 workweeks.

(4) *Handicapped workers when employed on a time basis.* The wage rate for workers certified by the Regional Director, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, 1371 Peachtree Street NE., Atlanta, Ga. 30309, to be handicapped because of age or physical or mental deficiency or injury, and whose productive capacity is thereby impaired, shall be not less than 75 percent of the applicable hourly rate for the class of worker prescribed in subparagraph (1) of this paragraph.

(5) *Work performed on a piecework basis.* The piecework rate for any operation shall be as agreed upon between the producer and the worker. The hourly rate of earnings of each worker employed on piecework during each pay period (not to be in excess of 2 weeks) shall average for the time worked at piecework rates during such pay period not less than the applicable hourly rate for the class of worker prescribed in subparagraph (1), (2), (3), or (4) of this paragraph.

(b) *Compensable working time.* For work performed under paragraph (a) of this section, compensable working time commences at the time the worker is required to start work and ends upon completion of work in the field, except time taken out for meals during the working

day. If the producer requires the operator of mechanical equipment, driver of animals, or any other class of worker to report to a place other than the field, such as an assembly point or tractor shed located on the farm, the time spent in transit from such place to the field and from the field to such place is compensable working time. Time spent in performing work directly related to the principal work performed by the worker, such as servicing equipment, is compensable working time. Time of the worker while being transported from a central recruiting point or labor camp to the farm is not compensable working time.

(c) *Equipment necessary to perform work assignment.* The producer shall furnish without cost to the worker any equipment required in the performance of any work assignment. The worker may be charged for the cost of such equipment in the event of its loss or destruction through negligence of the worker. Equipment includes, but is not limited to, hand and mechanical tools and special wearing apparel, such as boots and raincoats, required to discharge the work assignment.

§ 863.29 Applicability of wage requirements.

The wage requirements of this part apply to all persons who are employed or who work on the farm in operations directly connected with the production, cultivation, or harvesting of sugarcane on any acreage from which sugarcane is marketed or processed for the production of sugar, harvested for seed, or any acreage which qualifies as bona fide abandoned. Such persons include field overseers or supervisors while directing other workers, and those workers employed by an independent contractor who perform services on the farm. The wage requirements are not applicable to persons who voluntarily perform work without pay on the farm for a religious or charitable institution or organization; inmates of a prison who work on a farm operated by the prison; truck drivers employed by a contractor engaged only in hauling sugarcane; members of a cooperative arrangement among producers for the exchange of labor to be performed by themselves or members of their families; persons who have an agreement with the producer to perform all work on a specified acreage in return for a share of the crop or crops proceeds if such share, including the share of any Sugar Act payments, results in earnings at least as much as would otherwise be received in accordance with the requirements of this part for the work performed; independent contractors and members of their immediate families; or workers performing services which are indirectly connected with the production, cultivation, or harvesting of sugarcane, including but not limited to mechanics, welders, and other maintenance workers and repairmen.

§ 863.30 Payment of wages.

Workers shall be paid in cash for all work performed, except to the extent that the cash payment is reduced by the following deductions: cash advances made to the worker by the producer; the market value or the amount agreed upon for supplies furnished by the producer at the request of the worker; meals, lodging, and transportation expense which the producer agreed to furnish for a stated amount; and mandatory deductions such as taxes and Social Security contributions. In addition, a producer may deduct the amounts he has paid to a third party on behalf of the worker in connection with his employment as a farm worker which are acknowledged in writing signed by the worker or his agent or substantiated by other evidence acceptable to the county ASC committee to be an indebtedness of the worker, and which cover the expense of services and benefits furnished the worker by the third party, and which the worker or his agent has agreed may be deducted from his wages, such as public utilities, medical services, group hospitalization or other insurance for the benefit of the worker. As evidence of payments to a third party for which a deduction is made from the earnings of a worker, the producer shall maintain for a period of 3 years, for the inspection of the worker and the local county ASCS office, receipted bills or other written satisfactory evidence that support such deductions. Payments made to a labor contractor, supervisor, or labor trainer, or the cost of meals, lodging, transportation, and insurance covering injury or illness resulting from employment, any or all of which the producer agreed to furnish the worker free of charge, shall not be deducted from cash wages due the worker. When any deductions are made, the producer shall furnish to the worker, at time of settlement, a statement showing the gross amount of wages due for work performed and the amount of each deduction properly identified.

§ 863.31 Evidence of compliance.

Each producer subject to the provisions of this part shall keep and preserve, for a period of 3 years following the date on which his application for a Sugar Act payment is filed, such wage records as will demonstrate that each worker has been paid in full in accordance with the requirements of this part. Wage records should set forth dates work was performed, the class of work performed, units of work (piecework or hours), agreed upon rates per unit of work, total earnings and any permissible deductions, and the amount paid each worker. The producer shall furnish upon request to the appropriate Agricultural Stabilization and Conservation County Committee such records or other evidence as may satisfy such committee that the requirements of this part have been met.

§ 863.32 Subterfuge.

The producer shall not reduce the wage rates to workers below those determined in accordance with the requirements of this part through any subterfuge or device whatsoever.

§ 863.33 Claim for unpaid wages.

Any person who believes he has not been paid in accordance with this part may file a wage claim with the local Agricultural Stabilization and Conservation County Committee against the producer on whose farm the work was performed. Such claim must be filed on Form SU-191, entitled "Claim Against Producer for Unpaid Wages," within 2 years from the date the work with respect to which the claim is made was performed. Detailed instructions and Forms SU-191 are available at the local county ASCS office. Upon receipt of a wage claim the county office shall thereupon notify the producer against whom the claim is made concerning the representation made by the worker. The county ASC committee shall arrange for such investigation as it deems necessary and the producer and worker shall be notified in writing of its recommendation for settlement of the claim. If either party is not satisfied with the recommended settlement, an appeal may be made to the Florida State Agricultural Stabilization and Conservation Committee, 401 Southeast First Avenue, Gainesville, Fla. 32601, which shall likewise consider the facts and notify the producer and worker in writing of its recommendation for settlement of the claim. If the recommendation of the State ASC Committee is not acceptable, either party may file an appeal with the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture, Washington, D.C. 20250. All such appeals shall be filed within 15 days after the date the written notice of the recommended settlement is mailed by the respective committee, otherwise such recommended settlement will be applied in making payments under the act. If a claim is appealed to the Deputy Administrator, State and County Operations, his decision shall be binding on all parties insofar as payments under the act are concerned. Appeals procedures are set forth and explained fully in Part 780 of this Title 7 of the Code of Federal Regulations.

§ 863.34 Failure to pay all wages in full.

(a) Notwithstanding the provisions of this Part requiring that all persons employed on the farm in the production, cultivation, or harvesting of sugarcane be paid in full for all such work as one of the conditions to be met by a producer for payment under the act, if the producer has failed to meet this condition but has met all other conditions, a portion of such payment, representing the remainder after deducting from the payment the amount of accrued unpaid wages, may be disbursed to producer(s) upon a determination by the county committee (1) that the producer has made a full disclosure to the county committee or its representative of any known failure to pay all workers on the farm wages in full as a condition for payment under the Sugar Act; and (2) that either (i) the failure to pay all workers their wages in full was caused by the financial inability of the producer; or (ii) the failure to pay all workers in full was caused by an inadvertent error or was not the fault of the producer or his agent, and the producer has used reasonable diligence to locate

and to pay in full the wages due all such workers. If the county committee makes the determination as heretofore provided in this paragraph, such committee shall cause to be deducted from the payment for the farm the full amount of the unpaid wages which shall be paid promptly to each worker involved if he can be located, otherwise the amount due shall be held for his account, and the remainder of the payment for the farm, if any, shall be made to the producer. If the county committee determines that the producer did not pay all workers in full because of an inadvertent error that was not discovered until after he received his Sugar Act payment, the producer shall be placed on the claims control record for the total amount of the unpaid wages.

(b) Except as provided in paragraph (a) of this section, if upon investigation the county committee determines that the producer failed to pay all workers on the farm the required wages, the entire Sugar Act payment with respect to such a farm shall be withheld from the producer until such time as evidence is presented to the county committee which will satisfy the county committee that all workers have been paid in full the wages earned by them; or if unpaid workers cannot be located, and the county committee determines that the producer used reasonable diligence to locate such workers, the amounts of unpaid wages shall be deducted from the Sugar Act payment computed for the farm and the balance released to the producer after the expiration of 1 year from the date payment would otherwise be made. If payment has been made to the producer prior to the county committee's determination that all workers on the farm have not been paid in full, the producer shall be placed on the claims control record for the total payment until the county committee determines that all workers on the farm have been paid in full, the producer refunds the entire amount of debt, or a setoff in the amount of the debt is made from a program payment otherwise due the producer, or the county committee after determining that the producer used reasonable diligence to locate such workers has recovered from such producer the amount of unpaid wages computed for the farm.

§ 863.35 Checking compliance.

The procedures to be followed by county ASCS offices in checking compliance with the wage requirements of this part are set forth under the heading "Wage Rate Determinations" in Handbook 3-SU, issued by the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service. Handbook 3-SU may be inspected at local county ASCS offices, and copies may be obtained from the Florida State ASCS Office, 401 Southeast First Avenue, Gainesville, Fla. 32601.

STATEMENT OF BASES AND CONSIDERATIONS

General. The foregoing determination provides fair and reasonable wage rates to be paid for work performed by persons employed on the farm in the production cultivation, or harvesting of sugarcane in Florida as one of the conditions with which producers must comply to be eligible for payment under the act.

Requirements of the act and standards employed. Section 301(c)(1) of the act requires that all persons employed on the farm in the production, cultivation, or harvesting of sugarcane with respect to which an application for payment is made, shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearng, and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended (i.e., cost of living, prices of sugar and byproducts, income from sugarcane, and cost of production), and the differences in conditions among various sugar-producing areas.

Wage determination. This determination differs from the prior determination in that the minimum wage rates for work performed on a time basis are increased 10 cents per hour—to $1.90 for tractor drivers and principal operators of mechanical harvesting and loading equipment, and to $1.65 for all other workers. In addition, a provision has been added requiring producers, who make payments in connection with the worker's employment to a third party for items, such as utility bills, which the worker or his agent has agreed may be deducted from his wages, to maintain on file receipted bills for the inspection of the worker or the local county ASCS office for a period of 3 years. Other provisions of the prior determination remain unchanged.

A public hearing was held in Belle Glade, Fla., on July 1, 1969, at which interested persons were afforded the opportunity to testify with respect to whether the wage rates established for Florida sugarcane fieldworkers in the determination which became effective on November 18, 1968, continue to be fair and reasonable under existing circumstances, or whether such determination should be amended. Testimony was presented by representatives of processor-producers, cooperative producers, independent producers, and fieldworkers.

Representatives of producers recommended that the wage rate and other provisions of the prior determination be continued for the 1969–70 season. These witnesses testified that the producers' ability to pay higher wages has been restrained by acreage reductions and higher production costs, and that sugar prices and worker productivity have not kept pace with wage rates. The witnesses pointed out the helpfulness to their employee training programs of the provision which allows the payment of an apprentice rate for a maximum period of 6 weeks to inexperienced operators of mechanical equipment. They stated that additional worker classifications applicable to mechanical harvesting are not needed at present, since workers will be employed as harvester operators only for experimental purposes.

An independent producer of sugarcane recommended that a producer be deemed to be in compliance with the minimum hourly guarantee requirements if the individual earnings of not less than 90 percent of all workers employed on a piecework basis average for each pay period not less than the applicable hourly rate prescribed in the determination. The witness testified that this would discourage the use by slow workers of the minimum hourly guarantee as a tool to put forth the least possible effort.

Representatives of workers appearing at the hearing recommended a minimum wage ranging from $1.70 to $2.50 per hour. In support of this recommendation, the witnesses stated that an hourly increase of 15 cents in the minimum rate is necessary to offset the cost of living increase, and that workers in the Glades area of Florida earn wages ranging from $2.36 (citrus workers) to $4.15 (construction workers) per hour. One witness recommended that producers advertise for labor at progressively higher rates until domestic workers are attracted to harvest work; that workers receive portal-to-portal compensation rather than pay for actual field time only; that young people 14 and 15 years of age not be permitted to work; that a neutral arbitrator be provided to settle row price disputes; and that each worker be provided a record of his starting and finishing time, and number of hours worked. This witness also recommended that the Department publish the criteria used each year in determining wages.

Consideration has been given to the recommendations and testimony presented at the public hearing; to the returns, costs, and profits of producing surgarcane obtained by field survey for recent crops and recast in terms of conditions likely to prevail for the 1969 crop; and to other standards generally considered in wage determinations, including the cost of living and the producers' ability to pay. The increase during the past year in the cost of living has been in excess of 5 percent. Although the 1969 crop has been curtailed by restrictions on total acreage, present prospects are for a good crop, and the average producer is expected to make a profit. Analysis of all data and factors indicate that the increases in the minimum wage rates established in this determination are fair and reasonable and are within the producers' ability to pay.

This determination provides, in those instances where the producer pays utility bills or other obligations for the account of the worker and the worker has agreed in advance that such obligations may be deducted from his wage, that such deductions may be made provided the producer maintains receipted bills or other evidence for at least 3 years for the inspection of the worker or the local county ASCS office. Deductions from a worker's pay for consumer debts to a third party, such as household appliances, not connected with the worker's

employment as a farm worker are not proper and may not be withheld from wages due the worker. In addition, the producer is required to furnish to the worker an itemized statement showing the gross amount of wages due, and each deduction properly identified.

Section 301(c)(1) of the Sugar Act requires that all persons be paid in full at rates not less than those determined to be fair and reasonable. For this reason, the recommendation that the individual earnings of not less than 90 percent of all workers employed on a piecework basis average for each pay period not less than the applicable minimum hourly rate has not been adopted.

Information available to the Department indicates that unskilled workers employed on a piecework basis as cane cutters earned an average of approximately $1.90 per hour during the 1968–69 harvest, as compared to the minimum rate of $1.55 per hour. The hourly rates for tractor drivers and principal operators of mechanical harvesting and loading equipment ranged from $1.80 up to $2. The unskilled labor force in Florida cane fields is composed primarily of workers imported from the British West Indies, while the skilled and semiskilled labor force is composed of local domestic workers who are customarily employed on a year-round basis.

This determination is issued on a continuing basis and will remain in effect until amended or terminated. However, the Department will keep the wage situation under review and will hold hearings annually and conduct such investigations as may be necessary.

Accordingly, I hereby find and conclude that the foregoing wage determination will effectuate the wage provisions of the Sugar Act of 1948, as amended.

NOTE: The recordkeeping and reporting requirements of these regulations have been approved by, and subsequent recordkeeping and reporting requirements will be subject to approval of, the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

Effective date. This determination shall become effective on November 10, 1969.

Signed at Washington, D.C., on October 30, 1969.

CLIFFORD M. HARDIN,
Secretary of Agriculture.

[F.R. Doc. 69-13124; Filed, Nov. 4, 1969; 8:45 a.m.]

PART 864—WAGES; SUGARCANE; LOUISIANA

Fair and Reasonable Wage Rates

Pursuant to the provisions of section 301(c)(1) of the Sugar Act of 1948, as amended (herein referred to as "act"), after investigation and consideration of the evidence obtained at the public hearing held in Houma, La., on June 26, 1969, the following determination is hereby issued.

Sec.
864.23 Requirements.
864.24 Applicability of wage requirements.
864.25 Payment of wages.
864.26 Evidence of compliance.
864.27 Subterfuge.
864.28 Claim for unpaid wages.
864.29 Failure to pay all wages in full.
864.30 Checking compliance.

AUTHORITY: §§ 864.23 to 864.30 issued under secs. 301, 403, 61 Stat. 929, as amended, 932; 7 U.S.C. 1131, 1153.

§ 864.23 Requirements.

A producer of sugarcane in Louisiana shall be deemed to have complied with the wage provisions of the act if all persons employed on the farm in production, cultivation, or harvesting work, as provided in § 864.24, shall have been paid in accordance with the following:

(a) *Wage rates.* All such persons shall have been paid in full for all such work and shall have been paid wages in cash therefor at rates required by existing legal obligations, regardless of whether those obligations resulted from an agreement (such as a labor union agreement) or were created by State or Federal legislative action, or at rates as agreed upon between the producer and the worker, whichever is higher, but no less than the following, which shall become effective on November 10, 1969, and shall remain in effect until amended, superseded, or terminated:

(1) *For work performed on a time basis.*

Class of Worker:

Harvest work	*Rate per hour*
Harvester and loader operators	$1.55
Tractor drivers, truck drivers, harvester bottom blade operators, and hoist operators	1.50
All other harvesting workers	1.40

Production and cultivation work	*Rate per hour*
Tractor drivers	1.45
All other production and cultivation workers	1.40

(2) *Workers 14 and 15 years of age and full-time students when employed on a time basis.* For workers 14 and 15 years of age and, where the Secretary of Labor has by certificate or order provided for the employment of full-time students 14 years of age or older on a part-time basis (not to exceed 20 hours in any workweek during the time school is in session) or on a part-time or a full-time basis during school vacations, the rate shall be not less than 85 percent of the applicable hourly rate for the class of worker prescribed in subparagraph (1) of this paragraph. (The act provides that the employment of workers under 14 years of age, or the employment of workers 14 and 15 years of age for more than 8 hours per day, will result in a deduction from Sugar Act payments to the producer.)

(3) *Handicapped workers when employed on a time basis.* The wage rate for workers certified by the Regional Director, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, 1931 Ninth Avenue South, Birmingham, Ala. 35205, to be handicapped because of age or physical or mental deficiency or injury, and whose productive capacity is thereby impaired, shall be not less than 75 percent of the applicable hourly rate for the class of worker prescribed in subparagraph (1) of this paragraph.

(4) *Work performed on a piecework basis.* The piecework rate for any operation shall be as agreed upon between the producer and the worker. The hourly rate of earnings of each worker employed on piecework during each pay period (not to be in excess of 2 weeks) shall average for the time worked at piecework rates during such pay period not less than the applicable hourly rate for the class of worker prescribed in subparagraphs (1), (2), and (3) of this paragraph.

(b) *Compensable working time.* For work performed under paragraph (a) of this section, compensable working time commences at the time the worker is required to start work and ends upon completion of work in the field, except time taken out for meals during the working day. If the producer requires the operator of mechanical equipment, driver of animals, or any other class of worker to report to a place other than the field, such as an assembly point or a tractor shed located on the farm, the time spent in transit from such place to the field and from the field to such place is compensable working time. Time spent in performing work directly related to the principal work performed by the worker, such as servicing equipment, is compensable working time. Time of the worker while being transported from a central recruiting point or labor camp to the farm, is not compensable working time.

(c) *Equipment necessary to perform work assignment.* The producer shall furnish without cost to the worker any equipment required in the performance of any work assignment. The worker may be charged for the cost of such equipment in the event of its loss or destruction through negligence of the worker. Equipment includes, but is not limited to, hand and mechanical tools and special wearing apparel, such as boots and raincoats, required to discharge the work assignment.

§ 864.24 Applicability of wage requirements.

The wage requirements of this part apply to all persons who are employed or who work on the farm in operations directly connected with the production, cultivation, or harvesting of sugarcane on any acreage from which sugarcane is marketed or processed for the production of sugar, harvested for seed, or any acreage which qualifies as bona fide abandoned. Such persons include field overseers or supervisors while directing other workers, and those workers employed by an independent contractor who perform services on the farm. The wage requirements are not applicable to persons who voluntarily perform work without pay on the farm for a religious or charitable institution or organization;

inmates of a prison who work on a farm operated by the prison; truck drivers employed by a contractor engaged only in hauling sugarcane; members of a cooperative arrangement among producers for the exchange of labor to be performed by themselves or members of their families; persons who have an agreement with the producer to perform all work on a specified acreage in return for a share of the crop or crop proceeds if such share, including the share of any Sugar Act payments, results in earnings at least as much as would otherwise be received in accordance with the requirements of this part for the work performed; independent contractors and members of their immediate families; or workers performing services which are indirectly connected with the production, cultivation, or harvesting of sugarcane, including but not limited to mechanics, welders, and other maintenance workers and repairmen.

§ 864.25 Payment of wages.

Workers shall be paid in cash for all work performed, except to the extent that the cash payment is reduced by the following deductions: Cash advances made to the worker by the producer; the market value or the amount agreed upon for supplies furnished by the producer at the request of the worker; meals, lodging, and transportation expense which the producer agreed to furnish for a stated amount; and mandatory deductions such as taxes and Social Security contributions. In addition, a producer may deduct the amounts he has paid to a third party on behalf of the worker in connection with his employment as a farm worker which are acknowledged in writing signed by the worker or his agent or substantiated by other evidence acceptable to the county ASC Committee to be an indebtedness of the worker, and which cover the expense of services and benefits furnished the worker by the third party, and which the worker or his agent has agreed may be deducted from his wages, such as public utilities, medical services, group hospitalization or other insurance for the benefit of the worker. As evidence of payments to a third party for which a deduction is made from the earnings of a worker, the producer shall maintain for a period of three years, for the inspection of the worker and the local county ASCS office, receipted bills or other written satisfactory evidence that support such deductions. Payments made to a labor contractor, supervisor, or labor trainer, or the cost of meals, lodging, transportation, and insurance covering injury or illness resulting from employment, any or all of which the producer agreed to furnish the worker free of charge, shall not be deducted from cash wages due the worker. When any deductions are made, the producer shall furnish to the worker, at time of settlement, a statement showing the gross amount of wages due for work performed and the amount of each deduction properly identified.

§ 864.26 Evidence of compliance.

Each producer subject to the provisions of this part shall keep and preserve, for a period of 3 years following the date on which his application for a Sugar Act payment is filed, such wage records as will demonstrate that each worker has been paid in full in accordance with the requirements of this part. Wage records should set forth dates work was performed, the class of work performed, units of work (piecework or hours), agreed upon rates per unit of work, total earnings, and any permissible deductions, and the amount paid each worker. The producer shall furnish upon request to the appropriate Agricultural Stabilization and Conservation County Committee such records or other evidence as may satisfy such committee that the requirements of this part have been met.

§ 864.27 Subterfuge.

The producer shall not reduce the wage rates to workers below those determined in accordance with the requirements of this part through any subterfuge or device whatsoever.

§ 864.28 Claim for unpaid wages.

Any person who believes he has not been paid in accordance with this part may file a wage claim with the local Agricultural Stabilization and Conservation County Committee against the producer on whose farm the work was performed. Such claim must be filed on Form SU–191 entitled "Claim Against Producer for Unpaid Wages," within 2 years from the date the work with respect to which the claim is made was performed. Detailed instructions and Forms SU–191 are available at the local county ASCS office. Upon receipt of a wage claim the county office shall thereupon notify the producer against whom the claim is made concerning the representation made by the worker. The county ASC committee shall arrange for such investigation as it deems necessary and the producer and worker shall be notified in writing of its recommendation for settlement of the claim. If either party is not satisfied with the recommended settlement, an appeal may be made to the Agricultural Stabilization and Conservation State Committee, 3737 Government Street, Alexandria, La. 71303, which shall likewise consider the facts and notify the producer and worker in writing of its recommendation for settlement of the claim. If the recommendation of the State ASC committee is not acceptable, either party may file an appeal with the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture, Washington, D.C. 20250. All such appeals shall be filed within 15 days after the date the written notice of the recommended settlement is mailed by the respective committee, otherwise such recommended settlement will be applied in making payments under the act. If a claim is appealed to the Deputy Administrator, State and County Operations, his decision shall be binding on all parties insofar as payments under the act are concerned. Appeals procedures are set forth and explained fully in Part 780 of this Title 7 of the Code of Federal Regulations.

§ 864.29 Failure to pay all wages in full.

(a) Notwithstanding the provisions of this part requiring that all persons employed on the farm in the production, cultivation, or harvesting of sugarcane be paid in full for all such work as one of the conditions to be met by a producer for payment under the act, if the producer has failed to meet this condition but has met all other conditions, a portion of such payment representing the remainder after deducting from the payment the amount of accrued unpaid wages, may be disbursed to producer(s), upon a determination by the county committee (1) that the producer has made a full disclosure to the county committee or its representatives of any known failure to pay all workers on the farm wages in full as a condition for payment under the Sugar Act; and (2) that either (i) the failure to pay all workers their wages in full was caused by the financial inability of the producer, or (ii) the failure to pay all workers in full was caused by an inadvertent error or was not the fault of the producer or his agent, and the producer has used reasonable diligence to locate and to pay in full the wages due all such workers. If the county committee makes the determination as heretofore provided in this paragraph, such committee shall cause to be deducted from the payment for the farm the full amount of the unpaid wages which shall be paid promptly to each worker involved if he can be located, otherwise the amount due shall be held for his account, and the remainder of the payment for the farm, if any, shall be made to the producer. If the county committee determines that the producer did not pay all workers in full because of an inadvertent error that was not discovered until after he received his Sugar Act payment, the producer shall be placed on the claims control record for the total amount of the unpaid wages.

(b) Except as provided in paragraph (a) of this section, if upon investigation the county committee determines that the producer failed to pay all workers on the farm the required wages, the entire Sugar Act payment with respect to such a farm shall be withheld from the producer until such time as evidence is presented to the county committee which will satisfy the county committee that all workers have been paid in full the wages earned by them, or if unpaid workers cannot be located and the county committee determines that the producer used reasonable diligence to locate such workers, the amounts of unpaid wages shall be deducted from the Sugar Act payment computed for the farm and the balance released to the producer after the expiration of 1 year from the date payment would otherwise be made. If payment has been made to the producer

prior to the county committee's determination that all workers on the farm have not been paid in full, the producer shall be placed on the claims control record for the total payment until the county committee determines that all workers on the farm have been paid in full, the producer refunds the entire amount of the debt, or a setoff in the amount of the debt is made from a program payment otherwise due the producer, or the county committee after determining that the producer used reasonable diligence to locate such workers has recovered from such producer the amount of unpaid wages computed for the farm.

§ 864.30 Checking compliance.

The procedures to be followed by county ASCS offices in checking compliance with the wage requirements of this part are set forth under the heading "Wage Rate Determinations" in Handbook 3–SU, issued by the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service. Copies of Handbook 3–SU may be inspected at local county ASCS offices and copies may be obtained from the Louisiana State ASCS Office, 3737 Government Street, Alexandria, La. 71303.

STATEMENT OF BASES AND CONSIDERATIONS

General. The foregoing determination provides fair and reasonable wage rates to be paid for work performed by persons employed on the farm in the production, cultivation, or harvesting of sugarcane in Louisiana as one of the conditions with which producers must comply to be eligible for payments under the act.

Requirements of the act and standards employed. Section 301(c)(1) of the act requires that all persons employed on the farm in the production, cultivation, or harvesting of sugarcane with respect to which an application for payment is made, shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing, and in making such determinations, the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, (i.e., cost of living, prices of sugar and byproducts, income from sugarcane, and cost of production), and the differences in conditions among various sugar-producing areas.

Wage determination. This determination continues the requirements of the prior determination except that (1) the minimum time wage rates are increased 10 cents per hour for all classes of workers, and (2) a provision has been added requiring producers, who make payments in connection with the worker's employment to a third party for items such as utility bills which the worker or his agent has agreed may be deducted from his wages, to maintain on file receipted bills for the inspection of the worker or the local county ASCS office for a period of 3 years.

A public hearing was held in Houma, La., on June 26, 1969, at which interested persons were afforded the opportunity to testify on whether the wage rates established for Louisiana sugarcane fieldworkers in the wage determination which became effective on October 14, 1968, continue to be fair and reasonable under the circumstances, or whether such determination should be amended.

Witnesses appearing at the public hearing on behalf of sugarcane workers generally recommended a minimum wage of $2 to $2.50 per hour. These witnesses testified that the present minimum wage of $1.40 or $1.45 per hour will not yield to a fully employed worker an annual income sufficient to feed, clothe, and house his family. One witness stated that previous wage rate increases have hardly kept up with increases in the cost of living. The witness further stated that a wage is not fair and reasonable unless it will provide an income sufficient to maintain a family "above the poverty level."

A witness provided details of the findings of a June 1969 study of the socio-economic characteristics of sugarcane fieldworkers. He stated that the average age of workers surveyed was 42 years, that educational attainment averaged 4.5 years of schooling, and that annual earnings averaged $2,446. The witness stated that a family with the characteristics described is living in poverty. Other witnesses testified that housing for sugarcane workers is substandard; that many homes do not have running water or indoor toilets; and that in some instances deductions are made from workers' wages for the cost of utilities which the worker had agreed to pay, but that the worker had not been furnished a copy of the bill and therefore could not judge its validity.

A professor of agricultural economics at Louisiana State University presented data from studies of large-scale sugarcane farms (200 acres or more) and from family-sized sugarcane farms (less than 200 acres). The witness stated that wage rates have been increased in every year since 1961 and that adverse weather conditions such as the hurricanes of 1964 and 1965 and the freeze of 1966 apparently have not been taken into account. The witness presented data for the 1967 crop showing that large-scale farms had gross returns of $276 per acre, incurred expenses of $238 per acre, and realized net income of $38 per acre. He further stated that the 26 percent acreage cut between 1965 and 1969 had brought about lower total returns while at the same time causing increased unit costs.

Another witness, testifying on behalf of sugarcane producers, recommended no change in the present minimum wage rates. He stated that $1.30 per hour is the minimum established for all farm workers in the United States, and that it is not proper to increase the minimum wage for unskilled sugarcane fieldworkers above that figure. He also stated that since 1957 the cost of living has increased 27.6 percent while during the same period sugarcane fieldworkers' wage rates have increased by 195 percent. The witness stated that the most significant factor to consider in setting wage rates should be the drastic reduction in sugarcane acreage. He stated that in 1964 producers harvested 348,000 acres of sugarcane, while in 1969 this acreage has been reduced due to acreage restrictions to 257,000 acres.

Consideration has been given to the testimony presented at the public hearing, and to the returns, costs, and profits of producing sugarcane for recent crops and recast in terms of conditions likely to prevail for the 1969 crop, and to other pertinent factors. Analysis of these data indicate that the minimum rates established in this determination are fair and are within the producer's ability to pay.

This determination provides, in those instances where the producer pays utility bills or other obligations for the account of the worker and the worker has agreed in advance that such obligations may be deducted from his wages, that such deductions may be made provided the producer maintains for at least 3 years receipted bills or other evidence for the inspection of the worker or the local county ASCS office. Deductions from a worker's pay for consumer debts to a third party, such as household appliances, not connected with the worker's employment as a farm worker, are not proper and may not be withheld from the wages due the worker. In addition, the producer is required to furnish to the worker an itemized statement showing the gross amount of wages due and each deduction properly identified.

This determination provides for an increase in minimum wage rates of 10 cents per hour for all classes of workers. This will result in hourly wage rates for sugarcane fieldworkers ranging from $1.40 to $1.55 during the coming harvest season, and from $1.40 to $1.45 for cultivating the 1970 crop. Although the 1969 crop has been curtailed somewhat by acreage restrictions, present prospects are for a successful crop, and the average producer is expected to make a profit.

This determination is issued on a continuing basis and will remain in effect until amended or terminated. However, the Department will keep the wage situation under review and will conduct investigations and hold hearings annually.

Accordingly, I hereby find and conclude that the foregoing wage determination will effectuate the wage provisions of the Sugar Act of 1948, as amended.

NOTE: The recordkeeping and reporting requirements of these regulations have been approved by, and subsequent recordkeeping and reporting requirements will be subject to the approval of the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

Effective date. This determination shall become effective on November 10, 1969.

Signed at Washington, D.C., on October 30, 1969.

CLIFFORD M. HARDIN,
Secretary of Agriculture.

[F.R. Doc. 69–13125; Filed, Nov. 4, 1969; 8:45 a.m.]

Chapter IX—Consumer and Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture

PART 984—WALNUTS GROWN IN CALIFORNIA, OREGON, AND WASHINGTON

Expenses of Walnut Control Board and Rates of Assessment for 1969–70 Marketing Year

Notice was published in the October 15, 1969, issue of the FEDERAL REGISTER (34 F.R. 15845) regarding proposed expenses of the Walnut Control Board for the 1969-70 marketing year and rates of assessment for that year. This action approves such expenses and assessment rates. It is pursuant to §§ 984.68 and 984.69 of the marketing agreement, as amended, and order No. 984, as amended (7 CFR Part 984). The amended marketing agreement and order regulate the handling of walnuts grown in California, Oregon, and Washington, and are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674).

The notice afforded interested persons an opportunity to submit written data, views, or arguments on the proposal. None were submitted within the prescribed time.

After consideration of all relevant matter presented, including that in the notice, the information and recommendations submitted by the Walnut Control Board, and other available information, it is found that the expenses of the Board and rates of assessment for the 1969–70 marketing year (which began August 1, 1969, and ends July 31, 1970), shall be as follows:

§ 984.321 Expenses of the Walnut Control Board and rates of assessment for the 1969–70 marketing year.

(a) *Expenses.* Expenses in the amount of $130,000 are reasonable and likely to be incurred by the Walnut Control Board during the marketing year beginning August 1, 1969, for its maintenance and functioning, and for such purposes as the Secretary may, pursuant to the provisions of this part, determine to be appropriate.

(b) *Rates of assessment.* The rates of assessment for said marketing year, payable by each handler in accordance with § 984.69, are fixed at 0.10 cent per pound for merchantable inshell walnuts and 0.20 cent per pound for merchantable shelled walnuts.

It is further found that good cause exists for not postponing the effective time of this action until 30 days after publication in the FEDERAL REGISTER (5 U.S.C. 553) in that: (1) The relevant provisions of said marketing agreement and this part require that the rates of assessment fixed for a particular marketing year shall be applicable to all assessable walnuts from the beginning of such year; and (2) the 1969–70 marketing year began August 1, 1969, and the rates of assessment herein fixed will automatically apply to all such assessable walnuts beginning with that date.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: October 31, 1969.

PAUL A. NICHOLSON,
Deputy Director, Fruit and Vegetable Division, Consumer and Marketing Service.

[F.R. Doc. 69-13203; Filed, Nov. 4, 1969; 8:49 a.m.]

Chapter XIV—Commodity Credit Corporation, Department of Agriculture

SUBCHAPTER B—LOANS, PURCHASES, AND OTHER OPERATIONS

[Amdt. 7]

PART 1468—MOHAIR

Subpart—Payment Program for Mohair

1970 MARKETING YEAR

The regulations issued by Commodity Credit Corporation containing the requirements with respect to the payment program for mohair, as amended (31 F.R. 5817, 15234; 32 F.R. 4568, 16391; 33 F.R. 5208, 18009; 34 F.R. 6328), cover the marketing years 1966 through 1969. This amendment of 7 CFR Part 1468 extends such regulations to cover the 1970 marketing year, as follows:

1. Section 1468.251 is revised to read as follows:

§ 1468.251 General.

This subpart sets forth the policies, procedures, and requirements governing price support payments for mohair for the 1966, 1967, 1968, 1969, and 1970 marketing years by the Commodity Credit Corporation (referred to in this subpart as "CCC").

§ 1468.253 [Amended]

2. Section 1468.253 is amended by revising the first sentence to read: "Pursuant to the National Wool Act of 1954, as amended by the Food and Agriculture Act of 1965 (Public Law 89–321) and Public Law 90–559, the Secretary of Agriculture is to announce a price support level for mohair which has been determined to meet the requirements of the Act for each of the 5 marketing years, 1966, 1967, 1968, 1969, and 1970."

3. Section 1468.255 is amended by adding the following new paragraph (f) at the end of the section:

§ 1468.255 Price support level.

* * * * *

(f) *1970 marketing year.* For the 1970 marketing year, the price support level was announced June 20, 1969, as 80.2 cents per pound of mohair, grease basis.

(Sec. 4, 62 Stat. 1070, sec. 5, 62 Stat. 1072, secs. 702–708, 68 Stat. 910–912, as amended, secs. 401–403, 72 Stat. 994–995, sec. 151, 75 Stat. 306, sec. 201, 79 Stat. 1188, 82 Stat. 996; 15 U.S.C. 714b, 15 U.S.C. 714c, 7 U.S.C. 1781–1787, as amended)

Effective date. This amendment shall become effective upon publication in the FEDERAL REGISTER.

Signed at Washington, D.C., on October 28, 1969.

CARROLL G. BRUNTHAVER,
Acting Executive Vice President, Commodity Credit Corporation.

[F.R. Doc. 69-13201; Filed, Nov. 4, 1969; 8:49 a.m.]

Title 18—CONSERVATION OF POWER AND WATER RESOURCES

Chapter I—Federal Power Commission

SUBCHAPTER A—GENERAL RULES

[Docket No. RP66-24]

PART 2—GENERAL POLICY AND INTERPRETATIONS

Pricing for New Gas Produced by Pipelines and Pipeline Affiliates

On June 29, 1964, the Federal Power Commission issued an order instituting an area rate proceeding for the Hugoton-Anadarko Area, Dockets Nos. AR64–1, et al, published July 7, 1964, in the FEDERAL REGISTER (29 F.R. 8501).

After certain direct evidence had been submitted, upon Staff's motion, the Commission by order issued on April 13, 1966, severed the pipeline production issue and instituted a separate proceeding entitled Pipeline Production Area Rate Proceeding, Docket No. RP66–24, to determine whether, in pipeline rate making, the Commission should depart from the cost of service method and adopt an area method for pricing gas produced by pipelines or acquired by them from their affiliates. The proceeding was divided into two phases. We are here concerned with only Phase I,[1] namely, "What is the most appropriate price method to be applied to natural gas utilized in a pipeline's interstate system which is produced by the pipeline or its affiliated producing company from leases acquired after the date of determination of this issue."

The order issued April 13, 1966, in Phase I, directed that a public hearing be held and provided for a prehearing conference. Persons wishing to participate in the prehearing conference, or desiring to intervene in the proceeding, were asked to so advise the Commission by May 2, 1966. Following conclusion of the prehearing conference and public notice, extensive public hearings were held before a presiding examiner. Parties were afforded full opportunity to submit evidence, cross-examine witnesses, file rebuttal evidence, and submit briefs. The presiding examiner issued his initial decision on March 3, 1969. Subsequently,

[1] Phase II is concerned with pricing policy for gas which pipelines produce from leases acquired prior to the determination of the issue in Phase I.

briefs on exceptions to the presiding examiner's initial decision and briefs opposing exceptions were filed, and the Commission then heard oral argument on June 27, 1969. After consideration of the entire record in this proceeding, the Commission, on October 7, 1969, issued Opinion No. 568. Among other things, Opinion No. 568 set up a new § 2.66 in the rules of practice and procedure, relating to the pricing of new gas produced by pipelines and pipeline affiliates.

In the opinion, the Commission also directed the Secretary to cause prompt publication to be made in the FEDERAL REGISTER of a notice of availability of the entire opinion and of the findings and ordering paragraphs. The findings and ordering paragraphs are set out below.

Excerpts from Federal Power Commission Opinion No. 568, Pipeline Production Area Rate Proceeding (Phase I), FPC Docket No. RP66-24, 42 FPC ———, issued October 7, 1969:

The Commission further finds:

(1) The notice and effective date provisions of section 4 of the Administrative Procedure Act, 5 U.S.C. 553, do not apply with respect to the amendment here adopted.

(2) It is appropriate and in the public interest in administering the Natural Gas Act to promulgate Commission policy on pricing natural gas produced by pipelines and their affiliates from leases acquired after the date of this order.

The Commission, acting pursuant to the authority of the Natural Gas Act, as amended, particularly sections 4, 5, 8 and 16 thereof (52 Stat. 822, 823, 825, 830; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717g, 717o), orders:

(A) Effective upon issuance of this statement, Part 2, Subchapter A, general rules, Chapter I of Title 18 of the Code of Federal Regulations, is amended by adding a new § 2.66 to read as follows:

§ 2.66 Pricing of new gas produced by pipelines and pipeline affiliates.

(a) As a matter of policy in future pipeline rate proceedings, gas produced by pipelines or by their affiliates from leases acquired after the date of this order will be priced for ratemaking purposes at the just and reasonable area rate applicable to gas of a vintage corresponding to the date of completion of the first well on the lease, otherwise at the "in-line" price, or, if there is no in-line price, on the basis of the guideline price set forth in § 2.56 with the following exceptions:

(1) If a pipeline or pipline affiliate acquires a developed lease from which jurisdictional sales are being made, the applicable price of gas shall be the lower of (i) the contract price applicable to the gas, or (ii) the applicable area price (or in-line or guideline price);

(2) If a pipeline or pipeline affiliate acquires a developed lease from which nonjurisdictional sales are being made, gas produced from the lease will be priced at the just and reasonable area price applicable to gas of the vintage corresponding to the date of lease acquisition (or in-line or guideline price);

(3) If the pipeline is able to show in a rate proceeding that special circumstances exist which justify different treatment, such a showing should be made by means of a special schedule and supporting evidence filed in addition to the material otherwise required by § 154.63 of this chapter.

(b) Pipelines acquiring production leases subsequent to the date of this opinion either on their own part or through affiliates should:

(1) Where they have their own production, maintain separate subdivisions of their plant and expense accounts related to production properties and production activities, so as to show separately costs related to production from present leases and costs related to production from leases acquired after the date of this opinion;

(2) In making a rate filing, provide additional detail in subdivisions within the production function, i.e., as between gas from present leases and gas from leases acquired after the date of this opinion with respect to their own production and also with respect to any production of their affiliates.

(B) The Secretary shall cause prompt publication of the findings and ordering paragraphs, together with notice of the availability of this entire opinion, to be made in the FEDERAL REGISTER.

(C) Union Producing's request to be discharged from these proceedings is denied.

(D) The petition filed July 16, 1969, by the United Distribution Cos. for leave to intervene and file statement of position is denied.

(E) Except as herein granted, the exceptions to the initial decision are denied.

Copies of the complete text of opinion No. 568 may be obtained in person from the Office of Public Information, of the Federal Power Commission, or by written request addressed to the Secretary, Federal Power Commission, 441 G Street NW., Washington, D.C. 20426.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69-13135; Filed, Nov. 4, 1969; 8:45 a.m.]

Title 29—LABOR

Chapter XIII—Bureau of Labor Standards, Department of Labor

PART 1500—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

EXPERIMENTAL SCHOOL SUPERVISED AND SCHOOL ADMINISTERED WORK-EXPERIENCE AND CAREER EXPLORATION PROGRAM

On August 8, 1969, a proposal was published in the FEDERAL REGISTER (34 F.R. 12892) inviting written data, views, or arguments on an amendment varying some of the requirements of subpart C of part 1500 of title 29 of the Code of Federal Regulations for the employment of minors between 14 and 16 years of age who are enrolled in and employed pursuant to an experimental school supervised and school administered work-experience and career exploration program. After consideration of all relevant matters submitted, subpart C of part 1500 of the Code of Federal Regulations is amended by adding a new § 1500.35a. The amendment shall be effective immediately upon publication in the FEDERAL REGISTER because it relieves certain restrictions, and there is a clear need for promptness in considering applications under the programs involved in relation to present school sessions.

The new § 1500.35a reads as follows:

§ 1500.35a Work experience and career exploration programs.

(a) This section varies some provisions of this subpart for the employment of minors between 14 and 16 years of age who are enrolled in and employed pursuant to an experimental school supervised and school administered work-experience and career exploration program which meets the requirements of paragraph (b) of this section, in the occupations permitted under paragraph (c) of this section, and for the periods and under the conditions specified in paragraph (d) of this section. With these safeguards, such employment is not found to interfere with the schooling of the minors or with their health and well-being and therefore is not deemed to be oppressive child labor.

(b) (1) An experimental school supervised and school administered work-experience and career exploration program shall meet the educational standards established and approved by the State Educational Agency in the respective State.

(2) The State Educational Agency shall file with the Director of the Bureau of Labor Standards a written application for approval of a particular program as one not interfering with schooling or with the health and well-being of the minors involved and therefore not constituting oppressive child labor. The application must include the information listed in subparagraph (3) of this paragraph. The director of the Bureau of Labor Standards shall approve the application, or give prompt notice of any denial and the reasons therefor.

(3) The criteria to be used in consideration of applications are the following:

(i) *Admission.* Any student aged 14 or 15 years who authoritative local school personnel identify as being able to benefit from the program shall be eligible to participate.

(ii) *Credits.* Students shall receive school credits for both in-school related instruction and on-the-job experience.

(iii) *Size.* Each program unit shall be a reasonable size. A unit of 12 to 20 students to one teacher-coordinator would be generally considered reasonable. Whether other sizes are reasonable would depend upon the individual facts and circumstances involved.

(iv) *Time schedule.* Except when necessary to accommodate to State law requirements of equivalent instruction, on each school day there shall be (*a*) a minimum of two classroom hours of instruction devoted to job-related and to employability skill instruction, and (*b*) a minimum of two classroom hours of instruction devoted to regularly required subjects or elective subjects which meet State standards for graduation.

(v) *Teacher-coordinator.* Each program unit shall be under the supervision of a school official to be designated for the purpose of the program as a teacher-coordinator, who shall generally supervise the program and perform the following specific duties:

(*a*) Select and place students.

(*b*) Choose work stations for the students.

(*c*) Coordinate the work and education aspects of the program.

(*d*) Maintain records and prepare reports.

(*e*) Conduct in-school related class instruction.

(vi) *Physical facilities.* The school will furnish adequate classroom facilities and supplies.

(vii) *Written training agreement; administration.* The program shall provide that no student shall participate in the program until there has been made a written training agreement signed by the teacher-coordinator, the employer, and the student. The agreement shall also be signed or otherwise consented to by the student's parent or guardian. The program shall require the employer to have on file a copy of this training agreement for each student employed by him for the duration of the program.

(viii) *Permissible occupations.* The program shall permit the assignment of students only in work in those occupations permitted under paragraph (c) of this section.

(ix) *Reports and records.* The program shall provide that all records and reports made and kept by each program unit for the purposes of this section shall be made available for inspection to representatives of the director of the Bureau of Labor Standards.

(x) *Other provisions.* Any other provisions of the program providing safeguards ensuring that the employment permitted under this section will not interfere with the schooling of the minors or with their health and well-being may also be submitted for use in consideration of the application.

(c) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be permitted in all occupations except the following:

(1) Manufacturing and mining.

(2) Occupations declared to be hazardous for the employment of minors between 16 and 18 years of age in Subpart E of this part.

(3) Occupations other than those permitted under §§ 1500.33 and 1500.34, except upon approval of a variation in individual cases or classes of cases by the Director of the Bureau of Labor Standards after notice to interested persons and opportunity to be heard. Any such variation of general application shall be published as an amendment to this subpart. Applications for such approval may be included with the application for approval of the program; or filed specifically under § 1500.38. Such applications shall be processed under § 1500.38.

(d) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be confined to not more than 28 hours in any 1 week when school is in session and not more than 4 hours in any day when school is in session, any portion of which may be during school hours. Insofar as these provisions are inconsistent with the provisions of § 1500.35, this section shall be controlling.

(e) This section shall terminate and have no force and effect after August 31, 1972.

(Sec. 3, 52 Stat. 1061, as amended; 29 U.S.C. 203)

Signed at Washington, D.C. this 31st day of October 1969.

GEORGE P. SHULTZ,
Secretary of Labor.

[F.R. Doc. 69-13226; Filed, Nov. 4, 1969; 8:50 a.m.]

Title 49—TRANSPORTATION

Chapter X—Interstate Commerce Commission

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

[S.O. 1032, Amdt. 2]

PART 1033—CAR SERVICE

Great Northern Railway Co. Authorized To Operate Over Tracks of Chicago, Rock Island and Pacific Railroad Co.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 30th day of October 1969.

Upon further consideration of Service Order No. 1032 (34 F.R. 12180, 15356), and good cause appearing therefor:

It is ordered, That § 1033.1032 *Service Order No. 1032* (Great Northern Railway Co., authorized to operate over tracks of the Chicago, Rock Island and Pacific Railroad Co.) Be, and it is hereby amended by substituting the following paragraph (e) for paragraph (e) thereof:

(e) *Expiration date.* This order shall expire at 11:59 p.m., November 30, 1969, unless otherwise modified, changed, or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., October 31, 1969.

(Secs. 1, 12, 15 and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15 and 17(2). Interprets or applies secs. 1(10-17), 15(4) and 17(2), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2))

It is further ordered, That copies of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] H. NEIL GARSON,
Secretary.

[F.R. Doc. 69-13180; Filed, Nov. 4, 1969; 8:48 a.m.]

Title 14—AERONAUTICS AND SPACE

Chapter I—Federal Aviation Administration, Department of Transportation

[Airspace Docket No. 69-SW-64]

PART 73—SPECIAL USE AIRSPACE

Revocation of Restricted Area

The purpose of this amendment to Part 73 of the Federal Aviation Regulations is to revoke Restricted Area R-5112 Magdalena, N. Mex.

The Department of the Air Force has informed the Federal Aviation Administration that there is no longer a requirement for R-5112 and that it may be revoked. Such action is taken herein.

Since this amendment restores airspace to the public use and relieves a restriction, notice and public procedure thereon are unnecessary, and good cause exists for making this amendment effective on less than 30-days notice.

In consideration of the foregoing, Part 73 of the Federal Aviation Regulations is amended effective immediately as hereinafter set forth: In § 73.51 New Mexico (34 F.R. 4837) "R-5112 Magdalena, N. Mex." is revoked.

(Sec. 307(a), Federal Aviation Act of 1958, 49 U.S.C. 1348; sec. 6(c), Department of Transportation Act, 49 U.S.C. 1655(c))

Issued in Washington, D.C., on October 28, 1969.

H. B. HELSTROM,
Chief, Airspace and Air Traffic Rules Division

[F.R. Doc. 69-13171; Filed, Nov. 4, 1969; 8:48 a.m.]

Title 15—COMMERCE AND FOREIGN TRADE

Chapter X—Office of Foreign Direct Investments, Department of Commerce

[1969 General Bulletin]

PART 1000—FOREIGN DIRECT INVESTMENT REGULATIONS

Interpretative Analyses and Statements With Respect to the Regulations

Notice is hereby given that the Office of Foreign Direct Investments ("OFDI") has issued the following 1969 General Bulletin (the "1969 Bulletin" or the "Bulletin"), interpreting and analyzing the Foreign Direct Investment Regulations (the "regulations") applicable to the Foreign Direct Investment Program (the "Program") for calendar year 1969.

The purpose of the Bulletin is to interpret, explain, and amplify, by text and illustrative examples, principal provisions of the current regulations for the benefit of persons affected by, or otherwise interested in, the Program. Certain statements in the Bulletin may have the effect of qualifying or modifying certain provisions of the regulations, the instructions applicable to reporting forms or other official OFDI publications. Unless subsequently modified or rescinded by public notice, statements contained in this Bulletin shall represent the official position of OFDI.

General Bulletin No. 1 and General Bulletin No. 2, dated October 10 and 25, 1968 (33 F.R. No. 198 (Part II) and No. 209 (Part III), respectively) were issued by OFDI as general interpretive guidelines for the regulations applicable to the Program in effect during 1968. To the extent expressly or implicitly overruled or modified by the 1969 Bulletin, General Bulletin Nos. 1 and 2 are hereby superseded insofar as concerns compliance with the regulations in effect for 1969. While certain portions of the text and particular examples in General Bulletins Nos. 1 and 2 may continue to be pertinent to the 1969 Regulations, extreme care should be exercised in basing substantive decisions upon the material in those Bulletins. In case of doubt concerning relevance of any such material, OFDI should be consulted.

The 1969 Bulletin is principally interpretive and, to the extent that any provision of the regulations or other official OFDI publications may be modified, the changes are generally in the nature of liberalization or relaxation. Accordingly, it is not deemed necessary in the public interest to publish the Bulletin in proposed form for comment.

Effective date. The 1969 General Bulletin, as set forth below, shall be effective on the date of publication in the FEDERAL REGISTER.

(Sec. 5, Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan 1, 1968, 33 F.R. 47)

RICHARD P. URFER,
Director, Office of Foreign Direct Investments.

OCTOBER 28, 1969.

EDITORIAL NOTE: The Foreign Direct Investment Regulations are published in Title 15, Chapter X, Part 1000 of the Code of Federal Regulations ("CFR"). All sections of the regulations contained in CFR are preceded by the designation "1000" (e.g., § 1000.201 etc.). The "1000" designation has, for convenience, been eliminated from section references contained in the 1969 General Bulletin. Sections of the Bulletin correspond to section numbers of the regulations, but are distinguished by use of the prefix "B" and a hyphenated numeral suffix indicating major topical divisions of the related analytical discussion (e.g., § B201–1 etc.). References by OFDI to the Bulletin in correspondence and for other purposes will sometimes be abbreviated (e.g., 1969 Bulletin § B201–1 etc.).

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E. Revised Instructions for Submitting Applications for Specific Authorizations Regarding an Increase in Intercompany Accounts Resulting from Increased Exports (Oct. 24, 1969).

*Not filed with the Office of the Federal Register. These appendices have been issued and distributed by OFDI to direct investors and other interested persons on the dates respectively indicated. They will also be reproduced in a reprint of the 1969 General Bulletin to be issued by OFDI following this publication in the FEDERAL REGISTER.

Introduction

General.

The purpose of this Bulletin is to provide a reliable and authoritative source of information concerning interpretation and application of the regulations in effect for 1969.

The Program is administered on a calendar year basis, and a number of significant changes have been made in the regulations either by amendment or by interpretation since the end of calendar year 1968. Accordingly, extreme care should be exercised in relying on General Bulletins Nos. 1 and 2 (issued, respectively, on Oct. 10 and 25, 1968) for purposes other than as an interpretive adjunct to the regulations in effect for 1968. Likewise, caution should also be exercised in applying the material in this 1969 Bulletin to the regulations that will govern during calendar year 1970.

Program liberalization in 1969.

The initial objective of the Program, as established by Executive Order No. 11387 and Department of Commerce Order 184–A, both dated January 1, 1968, was to reduce foreign direct investment financed by U.S.-source funds during 1968 to $2.7 billion (from the 1967 level of $3.7 billion).

The target ceiling for 1969 was established at a level of $3.35 billion. To implement this change, OFDI effected several fundamental changes in the regulations.

(i) *The § 503 minimum allowable.* The foreign direct investment allowable for a direct investor ("DI") provided in § 503 was raised from a level of $200,000 in effect during 1968 to $1 million for 1969, and was made applicable on a worldwide basis without restriction by "scheduled area", in contrast to the direct investment allowables provided in § 504 (a) and (b).

(ii) *The alternative earnings allowable in § 504.* An optional investment allowable for DIs electing to be governed by § 504 rather than by § 503 was also introduced in 1969, based on earnings of affiliated foreign nationals in each of the three scheduled areas during the preceding year. This "earnings" allowable is an alternative to the "historical" allowable that is based essentially on 1965–66 direct investment experience by scheduled area.

(iii) *Use of long-term foreign borrowing.* Another modification in the 1969 regulations permits increased flexibility in use of proceeds obtained by long-term foreign borrowing to make or to offset direct investment subject to the Program that would normally be charged against a DI's allowables if made with U.S.-source funds.

(iv) *Miscellaneous amendments.* Steps have also been taken to accommodate the 1969 Program to particular problems encountered by the airline, shipping, and construction industries, and quarterly reporting requirements have been eliminated for all but the major DIs.

Summary of the regulations.

The regulations contain the operative rules of the Program, the principal features of which are discussed in general terms below.

(i) *Applicability.* The regulations apply to "direct investors." A DI is any person (whether an individual or a business entity) within the United States that owns or holds a 10 percent or greater interest in an incorporated or unincorporated foreign entity (§ 305). A foreign entity in which such interest is owned or held is referred to as an "affiliated foreign national" ("AFN") (§ 304). Interest in an AFN is measured by voting power in the case of a corporation and by the right to a share of profits in the case of an unincorporated enterprise (§ 304(b)(2)). Persons may be DIs either in their individual capacity or by virtue of their relationships with other U.S. persons (§§ 903–906). The regulations specifically do not apply to banks or other financial institutions subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System (§ 201(b)(2)).

(ii) *Direct investment restrictions.* Three fundamental requirements are imposed on all DIs:

The amount of annual direct investment in AFNs must not exceed the level authorized under the general allowables provided for in the regulations or the amount specifically authorized by OFDI;

The amount of certain foreign balances or other forms of foreign property must be restricted as specified in the regulations; and

Reports reflecting allowables and transactions pertinent to foreign direct investment activities must be filed with OFDI.

DIs may seek relief from a particular restraint imposed by the regulations through application to OFDI for specific authorizations or exemptions (§ 801).

A DI making foreign direct investment in excess of that authorized either generally under the regulations or specifically by OFDI, or otherwise violating the Program restrictions, is subject to enforcement proceedings. Noncompliance with the requirements of the regulations may give rise to imposition of sanctions, either criminal or administrative (§§ 201(d), 701). Rules and procedures concerning the enforcement function of OFDI (including investigations and administrative remedies) are contained in 15 CFR Parts 1020–1050.

(iii) *Calculation of direct investment.* Direct investment by a DI is calculated (usually on a calendar year basis) by adding the DI's net transfer of capital to AFNs and the DI's share of earnings reinvested by incorporated AFNs (§ 306(a)).

"Net transfer of capital" means (a) aggregate transfers of capital by a DI to incorporated AFNs during the year, less (b) aggregate transfers of capital by such incorporated AFNs to the DI during the same period, plus (c) the DI's share of net increase or decrease in net assets of unincorporated AFNs (§ 313). A transfer of funds or other property that increases a DI's aggregate equity and debt investment in an AFN is generally a transfer of capital by the DI to the AFN (§ 312(a)). A transfer of funds or other property that decreases a DI's investment in an AFN is generally a transfer of capital by the AFN to the DI (§ 312(b)). In computing a DI's transfers of capital and net transfer of capital, special rules apply to transactions between a DI's AFNs that are located in different scheduled areas (§ 505).

"Reinvested earnings" means (a) total earnings (defined in § 306(c)) of incorporated AFNs, less (b) dividends paid by incorporated AFNs to the DI, plus (c) dividends and remittances received by incorporated AFNs from certain other AFNs (§ 306(b)).

For purposes of the regulations, each of the countries in the world is assigned to one of three "scheduled areas" (A, B, and C) (§ 319). Direct investment of a DI is generally calculated on the basis of these scheduled areas, reflecting aggregate transactions involving all AFNs located in each such area (§§ 306, 313). Schedule A generally comprises the less-developed countries; Schedule B, certain specified developed countries; and Schedule C, the remaining countries.

For certain purposes, however, direct investment allowables may be used on a worldwide rather than a schedular basis (§§ 503, 504(f)(3)(i), and 506; see also Subpart M).

(iv) *Authorized direct investment.* Positive direct investment in AFNs is prohibited except to the extent that it is authorized either generally under the regulations or individually by specific authorization (§§ 201(a), 801).

Subpart E (§§ 501–506) provides three direct investment allowables, one of which a DI must elect for each year (§ 502):

A worldwide "minimum allowable" of $1 million (§ 503);

An "historical allowable" for each scheduled area based primarily on direct investment in each such area by the DI during 1965–66 (§ 504(a)); and

An "earnings allowable" for each scheduled area based on the DI's share of AFN earnings in each such area during the preceding year (§ 504(b)).

In general, the unused portion of an allowable (other than the $1 million § 503 minimum allowable) may be carried forward to succeeding years (§§ 504(d) and (f), 506(c)).

Historical allowables in Schedule C or B are increased by a limited "upstream" redistribution (§ 504(c)).[1] The historical or the earnings allowables provided in § 504 may be used "downstream" (§ 504(d)).

Commencing in 1970, DIs will be eligible for a worldwide "incremental earnings" allowable (in addition to one of the foregoing allowables) based on the amount by which aggregate AFN earnings in a calendar year exceed the average of such earnings during 1966–67 (§ 506).

Because of considerations unique to the airlines industry, special rules for computing authorized direct investment for U.S.-flag air carriers are provided in the regulations (Subpart M).

Although Canada is assigned to Schedule B, the regulations do not restrict direct investment made in that country (Subpart K).

[1] "Upstream" and "downstream" refer to the relationship of one scheduled area to another. The upstream sequence is Schedule A, Schedule B, and Schedule C. The downstream sequence is Schedule C, Schedule B, and Schedule A.

(v) *Long-term foreign borrowing.* In general, direct investment in AFNs that is financed with or offset by proceeds of long-term foreign borrowing (defined in § 324) will not be charged against the DI's allowables until the borrowing is repaid. "Available proceeds" of long-term foreign borrowing (defined in § 324(d)) may be used as a deduction against a DI's net transfer of capital if expended in making transfers of capital (§ 313(d)(1)), or as an offset to positive direct investment if "allocated" in accordance with certain prescribed conditions (§ 306(e)). Proceeds that have been expended may subsequently be allocated, and allocated proceeds may later be reallocated, as an offset to positive direct investment in a different scheduled area (§ 203(d)(2) and (3)).

The deferred charge against allowables permitted for direct investment transactions that involve proceeds of long-term foreign borrowing is available to any DI who satisfies the necessary certification, recordkeeping and reporting requirements. (See, generally, Subpart J.)

DIs, except those electing the $1 million minimum allowable, may not make a net transfer of capital (other than one attributable to repayment of long-term foreign borrowing authorized by § 1002) resulting in positive direct investment while holding available proceeds of long-term foreign borrowing in excess of $25,000 in the form of foreign property (§ 203(d)(1) and (e)(2)).

(vi) *Foreign balance restrictions.* The regulations restrict the amount of assets that a DI may hold in liquid form abroad. In general, such balances may not exceed the greater of $25,000 or the average of month-end liquid foreign balances held by the DI in 1965–66 (§ 203(c) and (e)(1)).

(vii) *Reporting requirements.* DIs are required to keep records and to submit certain reports to OFDI (§§ 203(b), 601, 602). If the DI's interest in all AFNs is $100,000 or more, a Base Period Report (Form FDI–101) of direct investment by scheduled area during 1965–66 (and 1964 earnings for Schedule C) must be submitted, and an Annual Report (Form FDI–102F) is required to be filed within four months after the end of each calendar year. In addition, a DI must file Cumulative Quarterly Reports (Form FDI–102) beginning in the quarter that direct investment (positive or negative) exceeds $1 million for the year. In calculating direct investment to determine whether the quarterly reports are required, a DI must include direct investment in Canada and exclude deductions for expenditure or allocation of proceeds of long-term foreign borrowing.

Special rules apply to reporting by DIs that are members of an affiliated, family, or associated group or are owners of other DIs (§ 907).

Additional comments.

As used in this Bulletin, "OFDI" refers generally to the Office of Foreign Direct Investments, but may also be used, for the sake of convenience, to include the Secretary of Commerce and all other persons to whom any function, duty or authority referred to in Executive Order 11387 or in the regulations has been delegated pursuant to Department Order 184–A (issued on Jan. 1, 1968), Department Order 184–B (as amended) or § 806 of the regulations.

Bulletin references to the amount of general allowables set forth in Subparts E and M of the regulations are based on applicable provisions in effect for 1969. Certain examples that involve transactions in years subsequent to 1969 assume retention of the 1969 allowables for future years. All such references are intended for illustrative purposes only, and no inference should be drawn concerning the actual amount of direct investment that will or may be generally authorized in future years. In submitting certificates described in § 1002(b), however, a DI may assume that general allowables in future years will not be less than the amounts applicable during 1969.

Unless expressly stated to the contrary in a particular instance, reference in the text and examples of this Bulletin to an AFN means only an AFN of the DI being discussed, and reference to AFNs means only AFNs of the same DI. Thus, for example, in discussing the effect of interschedular transfers of capital between AFNs under § 505, it should be understood that each foreign national referred to is an AFN of the same DI.

The analysis, interpretation and application of the regulations in this Bulletin may be relied upon by DI's and other interested persons as representative of the policy determinations and official view of OFDI with regard to the 1969 Program, unless superseded by amendment, modification, or revocation of the regulations, by published revision of particular material in the Bulletin, or by direct notice to all persons known by OFDI to be DI's on the date of any change adopted.

B201—Prohibited Direct Investment

§ B201–1 Introduction.

Section 201 sets forth the basic prohibitions on direct investment and the regulatory authority of OFDI, as derived from Executive Order 11387 of January 1, 1968. The section covers: General prohibition of positive direct investment (§ 201(a)); exclusion of financial institutions subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System (§ 201(b)(2)); exclusion of transactions arising from a foreign national's interest in a U.S. business (§ 201(c)); and discretionary conditions or sanctions (§ 201(d)).

§ B201–2 General prohibition.

Section 201(a) prohibits a DI from making positive direct investment in AFNs during any year, beginning with the effective date of the regulations (Jan. 1, 1968), subject to express authorization for certain kinds and amounts of positive direct investment set forth in Subpart E (general allowables), Subpart J (repayment of borrowings), Subpart K (direct investment in

Canada), and Subpart M (U.S.-flag air carriers). In addition, OFDI may permit other transactions by means of specific authorizations or exemptions, as provided in § 801.

The prohibition of § 201(a) is addressed to "positive direct investment (a technical term defined in § 306(a)(3)) during any year." This does not mean that specific transactions between a DI and an AFN are prohibited; rather, the focus is on the net effect of all transactions during a year, measured at yearend.

The term "year" normally means a calendar year. However, in certain circumstances, a DI may be specifically authorized to measure compliance with § 201(a) on the basis of a fiscal year. (See § 321.)

Example 1. DI has a wholly owned incorporated AFN (C) in Germany. During 1969, DI loans $1,200,000 to C. The loan does not violate § 201(a) at the time it is made, although the transaction constitutes a transfer of capital under § 312(a) and will be taken into account in determining the amount of direct investment made by DI in all AFNs in Schedule C for the entire year.

Example 2. DI is authorized, by § 504 (a) and (c), to make positive direct investment of $1,500,000 in Schedule A during 1969. Between January 1, and December 31, 1969, DI's positive direct investment in that scheduled area is $1,700,000. DI is out of compliance (i.e., has violated § 201(a)) in the amount of $200,000.

§ B201–3 Exclusions.

(i) *Financial institutions.* Under the terms of Executive Order 11387, and as provided in § 201(b)(2), banks and nonbank financial institutions are exempt from the regulations if they are subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System. Included in this category are commercial banks, bank holding companies, savings banks, trust companies and trust departments of banks, insurance companies, mutual funds, finance companies, investment bankers and brokers, pension funds, foundations and other nonprofit institutions, "Edge Act" and "Agreement" subsidiaries of commercial banks, and U.S. branches of foreign banks or nonbank financial institutions. The Federal Reserve Program calls upon such institutions to refrain from making loans or extending credit to U.S. borrowers that would "directly or indirectly" permit an outflow of funds inconsistent with the provisions and intent of the OFDI Program.

(ii) *Transfers of capital to foreign owners.* The regulations do not restrict bona fide transfers of capital or distribution of earnings to a foreign national arising from the foreign national's ownership interest in a U.S. entity.

Example 3. A U.S. corporation (X) is 50 percent owned by an Italian corporation (Y). Y is publicly owned by foreign nationals. During 1969, Y purchases $500,000 of goods on credit from X, and X pays Y a dividend of $100,000. During 1970, X is liquidated and a liquidating dividend is paid to Y. The transactions are not subject to the regulations.

§ B201–4 Reduction of authorized direct investment or of period for measuring compliance.

Section 201(d) authorizes OFDI to impose conditions on, or to reduce the amount of, authorized direct investment by a DI. These sanctions constitute the basic administrative enforcement authority under the Program. Criminal penalties are also available in certain circumstances. (See § 701.)

Although direct investment is generally measured on an annual basis, § 201(d) gives OFDI the right to impose a shorter period for compliance purposes with respect to any DI. Considerations bearing on such a decision are, among other things, (a) whether direct investment by a DI in any scheduled area during any quarter is, or may reasonably be estimated to be, materially in excess of 25 percent of the amount generally authorized for the entire year, (b) whether the transactions resulting in such material excess were in accordance with customary business practices of the DI, and (c) whether the DI has complied with the provisions of Subpart F (relating to required records and reports).

In this connection, DIs are required to submit a supplemental statement to OFDI with the cumulative quarterly report (Form FDI–102) for the second and third quarters if their positive direct investment during the reporting period exceeds certain percentages (40 percent for the first quarter, 65 percent for the first two quarters, and 85 percent for the first three quarters) of the annual amount generally authorized. (See the specific instructions to line 09 of Form FDI–102, as revised October 1969.)

It is recognized that in many instances it may not be feasible for DIs to spread positive direct investment during any year equally over the four calendar quarters. For example, uneven outflow may result when the entire amount of positive direct investment arises from a single acquisition of a foreign company, or is concentrated in a particular quarter or quarters due to the seasonal nature of a DI's business, or results from unexpectedly high earnings of AFNs that customarily pay dividends or otherwise remit profits only at yearend. OFDI would not ordinarily invoke the provisions of § 201(d) in these cases, or in other cases where concentration of investment in a particular quarter or quarters cannot reasonably be avoided.

A major objective of the administrative sanctions available under § 201(d), apart from insuring compliance generally with the regulations, is to prevent concentration of direct investment in a particular quarter or quarters unless justified by legitimate business reasons. It provides authority for administrative action by OFDI where large outflows early in a year indicate that serious violations could occur unless remedial steps are taken. Collaterally, the section also contains authority for appropriate sanctions in flagrant instances of disregard for the objectives of the Program, such as in the case of a company that temporarily makes a large reduction in foreign investments at the very end of a year (thereby producing literal compliance with the regulations for that year) and then offsets the reduction with a major reinvestment abroad in the beginning of the following year.

B203—Liquid Foreign Balances

§ B203–1 Introduction.

The principal purpose of § 203 is to limit the amount of funds or other liquid assets (i.e., holdings that are readily withdrawable, transferable or marketable) that a DI may hold abroad as of the end of each month. Section 203(c) requires DIs to repatriate to the United States "liquid foreign balances" (defined in § 203(a)(2)) in excess of specified historical levels for such holdings or of $25,000, whichever is greater. An exception from the repatriation requirement is made for liquid foreign balances held in Canada (§ 1105(b)), and for available proceeds of long-term foreign borrowing that are held in the form of liquid foreign balances (§ 203(c)).

While § 203(c) refers to monthend holdings for purposes of the limitation on liquid foreign balances, the spirit and intent of this restriction is that DIs should not exceed the specified level throughout the month.

A second purpose of § 203 is to encourage utilization of available proceeds of long-term foreign borrowing held in the form of liquid foreign balances for positive net transfers of capital that result in positive direct investment.

§ B203–2 Summary.

Section 203(a) defines the terms "foreign balances" and "liquid foreign balances" and indicates that under certain circumstances foreign balances held by another person will be deemed held by a DI.

Section 203(b) requires a DI to keep books and records listing each long-term foreign borrowing and the uses to which the proceeds of each such borrowing have been put.

Section 203(c) limits the amount of liquid foreign balances (other than Canadian balances or available proceeds of long-term foreign borrowing) a DI may hold at the end of any month to average end-of-month balances held by the DI during 1965 and 1966 (subject to a $25,000 "de minimis" exemption provided in § 203(e)(1)).

Section 203(d)(1) qualifies the exemption in § 203(c) for available proceeds of long-term foreign borrowing. While available proceeds held in liquid form outside the U.S. are not subject to the monthend balance restrictions of § 203(c), there is a yearend restriction imposed by § 203(d)(1). That is, the general authorization under § 504 for positive direct investment will not be available to a DI making a positive net transfer of capital (resulting in positive direct investment) if the DI holds available proceeds in the form of foreign balances or foreign property as of yearend. This qualification does not apply, however, (a) if the available proceeds do not exceed $25,000 (§ 203(e)(2)); (b)

the positive net transfer of capital represents debt repayment authorized by § 1002; or (c) the positive net transfer of capital is made pursuant to the § 503 minimum allowable. It should be emphasized that available proceeds held in liquid form in Canada are not exempt from the yearend repatriation requirement of § 203(d)(1).

Section 203(d)(2) permits proceeds of long-term foreign borrowing that have been previously expended in and deducted from net transfer of capital pursuant to § 313(d)(1) to be "allocated" to positive direct investment in another scheduled area. When expended proceeds are subsequently allocated, the DI must recognize a positive transfer of capital to the scheduled area in which the § 313(d)(1) deduction was previously taken; further allocation will likewise result in a transfer of capital to the schedued area to which the proceeds were last allocated. (For a more detailed analysis of § 203(d)(2), see § B324–10.)

Section 203(d)(3) permits a DI to reallocate proceeds of long-term foreign borrowing as an offset to positive direct investment in a scheduled area other than that in which such proceeds were originally allocated (whether such original allocation was made pursuant to § 306(e) or pursuant to § 313(d)(1) as in effect prior to July 23, 1969). In such event, a transfer of capital must be charged to the scheduled area to which the immediately preceding allocation was made. (For a more detailed analysis of § 203(d)(3), see § B324–10.)

§ B203–3 Definition of foreign balances.

The term "foreign balances" is defined in § 203(a)(1) to mean money on deposit in a foreign bank (including demand, time and fixed interest deposits and certificates of deposit); negotiable instruments; nonnegotiable instruments acquired after June 30, 1968, and commercial paper issued by unaffiliated foreign nationals (other than such instruments or paper acquired as a result of a DI's export of goods and services from the United States); and securities issued or guaranteed by a foreign country.

The term "money on deposit in a foreign bank" includes all bank deposits, whether interest-bearing or not, maintained with a "foreign bank" as defined in § 317(b).

The terms "negotiable instruments," "nonnegotiable instruments," "commercial paper," and "securities" includes notes, bonds, debentures, drafts, bills of exchange, or other evidences of indebtedness. The physical location of such evidences of indebtedness is immaterial.

The term "securities issued or guaranteed by a foreign country" includes debt securities issued or guaranteed by any governmental unit of a foreign country; i.e., the national government, states, cities, municipalities, counties, cantons, provinces, and the like. The physical location of such securities is immaterial.

Equity interests do not constitute foreign balances. Furthermore, items such as accounts receivable (not evidenced by any note or security), silver bullion, precious metals, jewels or jewelry, commodities futures contracts, and currency futures contracts do not constitute foreign balances.

§ B203–4 Definition of liquid foreign balances.

As defined in § 203(a)(2), "liquid foreign balances" do not include:

Negotiable instruments, nonnegotiable instruments, commercial paper and securities issued or guaranteed by a foreign country that were acquired on or before June 30, 1968 that are not redeemable at the option of the DI and are not transferable and readily marketable (but see comment following in text);

Bank deposits, negotiable instruments, nonnegotiable instruments, commercial paper and securities issued or guaranteed by a foreign government that have a period of more than 1 year remaining to maturity when acquired by the DI and are not redeemable in full at the option of the DI within a period of 1 year after such acquisition;

Foreign balances subject to restrictions on liquidation and transfer imposed by a foreign country (i.e., exchange controls or similar restrictions); and

Foreign balances pledged or hypothecated by the DI to secure a borrowing by the DI or by an AFN.

The exception for holdings described in the first category above is applicable only to acquisition of such items prior to July 1, 1969.

The exception described in the last category above includes only foreign balances that are pledged or hypothecated according to local law, and does not apply to any amount pledged or hypothecated in excess of the amount of the related borrowing by the DI or by an AFN.

Example 1. DI obtains a 3-year loan of $200,000 from a foreign bank and immediately expends the proceeds in an AFN. As a condition of obtaining the loan, DI is required to keep $40,000 on deposit with the foreign bank during the 3-year term, but the deposit is not specifically pledged or hypothecated as security. The $40,000 is a liquid foreign balance. (It should be noted, in addition, that this arrangement may involve a $40,000 transfer of capital to the AFN in addition to the $200,000 transfer of capital resulting from investment of the loan proceeds. See § 312(a)(9).)

Example 2. DI enters into an arrangement with a foreign bank pursuant to which DI deposits $100,000 with the bank and the bank immediately lends $100,000 to an AFN. The $100,000 deposited by DI is a liquid foreign balance. (It should be noted, in addition, that this arrangement may involve a $100,000 transfer of capital to the AFN. See § 312(a)(9).)

Example 3. DI enters into an arrangement with a foreign bank pursuant to which the bank lends $100,000 to an AFN. DI must maintain a $100,000 deposit with the bank until the loan is repaid by the AFN. If the loan is not repaid when due, the bank is entitled to satisfy any deficiency by resort to DI's $100,000 cash deposit. The $100,000 cash deposit is considered to have been pledged or hypothecated with the bank and, therefore, is not a liquid foreign balance. (This arrangement, however, will result in a $100,000 transfer of capital to AFN. See § 312(a)(9).)

§ B203–5 Foreign balances deemed held by a DI.

Section 203(c) comes into effect if liquid foreign balances are "held" by a DI. Generally, a DI holds foreign balances if it has title to the various securities, instruments or rights that are included within the meaning of the term, as defined in § 203(a)(1).

In addition, § 203(a)(4) establishes certain circumstances in which a DI is deemed to hold foreign balances even though title is vested in another person. Subparagraph (i) imputes foreign balances to a DI if they are held by any person (including an AFN) "principally formed or availed of by the DI for the purpose of holding title to such balances"; i.e., a DI having the real beneficial interest in foreign balances will be deemed to hold such balances notwithstanding that another person has nominal legal title.

Example 4. DI forms an incorporated AFN and transfers liquid foreign balances to its name. The AFN does not engage in any business. The liquid foreign balances are deemed to be held by DI under § 203(a)(4)(i). (Note that the transfer also constitutes a transfer of capital from DI to the AFN, pursuant to § 312(a)(2).)

Example 5. DI enters into an arrangement with an unaffiliated foreign national whereby the latter will hold title to DI's liquid foreign balances but will not use the funds for any purpose. The liquid foreign balances are deemed to be held by DI under § 203(a)(4)(i).

Subparagraph (ii) of § 203(a)(4) imputes foreign balances to a DI even though title is held by another person (including an AFN), if the balances (or cash equivalent) are returnable to the DI on demand without material conditions and they are not reasonably related to the business needs of the holder. Foreign balances are not returnable to a DI upon demand without material conditions merely because, by virtue of stock ownership, the DI controls the person holding title. However, foreign balances of a branch AFN generally will be deemed returnable to a DI on demand without material conditions.

Example 6. DI has an incorporated AFN (A) engaged in manufacturing operations. From 1960 through 1968, A earned $10,000,000 and on June 30, 1969 has $8,000,000 invested in 6-month certificates of deposit of foreign banks. No part of these funds is needed by A to meet business requirements. Nevertheless, the foreign balances are not deemed to be held by DI, since they are not considered to be returnable to DI upon demand without material conditions.

On the other hand, assume that on June 1, 1969, A declared a $500,000 dividend in favor of DI and such dividend became payable on demand on June 15, 1969. In this event, $500,000 of the $8,000,000 are deemed liquid foreign balances held by DI as of June 30, 1969. Note also that, since the dividend was not paid when due, a debt obligation is deemed to have been created in favor of DI, resulting in a $500,000 transfer of capital by DI to A under § 312(a)(1). Accordingly, payment of the past due dividend will constitute a transfer of capital from A to DI pursuant to § 312(b)(3).

Example 7. DI has 50 percent interest in a German company (C). In June 1969, DI lends $100,000 to C, repayable on demand. The $100,000 is invested by C in a 6-month certificate of deposit of a foreign bank. C does not need any part of the $100,000 to meet business requirements. The certificate of deposit is deemed to be held by DI. (Note also that the loan would constitute a transfer of capital from DI to C pursuant to § 312(a)(1).)

Determining whether liquid foreign balances held by an AFN are "unrelated to the business needs" of the AFN requires analysis of all facts and circumstances of the particular case. The nature of the AFN's business and customary holdings of liquid funds are relevant factors. As a general rule, liquid foreign balances held by an AFN will not be considered unrelated to its business needs if required to pay current operating expenses (including tax, royalty, interest and similar obligations), to pay for reasonably current or planned capital improvements or additions, or as standby contingency reserves.

Example 8. DI has a branch in the United Kingdom (B) engaged in manufacturing operations. For many years, B has maintained an account averaging $500,000 with a local bank. As of June 30, 1969, B's account with the local bank has a balance of $500,000, related to its business needs. Thus, although the $500,000 is deemed returnable to DI upon demand without material conditions because B is a branch, the liquid foreign balances are not attributable to DI under § 203(a)(4).

Example 9. DI has a branch in the United Kingdom (B) engaged in manufacturing operations. For many years, B has maintained an account averaging $500,000 with a local bank. However, as of June 30, 1969, B's balance in the account is $1,000,000. B has recently been expanding business at a rapid pace and estimates that, for the remainder of 1969 and thereafter, it will have to maintain cash balances of at least $1,000,000 in order to meet increased operating commitments. The liquid foreign balances held by B are related to business needs and, therefore, are not treated as liquid foreign balances of DI under § 203(a)(4), even though returnable to DI upon demand without material conditions.

Example 10. DI has a wholly owned subsidiary in Mexico (A) engaged in manufacturing operations. A holds $1,000,000 in liquid foreign balances as of June 30, 1969, of which only $250,000 may reasonably be required for working capital purposes. However, A has entered into a contract for expansion of facilities and plans to expend the remaining $750,000 in 1969 and 1970 for this purpose. The liquid foreign balances held by A are, therefore, related to business needs and are not treated as liquid foreign balances of DI under § 203(a)(4) even if returnable to DI upon demand without material conditions.

Example 11. DI has a wholly owned subsidiary (C) in Germany engaged in manufacturing operations. As of June 30, 1969, C holds liquid foreign balances of $1,000,000. C requires only $250,000 of this amount for working capital purposes, and intends to lend the remaining $750,000 from time to time to other AFNs on a short-term basis. Accordingly, $750,000 of the liquid foreign balances held by C are unrelated to its business needs and will be treated as liquid foreign balances of DI under § 203(a)(4)(ii) if they are returnable to DI upon demand without material conditions.

Example 12. An individual (X) who is a "person within the United States" owns a substantial apartment house complex in France. As a result, X is a DI and the apartment house complex is his AFN. X also owns a chalet in France purchased principally for his own personal use, although he and his family reside there only from June through August each year. During the remainder of the year, X and his family reside in the United States and the chalet is rented on a month-to-month basis to others. The chalet is not an AFN of X.

X maintains two demand accounts with French banks. The funds in one account (account No. 1), consisting principally of the income earned from the apartment house complex, are needed and utilized to pay the operating expenses of the apartment house complex and for repairs and improvements to this property. Operating expenses of the chalet and the cost of repairs and improvements to this property are paid out of the second account (account No. 2), but the principal use of this account is for X's personal expenses when he resides in France. The funds in account No. 1 are not liquid foreign balances of X, as they are related to the business needs of X's AFN (i.e., the apartment house complex); the funds in account No. 2 are liquid foreign balances of X, since their principal use is not for business needs.

§ B203–6 Valuation of foreign balances.

Negotiable instruments, nonnegotiable instruments, commercial paper and securities constituting foreign balances shall be valued, for purposes of § 203, at fair market value, or, if fair market value is not readily determinable, at the cost of acquisition. In the case of items the prices of which are quoted on a daily basis, the final bid price (or the closing sale price, if available) on the relevant date will be considered the fair market value on such date.

Foreign balances in the form of bank deposits or other claims denominated in a foreign currency are valued at the prevailing official exchange rate in terms of U.S. dollars.

§ B203–7 Limitation on amount of liquid foreign balances.

Section 203(c) requires a DI to limit the amount of liquid foreign balances (other than Canadian foreign balances and available proceeds of long-term foreign borrowing held in the form of liquid foreign balances) held as of the end of any month to the average end-of-month amounts held during 1965 and 1966 (i.e., the sum of liquid foreign balances held on the last day of each month during 1965 and 1966 divided by 24), subject to the $25,000 "de minimis" exemption in § 203(e)(1).

Under § 1105(b), Canadian foreign balances are not subject to the limitations of §§ 203(c) and 203(e)(1) and can be held by a DI without restriction on amount (subject, however, to the year-end repatriation requirement in § 203(d)(1)).

It should be noted in this connection that § 1105(b), in addition to excluding Canadian balances from the end-of-month restrictions on liquid foreign balances contained in § 203(c), is also intended to exclude Canadian balances from the calculation of total liquid foreign balances for purposes of the $25,000 "de minimis" exemption under § 203(e)(1). The parenthetical reference to "direct investment liquid foreign balances" in § 1105(b) is intended merely to reflect the exclusion of available proceeds of long-term foreign borrowing (as defined in § 324(d)) from the restrictions of § 203(c). It is not the intention of § 1105(b) to authorize inclusion of available proceeds held in Canada during 1965 and 1966 for purposes of calculating average end-of-month liquid foreign balances under § 203(c).

Section 203(c) also permits a DI to hold available proceeds of long-term foreign borrowing in the form of liquid foreign balances subject only to the limitation in § 203(d)(1). "Proceeds of long-term foreign borrowing" and "available proceeds" of long-term foreign borrowing are defined in § 324 (c) and (d).

Calculations under § 203(c) are to be made on a worldwide rather than on a schedular basis. Accordingly, a DI may transfer liquid foreign balances from one foreign country to another, but the aggregate amount held abroad at the end of any month may not exceed the amount permitted by § 203(c).

Example 13. DI held liquid foreign balances (other than Canadian foreign balances and available proceeds of long-term foreign borrowing) of $200,000 on March 31, 1965, $200,000 on April 30, 1965, $100,000 on May 31, 1965, $400,000 on April 30, 1966, and $300,000 on May 31, 1966. DI held no liquid foreign balances of any kind as of the end of any other month during 1965 or 1966. Therefore, DI may hold $50,000 of liquid foreign balances (other than Canadian liquid foreign balances and available proceeds of long-term foreign borrowing held in the form of liquid foreign balances) as of the end of any month commencing June 30, 1968 (i.e., $1,200,000 divided by 24).

Example 14. DI did not hold any liquid foreign balances during 1965 or 1966. Nevertheless, by operation of § 203(e)(1), DI may hold up to $25,000 in liquid foreign balances (other than Canadian liquid foreign balances and available proceeds held in the form of liquid foreign balances).

Example 15. DI held liquid foreign balances during 1965 and 1966, but all were Canadian foreign balances. DI may not (except for the "de minimis" exception in § 203(e)(1)) hold any liquid foreign balances (other than Canadian liquid foreign balances and available proceeds held in the form of liquid foreign balances) as of the end of the month.

Only available proceeds of long-term foreign borrowing (i.e., borrowings reported on appropriate records and OFDI reporting forms, the proceeds of which have not been expended or allocated (see § 324 (c) and (d)) may be held in the form of liquid foreign balances outside the limitations of § 203(c). Note, however, that if a DI does not properly report the borrowing as a long-term foreign borrowing, then the funds received, if held as liquid foreign balances, will be subject to the restrictions of § 203(c). (See §§ B203–8(i) and B324–6 and 7.)

Available proceeds held as liquid foreign balances denominated in a foreign currency cannot exceed the U.S. dollar equivalent of the original borrowing. (See § 324–2.) Accordingly, if a DI's $1 million long-term foreign borrowing is held in a DM deposit and the mark is revalued by 8.5 percent, available proceeds will remain $1 million. The $85,000 exchange gain realized by the DI does not constitute available proceeds and, therefore, will be subject to the provisions of § 203(c).

Once available proceeds are either expended in making transfers of capital (and deductions taken under § 313(d)(1)) or are allocated to offset positive direct investment pursuant to § 306(e), such funds cease to be available proceeds and will not qualify for the exemption contained in § 203(c). Moreover, § 306(e)

provides that available proceeds allocated to positive direct investment may not thereafter be held in the form of foreign balances or foreign property, liquid or otherwise.

Example 16. On May 1, 1969, DI negotiates a $1,000,000 long-term foreign borrowing, the proceeds of which are placed in a demand deposit with a London bank. The proceeds are available proceeds of long-term foreign borrowing, and may be held in the form of liquid foreign balances outside the limitations of § 203(c). On June 1, 1969, DI withdraws $600,000 from the London bank and loans the funds to a French AFN (C) on a 60-day note. The loan is a transfer of capital from DI to C, but since proceeds of long-term foreign borrowing were used, an amount equal to the transfer of capital must be deducted under § 313(d)(1). In July 1969, C repays the $600,000 loan. DI now holds $600,000 of proceeds of long-term foreign borrowing that are not available proceeds of such borrowing since they were expended in making the loan to C. Therefore, if the $600,000 is again placed on deposit with the London bank, it would have to be included in the computation of liquid foreign balances held by DI under § 203(c). On December 30, 1969, DI withdraws $400,000 from the London bank and repatriates the funds to the United States, for the purpose of allocating such proceeds to positive direct investment in Schedule B pursuant to § 306(e). If the criteria of § 306(e) for allocation are met, the $400,000 could not thereafter be held in the form of foreign balances or any other foreign property.

§ B203–8 Available proceeds of long-term foreign borrowing: Effect on positive net transfer of capital.

Section 203(d)(1) prohibits a DI holding more than $25,000 of available proceeds of long-term foreign borrowing in the form of foreign property at yearend from making a positive net transfer of capital to any scheduled area, to the extent such positive net transfer of capital would result in positive direct investment for such year, unless the positive direct investment is authorized by § 503 or by § 1002. A DI may be relieved from the prohibition of § 203(d)(1) only by § 203(e)(2) (the $25,000 "de minimis" exemption) or by specific authorization or exemption. The effect of § 203(d)(1) is to encourage use of available proceeds of long-term foreign borrowing, in whatever form held, for direct investment purposes in foreign countries before such investment is financed with funds from U.S. sources.

For purposes of § 203(d)(1), a DI need not take into account positive direct investment that occurs by reason of interschedular transfers of capital charged against an allowable "downstreamed" pursuant to § 504(d). Under § 505, transfers of capital between AFNs in different scheduled areas are attributed to the DI. Under § 504(d), a DI is permitted to "downstream" unused schedular allowables without limitation. Accordingly, circumstances may arise where, by reason of § 505, positive direct investment charged to a DI in a scheduled area will be authorized only by application of § 504(d). If, as of yearend, the DI holds available proceeds, such positive direct investment would be prohibited by a literal application of § 203(d)(1). However, OFDI construes § 203(d)(1) as being inapplicable to positive direct investment arising from a § 505 transfer of capital that is charged against a DI's § 504(d) allowable.

(i) *Available proceeds held in the form of foreign property.* The prohibitions of § 203(d)(1) apply during any year only if the DI holds available proceeds of long-term foreign borrowing in the form of foreign balances or other foreign property as of the end of such year. The term "available proceeds of long-term foreign borrowing" is defined in § 324(d) to mean the proceeds of long-term foreign borrowing remaining after deducting (a) amounts expended in making transfers of capital to AFNs (other than Canadian AFNs) and deducted from net transfer of capital under § 313 (d)(1) and (b) amounts allocated to and deducted from positive direct investment in any scheduled area (other than positive direct investment in Canada) under § 306(e). If a DI does not report a long-term foreign borrowing on all required periodic reports following the borrowing the proceeds cannot be treated as available proceeds and, therefore, are not subject to the prohibitions of § 203(d)(1). (See § B324–6 and 7.) Note also that the proceeds of an unreported borrowing do not qualify for use as a deduction from net transfer of capital under § 313(d)(1) or from positive direct investment under § 306(e), nor can such proceeds be excluded in computing liquid foreign balances for purposes of § 203(c).

The prohibitions of § 203(d)(1) apply if available proceeds are held in any form of foreign property including Canadian balances or assets, debt or equity securities of a foreign national (including debt or equity securities of a Canadian person, whether or not such person is an AFN of the DI) or any other foreign property.

For purposes of the following examples, asume that DI elects the § 504(a) historical allowable for 1969 and has historical allowables of $3 million in Schedule A, $2 million in Schedule B and $1 million in Schedule C:

Example 17. In June 1969, DI negotiates a long-term foreign borrowing of $10,000,000. The borrowing is not reported in DI's second quarter report on Form FDI–102 because the proceeds were intended for use in the United States. DI repatriates $8,000,000 to the United States for immediate use and purchases 6-month certificates of deposit of a London bank with the remaining $2,000,000. DI has not made and does not make during 1969 any other long-term foreign borrowings. As of the end of 1969, DI has made a positive net transfer of capital to Schedule A of $2,500,000. The positive net transfer of captial is not prohibited by § 203(d)(1); DI has no available proceeds because the borrowing was not reported as provided in § 324(c). Note, however, that the 6-month certificates of deposit are liquid foreign balances, subject to the limitation of § 203(c).

Example 18. In March 1969, DI negotiates a long-term foreign borrowing of $10,000,000, immediately expends $5,000,000 of the proceeds in a transfer of capital to a Schedule C AFN and purchases 6-month certificates of deposit of a London bank with the remaining $5,000,000. DI reports the borrowing on Form FDI–102 for the first quarter of 1969, pursuant to § 324(c). Upon maturity of the certificates of deposit in September, DI withdraws the funds (constituting "available proceeds") and deposits them with a New York bank. During November, DI makes a transfer of capital to Schedule A of $2,500,000, but not with the available proceeds, resulting in a positive net transfer of capital to Schedule A at the end of 1969 of $2,500,000. The positive net transfer of capital to Schedule A is not prohibited by § 203(d)(1), because DI does not hold, as of the end of the year, any available proceeds in the form of foreign property.

Example 19. In December 1968, DI negotiated a long-term foreign borrowing of $15,000,000, reported the borrowing as required by § 324(c), and invested $10,000,000 in 13-month certificates of deposit of a London bank. During 1969, DI makes a $2,000,000 positive net transfer of capital to Schedule A and a $1,000,000 positive net transfer of capital to Schedule B. Both positive net transfers of capital are prohibited by § 203(d)(1), since DI had available proceeds held in the form of foreign property on December 31, 1969 (i.e., the 13-month certificates of deposit of the London bank).

Example 20. During 1969, DI negotiates and properly reports a $10,000,000 long-term foreign borrowing and loans the proceeds to a Canadian AFN under a 5-year note. DI also makes a $2,000,000 positive net transfer of capital to Schedule A. Assuming no other transactions, the positive net transfer of capital to Schedule A is prohibited because DI holds available proceeds of long-term foreign borrowing in the form of debt obligations of a foreign person; i.e., the Canadian AFN. (DI could, however, avoid noncompliance with § 203(d)(1) by allocating and repatriating, pursuant to § 306(e), $2,000,000 of the available proceeds to offset the positive direct investment in Schedule A.)

Example 21. During 1969, DI's only AFN, a branch in Schedule C, increases net assets by $1,000,000. By operation of § 313(b), DI is deemed to have made a $1,000,000 positive net transfer of capital to Schedule C. DI has $2,000,000 of available proceeds of long-term foreign borrowing and such proceeds are invested in short-term foreign government securities. During the final quarter of 1969, DI allocates $1,000,000 of these proceeds to the positive net transfer of capital to Schedule C, liquidates that amount of foreign securities, repatriates the funds received, and deposits them in a U.S. bank. As of the end of 1969, DI does not have a positive net transfer of capital to Schedule C, and therefore DI is not affected by § 203(d)(1). Note that DI will carry over into 1970 $1,000,000 of available proceeds that are not subject to the repatriation requirements of § 203(c).

(ii) *Positive net transfer of capital authorized by § 503 or § 1002.* Section 203(d)(1) does not prohibit a DI holding available proceeds at yearend from making a positive net transfer of capital resulting in positive direct investment if the DI has elected to be governed by § 503, nor does that prohibition apply to a positive net transfer of capital authorized by § 1002 (resulting from the repayment of debt).

Example 22. DI has § 504 allowables for 1969 of $500,000 in Schedule A, $300,000 in Schedule B and $100,000 in Schedule C. During 1969, DI negotiates and properly reports a long-term foreign borrowing of $10,000,000. DI expends $6,000,000 to acquire a Schedule C AFN and invests the remaining $4,000,000 in 6-month certificates of deposit of a London bank. DI thereafter makes a positive net transfer of capital of $750,000 to Schedule A. DI elects to be governed by the § 503 allowable for 1969. The positive net transfer of

capital to Schedule A is not prohibited by § 203(d)(1), even though DI holds available proceeds in the form of foreign balances at the end of 1969.

Example 23. During 1967, DI negotiated a long-term foreign borrowing of $15,000,000 and expended all proceeds to acquire a Schedule B AFN. The terms of the borrowing called for repayment of principal in the amount of $2,500,000 in each of 1969, 1970, and 1971, the remainder being due in 1972. DI has a § 504 allowable in Schedule B of $2,000,000 for 1969. During 1969, DI acquires available proceeds from a second long-term foreign borrowing. The proceeds of this borrowing are held in a demand account with a foreign bank. During 1969 DI makes the first required repayment of the 1967 borrowing as authorized by § 1002(a)(4), and there are no other relevant transactions during the year. The positive net transfer of capital resulting from the repayment is not prohibited by § 203(d)(1).

Example 24. During 1968, DI negotiated a long-term foreign borrowing of $5,000,000. DI filed a certificate pursuant to Subpart J with respect to the borrowing. The borrowing was made under a $5,000,000 line of credit and was evidenced by a 90-day note renewable at fluctuating interest rates for a period of 5 years from the original date of the borrowing. During 1968, DI loaned all proceeds of the borrowing to a Schedule B AFN. During 1969, DI has a § 504 allowable in Schedule B of $2,000,000, and DI elects to be governed by § 504. During 1969, DI negotiated another long-term foreign borrowing of $20,000,000 and invested $10,000,000 of the proceeds in short-term certificates of deposit of a German bank. DI desires to repay $2,000,000 of the 1968 long-term foreign borrowing. Should such repayment result in positive direct investment for the year 1969, the transaction would be prohibited by § 203(d)(1). The repayment would not be covered by § 1002, because it would be made at the option of DI (i.e., DI would be electing not to exercise the right to renew that portion of the borrowing; see § 1002(d)). Note, however, that if DI uses $2,000,000 of the 1969 borrowing to curtail the 1968 borrowing, the transaction would be considered a refinancing to that extent rather than a repayment, and no transfer of capital will be charged. (See § 324(b)(1).)

(iii) *Positive net transfer of capital prohibited only if positive direct investment results.* A DI holding available proceeds in the form of foreign balances or property at year-end is prohibited by § 203(d)(1) from making a positive net transfer of capital to a scheduled area only to the extent such transfer results in positive direct investment.

For purposes of the following examples, assume that DI has elected a § 504 allowable for 1969 and that more than $25,000 in available proceeds of long-term foreign borrowing are held in the form of foreign property:

Example 25. DI has five Schedule C AFNs, all incorporated, and the AFNs have total losses of $3,000,000 during 1969. During 1969, DI makes a positive net transfer of capital to these Schedule C AFNs of $2,500,000. The positive net transfer of capital is not prohibited by § 203(d)(1), because it does not result in positive direct investment. (Section 504(e), which prohibits losses in Schedule C from being used as an offset to a positive net transfer of capital for purposes of determining compliance with the § 504 allowable, is not relevant to the application of § 203(d)(1).) The result would be the same if the AFNs and the positive net transfer of capital were in Schedule A or B.

Example 26. DI has five Schedule C AFNs, all incorporated, that have aggregate earnings of $4,000,000 during 1969, but declare dividends to DI of $5,500,000. During 1969, DI makes a positive net transfer of capital to Schedule C of $1,000,000. The positive net transfer of capital is not prohibited by § 203(d)(1), because it does not result in positive direct investment in Schedule C.

(iv) *Allocation or reallocation to positive direct investment deemed first to reduce positive net transfer of capital.* Section 203(d)(1) provides that any allocation to positive direct investment pursuant to § 203(d)(2), § 203(d)(3), or § 306(e) shall be deemed, for purposes of § 203(d)(1), first to reduce the positive net transfer of capital component of positive direct investment. Accordingly, an allocation that serves to offset positive direct investment in a scheduled area for purposes of conforming to a DI's § 504 allowable may also be availed of for purposes of satisfying the requirement of § 203(d)(1), even if the allocation had actually been made to the reinvested earnings component rather than to the positive net transfer of capital component of positive direct investment in the scheduled area.

Example 27. DI elects the 30 percent earnings allowable under § 504(b) for 1969, resulting in a Schedule B allowable of $2,000,000. During 1969, DI makes a positive net transfer of capital to Schedule B of $2,500,000 and its Schedule B AFNs earn $1,000,000. In addition, DI holds $5,000,000 in available proceeds of long-term foreign borrowing in the form of short-term deposits in a German bank. DI's Schedule B AFNs pay no dividends during 1969. DI must repatriate $1,500,000 of the available proceeds prior to the end of the year and allocate and deduct such amount from positive direct investment pursuant to § 306(e), thereby achieving compliance with § 504(b). However, since DI would still hold $3,500,000 of available proceeds in the form of foreign balances, and the net transfer of capital to Schedule B, after taking into account the second proviso to § 203(d)(1), would be $1,000,000 ($2,500,000 less $1,500,000), DI is also required to allocate before the end of the year at least an additional $1,000,000 to comply with § 203(d)(1). If this repatriated amount is allocated to positive direct investment under § 306(e), DI will report on its Form FDI-102F positive direct investment of $1,000,000 in Schedule B during 1969 (deemed to consist of a zero net transfer of capital plus reinvested earnings of $1,000,000) and would have a Schedule B carryforward into 1970 of $1,000,000 for its unused allowable in that amount. As an alternative to allocation, DI may repatriate the remaining $3,500,000 of available proceeds from abroad and hold them in nonforeign assets. Section 203(d)(1) would not then apply and DI would show positive direct investment in Schedule B of $2,000,000, no carryforward of the § 504 allowable and $3,500,000 of available proceeds for use in succeeding years.

(v) *Specific exemption from the prohibitions of § 203(d)(1).* A DI subject to the prohibitions of § 203(d)(1) may comply with the requirements of the section in any of three ways: (a) The DI may expend available proceeds of long-term foreign borrowing in making transfers of capital, so as to avoid having a positive net transfer of capital in any scheduled area; (b) the DI may allocate available proceeds of long-term foreign borrowing to positive direct investment in each scheduled area, to the extent of a positive net transfer of capital in each scheduled area; or (c) the DI may repatriate all available proceeds of long-term foreign borrowing to the United States by yearend. Compliance with § 203(d)(1) may, however, be impossible or may result in substantial hardship in certain instances. OFDI will consider applications for specific exemption from § 203(d)(1) upon showing by a DI that compliance with that section cannot be accomplished by any of the means listed above, for one or more of the following reasons:

The expenditure of available proceeds in making positive transfers of capital during the year and the liquidation and repatriation to the United States of available proceeds would contravene express representations made by the DI to, or restrictions imposed on the DI by, persons from whom the relevant long-term foreign borrowings were obtained (as conditions to obtaining such borrowings);

Available proceeds cannot be expanded in making positive transfers of capital or repatriated to the United States, because they were invested in nonliquid long-term foreign investments prior to June 18, 1969, the date § 203(d)(1) for 1969 was published in proposed form in the FEDERAL REGISTER;

The expenditure of available proceeds in making positive transfers of capital during the year and the liquidation and repatriation to the United States of available proceeds would create a substantial probability of material adverse United States or foreign tax consequences to the DI (such as jeopardizing the exemption of an international finance subsidiary's interest payments on debt issued to foreign persons from U.S. withholding tax because of an increase in U.S. source income of the international finance subsidiary); or

Available proceeds cannot be expended in making positive transfers of capital or repatriated to the United States without causing demonstrable, material economic hardship for the DI (generally, market yield differentials will not be considered sufficient grounds for such hardship relief).

DIs should note Internal Revenue Service Technical Information Release No. 1005, issued December 27, 1968 (Rev. Rul. 69-27), in which there is discussion of several options available under §§ 861-864 of the Internal Revenue Code (1954) that are consistent with the objectives and requirements of the Foreign Direct Investment Program and will not adversely affect an international finance subsidiary's "foreign-source income" position.

B304—Affiliated Foreign Nationals

§ B304-1 Introduction.

The term "affiliated foreign national" is a key concept in the regulations, since only persons within the United States who are or who become DIs by virtue of their interests in AFNs are subject to the Program.

As a general rule, any transaction between a person within the United States and any foreign national (as defined in § 302) that does not affect the U.S. person's equity or debt investment in an

AFN, or does not result in a foreign national becoming an AFN, is not subject to the direct investment prohibitions imposed by § 201(a) of the regulations.

§ B304–2 Summary.

Restrictions on foreign direct investment under the Program are applicable only to persons within the United States having or acquiring, directly or indirectly, a 10 percent or greater interest in an affiliated foreign national. A "foreign national" is defined in § 302(a) as—

> * * * any person which is not a person within the United States * * *, including a corporation or partnership organized under the laws of a foreign country * * *, a business venture conducted within a foreign country * * *, and a foreign bank * * *.

The interest in a foreign national required to make it an AFN for purposes of the regulations is, in general, determined by the U.S. investor's voting rights if the foreign national is a corporation, or by the share of profits to which the investor is entitled if an unincorporated foreign business activity is involved. Furthermore, to be an AFN a business venture must have gross assets of more than $50,000 at some time during the year and be in existence (or have reasonable prospect of existence) for more than 12 consecutive months.

Foreign nationals of a nonprofit nature, such as charitable, educational, religious, scientific, literary, or similar organizations, are not treated as AFNs.

Business ventures in which an AFN has an interest may themselves be AFNs if located in a scheduled area other than that of the parent. Since Canada is accorded special treatment pursuant to Subpart K of the regulations, Canadian business ventures of AFNs located in Schedule B and non-Canadian, Schedule B business ventures of Canadian AFNs are treated as separate AFNs, even though such relationships within the same scheduled area would ordinarily result in a single AFN.

§ B304–3 Requisite financial interest.

The interest that will give rise to a DI–AFN relationship is, generally, a 10 percent or greater voting interest in a foreign corporation or a 10 percent or greater interest in the profits of a foreign partnership or business venture. (See §§ 304(b)(2), 901 and 902.) However, § 304(b)(4) provides that a DI–AFN relationship may be deemed to exist notwithstanding this general rule. Under present OFDI policy, this caveat applies principally to cases where the U.S. investor actually participates in and exercises a controlling interest over the affairs of the foreign national, and has transferred funds or other property in excess of $200,000 to the enterprise during any year commencing with 1968. (The $200,000 figure is a "de minimis" test, unrelated to the minimum allowable in effect for 1968 under § 503.)

The 10-percent interest test is inapplicable to creditor-debtor relationships (whether or not the loan is secured), even though principal and/or interest payments by the foreign borrower may result in the U.S. creditor receiving all or a substantial portion of the foreign enterprise's revenues.

§ B304–4 Foreign nationals.

(i) *Corporations.* A foreign corporation includes any organization incorporated under the laws of a foreign country, or having all or a substantial part of the legal characteristics commonly attributed to corporations under the laws of the United States (§ 307(b)). Thus, an organization that (a) is not formally incorporated under foreign law but has transferable interests, that (b) is organized so that holders of interests are not liable for its obligations except to the extent of their contributions or subscriptions, and (c) has perpetual duration (or for a substantial fixed period), would be considered a foreign corporation.

Pursuant to § 304(b)(1), an incorporated AFN is generally assigned to the scheduled area where organized, regardless of the situs of operations. However, if the AFN conducts no operations in the scheduled area of incorporation but merely maintains a required statutory office there, it may be assigned to a different scheduled area for purposes of the Regulations (§ 304(b)(4)).

(ii) *Partnerships.* A foreign partnership includes formally structured noncorporate organizations created under a partnership law or similar statute of a foreign country. A foreign joint venture will ordinarily be treated as a "business venture" (see below), rather than as a partnership, if it is formed to engage in a specific transaction or series of related transactions and is to be liquidated when the transaction or transactions have been completed.

A foreign partnership is assigned to the scheduled area where it is organized (§ 304(b)(1)).

(iii) *Business ventures.* A foreign business venture encompasses business activities in a foreign country (a) by a DI, (b) by employees or partners of a DI on behalf of the DI, or (c) by employees or partners of an AFN on behalf of such AFN (§ 304(a)(1)(ii) and (iii), as limited by § 304 (c) and (d)). Some types of facilities abroad, such as storage areas and display offices owned or physically controlled by the DI, may be treated as business ventures for purposes of the regulations even though frequently not considered "permanent establishments" for other legal purposes.

The term "employee" as used in § 304 is not necessarily synonymous with its meaning for Federal tax purposes. For example, an agent working substantially full-time for a U.S. principal and having a stock of goods from which orders are filled, or having authority to accept orders or otherwise execute contracts on behalf of his principal, may be considered an employee for purposes of this section. Furthermore, the agent's lack of authority to conclude contracts may be immaterial if acceptance by the DI is, in actual practice, merely a ministerial act.

Ownership interests in real property abroad (excluding mortgages secured by real property) will constitute business ventures if held primarily for business purposes (including real property held for appreciation). Therefore, crop or grazing acreage, apartment houses and land held for subdivision are considered business ventures. On the other hand, real property such as a house in a foreign country purchased by a U.S. resident principally for personal use will not be considered held for business purposes even though rented to others for a portion of the year.

Contract construction, engineering, oil exploration, and similar operations involving a jobsite or project office in a foreign country are also business ventures. Drilling operations on the U.S. continental shelf or geological drilling in the deep ocean over which no nation asserts jurisdiction are deemed to be conducted within the United States for purposes of the regulations, while drilling operations conducted on the continental shelf adjacent to a foreign country are deemed to be conducted in that country. While drilling operations over water are in all other respects treated the same as drilling operations on land, vessels registered in the United States that are used in connection with such operations in the jurisdiction of a foreign country are assigned a value of zero (and related liabilities or depreciation charges should be excluded) in computing net branch assets of that business venture.

Under § 304(a)(1)(ii), a DI's overseas sales or manufacturing branch is a business venture. This is true whether or not the DI customarily maintains separate books and records reflecting the assets, liabilities, earnings, and expenses, etc. attributable or allocable to the branch. Similarly, a sales or manufacturing branch of an incorporated AFN would be a foreign business venture. However, if located in the same scheduled area as the parent AFN, the parent and its business venture are grouped as a single AFN for purposes of the regulations, provided neither is Canadian (§ 304(a)(1)(i), as qualified by § 304(a)(1)(iii)). If the parent AFN and its business venture are in different scheduled areas, or if in the same scheduled area and one is Canadian, two AFNs would be attributed to the DI (§ 304(a)(1)(iii)).

A special rule is provided in § 304(b)(1) for certain nonpermanent or transient business ventures conducted in more than one scheduled area during any year. In that case, the scheduled area in which the business venture is conducted for the greatest period of time during such year will govern. Thus, for example, a traveling circus performing for short periods of time during a given year in a number of countries in different scheduled areas, but primarily in continental European countries, will be treated as a Schedule C AFN for that year.

§ B304–5 Specific exceptions.

Section 304 (c) and (d) enumerate certain categories of foreign business activities that are not treated as AFNs for purposes of the Regulations regardless of

the quantum of interest that a person within the United States may have or may acquire. Excepted are foreign enterprises solely of a charitable, educational, religious, scientific, literary, or other similar nature not engaged in for profit. Also excepted from treatment as AFNs during a given year are business ventures that (a) do not have or involve, at any time during the year, gross assets of more than $50,000, valued at the greatest of cost, book, replacement or market (§ 304(d)(i)); (b) are commenced during the year and are not reasonably expected to be conducted for more than 12 consecutive months (§ 304(d)(ii)); or (c) are terminated within the year and were not, in fact, conducted for more than 12 consecutive months (§ 304(d)(iii)).

The test under § 304(d)(i) relates to gross assets determined in accordance with accounting principles generally accepted in the United States. If, at any time during the year, the business venture has gross assets of more than $50,000, it is deemed an AFN for the entire year.

The determination whether a business venture in a foreign country is reasonably expected to be conducted, or is in fact conducted, for a period of 12 consecutive months, under § 304(d)(ii) and (iii), is governed by the primary activity of the enterprise during such period. Continuous physical presence is not required. If, for example, a traveling circus spent substantially all of the requisite 12-month period abroad, but returned to the United States occasionally for appearances, the business venture would nevertheless be considered to have been conducted within one or more foreign countries for more than 12 consecutive months.

With specific reference to contract construction, engineering, and similar operations conducted directly by U.S. companies involving opening of a job site and/or project office in a foreign country (or in waters under the jurisdiction of a foreign country), the following rules will generally be applied under § 304(d)(ii) and (iii):

The commencement date of the business venture is the date on which the first materials or equipment arrive at the job site, or the date the project office is opened, whichever is earlier; and

The termination date of the business venture is the date when all transfers of capital and earnings attributable to the relevant contract (except for guaranty retentions of a reasonable amount) are charged off the job's books and repatriated to the United States. (Payments under guaranty retentions should be charged off and the balance repatriated to the United States as soon as practicable.)

A determination under § 304(d)(ii) whether an overseas business venture is reasonably expected to be conducted for more than 12 consecutive months should be based on the facts and circumstances existing when the venture is commenced. Determinations need not anticipate delays or interruptions that are not foreseeable when the venture is commenced, such as delays or interruptions due to unanticipated labor strikes or slowdowns or unusual weather conditions.

The rule with respect to termination of a business enterprise during any year under § 304(d)(iii) is not intended to be applied inflexibly. If, due to unforeseeable delays or interruptions, a business venture cannot be terminated within the required 12-month period, but is in fact terminated with reasonable dispatch in view of the unanticipated difficulties, a specific exemption from application of the Regulations may be granted (see § 801).

Should an exemption under § 304(d) be applicable to a business venture owned directly by a DI (e.g., a branch of the DI), the venture is not considered to be an AFN of the DI. Therefore, transfers of capital between the DI and the venture have no effect under the regulations, nor do profits (or losses) of the venture. The result is different, however, if an exemption under § 304(d) applies to an AFN's business venture that is located in a different scheduled area from the AFN. Section 304(d) then merely serves to exclude the venture as an AFN of the DI, not to remove it from the reach of the regulations altogether. Ventures of this nature are deemed a part of the parent AFN (as are an AFN's business ventures in the same scheduled area). Accordingly, profits (or losses) of an incorporated AFN's ventures of this nature would be deemed earnings of the parent AFN, transfers of capital to the venture would be deemed transfers to the parent AFN, and any net change in the net assets of the venture would not be reflected in calculating the DI's net transfer of capital to unincorporated AFNs for purposes of § 313(b).

§ B304–6 Application of § 304.

The operation and effect of § 304 are illustrated by the following examples:

Example 1. (*General.*) A U.S. corporation (X) owns 10 percent of the outstanding voting stock of a corporation organized under the laws of France. The foreign company is an incorporated AFN in Schedule C (see § 304 (a)(1)(i) and (b)(1)). If the company were incorporated under the laws of Brazil, it would be an incorporated AFN located in Schedule A. If it were incorporated under the laws of the United Kingdom, it would be an incorporated AFN located in Schedule B.

If the French AFN has a branch in Italy, or if the AFN in the United Kingdom has a branch in Japan, the branch operations would be subsumed under the parent company for purposes of the regulations, since both parent and branch would be in the same scheduled area (§ 304(a)(1)(i)). An exception to this rule applies where either the parent AFN or its branch is located in Canada, in which case both would be AFNs (§ 304(a)(1)(iii)).

By the same token, if the French corporation has a branch in Germany and a wholly-owned corporate subsidiary in Australia, and the latter has a branch in Canada, DI would have only three AFNs: (a) The French corporate subsidiary, (b) the French corporation's Australian subsidiary, and (c) the latter's Canadian branch. The French AFN's branch in Germany would not be a separate AFN, since Germany and France are in the same scheduled area. The Canadian branch would be a separate AFN since, for purposes of § 304(a)(1)(iii), Canada is not deemed to be a Schedule B country.

Example 2. (*Voting interest test.*) A U.S. corporation owns 95 percent of the outstanding voting stock of a company in France, the remainder being owned by unaffiliated foreign nationals. The French company has a 10 percent direct interest in a corporation in Japan. Only the French company is an AFN, since X's indirect interest in the Japanese company is only 9.5 percent, i.e., 95 percent × 10 percent (see §§ 901, 902).

Example 3. (*Profit interest test.*) An individual (X) who is a person within the United States is a partner in a partnership (C) organized under the laws of Germany, although he is not actively engaged in C's business. Under the partnership agreement, X is entitled to receive 15 percent of the profits of C. C is an unincorporated AFN of X (see § 304 (a)(1)(i) and (b)(1)).

Example 4. (*Indirect profit interest through non-AFN parent.*) A French corporation (C) has 200,000 shares of stock outstanding, 100,000 of which are voting and 100,000 of which are nonvoting fixed-dividend preferred. C has numerous branches in Schedules A and B. For many years, substantially all of C's profits (including branch profits) have been distributed as dividends to holders of the preferred stock and no dividends have been paid on the common stock. A corporation in the United States (X) owns 8,000 shares of C's voting stock (8 percent) and 70,000 shares of the preferred stock (70 percent); however, this investment has not been accompanied by active participation in or control over C's business affairs. C is not an AFN of X. Moreover, although X has for many years received more than 10 percent of the profits of C's Schedule A and B branches, in the form of preferred stock dividends from C, OFDI would not consider the branches to be AFNs. A foreign business venture owned directly by a foreign corporation or partnership is not treated as an AFN of a U.S. person unless the parent is also an AFN of the U.S. person.

Example 5. (*Exception to the 10 percent interest test.*) A U.S. corporation (X) owns 9 percent of the outstanding voting stock of a French corporation (C). X also owns a current option to acquire additional voting stock of C that, if exercised, would give X ownership of 35 percent of C's outstanding voting stock. Moreover, a majority of C's directors are designees of X and, for a number of years, X has actively participated in and exercised a controlling influence over the affairs of C. Under § 304(b)(4), OFDI could deem C to be an AFN notwithstanding X's present 9 percent interest. As a matter of policy, however, such discretion would not normally be exercised unless X transfers more than $200,000 in funds or other property to C during any year commencing with the year 1968.

Example 6. (*Second-tier AFNs.*) A U.S. corporation (X) owns 10 percent of the outstanding voting stock of a French corporation (C). C owns a factory in Argentina, a sales office in Brazil, a sales office in Japan, a sales office in the United Kingdom and numerous factories and sales offices in continental Europe. The Japanese sales office has gross assets of less than $50,000 and, therefore, cannot be an AFN because of the exemption in § 304(d)(i). Accordingly, C is an incorporated AFN located in Schedule C, embracing also the factories and sales offices in continental Europe and in Japan. Assuming the inapplicability of the exemptions set forth in § 304(d), the factory in Argentina, the sales office in Brazil, and the sales office in the United Kingdom are separate unincorporated AFNs of X (§ 304 (a)(1)(iii) and (b)(1)).

Example 7. (*Bank or brokerage account.*) An individual within the United States maintains a number of bank accounts with foreign banks and also maintains an account with a German stock brokerage firm. The foregoing facts do not give rise to a DI–AFN relationship.

Example 8. (*Investment real estate.*) An individual within the United States purchased a parcel of 1,000 acres of undeveloped real estate in Brazil for $75,000 in 1967. The land is being held for investment. The real estate is an unincorporated AFN (see § 304 (a)(1)(ii) and (b)(1)).

Example 9. (*Commission salesmen.*) A U.S. corporation (X) enters into a contract with an individual citizen of Argentina (A) pursuant to which A will be X's exclusive representative in Latin America to solicit orders for X's products. A is not to handle the products of any other company but is to work full time in soliciting orders for X. A has no authority to accept orders, but must forward them to X for approval. A is to be compensated on a commission basis based on the gross sales of X's products attributable to A's efforts. All payments for such sales must be remitted directly to X by the purchaser. X is to pay the rental for A's office in Buenos Aires, but all of A's other expenses (including the salaries of clerical and other required personnel) are to be paid by A out of his commissions. The Buenos Aires telephone directory is to carry a listing in X's name showing the telephone number of A's office. X also rents space in a warehouse in Buenos Aires, from which orders from Latin American customers are filled. Under the foregoing facts A's operation is not an AFN.

Example 10. (*Sales agents.*) A U.S. corporation (X) employs five salesmen who travel throughout Europe to solicit orders for X's products. The salesmen operate out of a rented office in France and are all permanent residents of France. All orders must be accepted by X in the United States, but payment is made to the office in France. The rental and all other expenses of the sales office, including the salaries of the salesmen and other office personnel, are paid by X. Assuming the inapplicability of § 304(d), the sales office operation is an unincorporated AFN of X because it is a business venture conducted on behalf of X by employees of X (see § 304 (a)(1)(ii) and (b)(1)).

Example 11. (*Sales agents; leased warehouse facilities.*) A U.S. corporation (X) sells its products in continental Europe through independent sales agents in Europe, who also sell products of many other U.S. corporations. The agents are compensated strictly on a commission based on their gross sales of X's products. X also employs salaried salesmen in the United States who periodically travel to Europe to make sales to X's largest European customers. X does not maintain any permanent manufacturing or sales facility in Europe. Under the foregoing facts X does not have AFNs in Schedule C. In addition, if in order to expedite deliveries to its European customers, X rents space in a warehouse in the Netherlands where a substantial inventory is maintained and orders from X's European customers are filled from this inventory, periodically being replenished by X, such operation would not constitute an AFN. Note that the result would be different if X owned the warehouse (assuming the inapplicability of § 304(d)); in that case, the warehouse itself would be an AFN.

Example 12. (*U.S.-based consulting services.*) A U.S. corporation (X) is engaged in rendering management consulting services. Many of its clients are unaffiliated foreign corporations. During the course of a year, X's salaried personnel, all of whom are permanent residents of the United States, travel to X's foreign customers to render consulting services. They typically work at the head offices of the foreign companies for 1 to 2 months at a time. X does not have any AFNs by virtue of the foregoing facts.

Example 13. (*Construction projects.*) A U.S. corporation (X) is engaged in the construction business. During the course of a year, X bids on numerous European construction projects and receives contracts on a small fraction thereof. X has a permanent office in France where a variety of personnel are employed, principally to gather information concerning contemplated construction projects and to supervise and coordinate all projects on which X is then working. In January 1968, X received two contracts for construction of factories in Germany and Belgium. Soon thereafter, X transferred men and equipment to the project sites. Assuming the inapplicability of § 304(d), each project site is an unincorporated AFN of X, as is X's office in France (see § 304 (a)(1)(iii) and (b)(1)). (Note that the office in France is an AFN without regard to the opening of the German and Belgian project sites, and vice versa.)

Example 14. (*Oil concessions and licenses for exploration.*) A U.S. corporation (X) obtains a concession from a Middle Eastern Schedule B country to drill for oil within that country. X then enters into a joint venture agreement with two U.S. and two foreign companies for the purpose of exploiting the concession. Under the terms of the agreement, X is entitled to receive 25 percent of any ensuing production. The oil exploration venture is an unincorporated AFN of X located in Schedule B (see § 304 (a)(1)(ii) and (b)(1)). Note that the joint venture will also be an unincorporated AFN of the other U.S. corporations, and that X and the other U.S. corporations are members of an "associated group". (See § 905.)

Example 15. (*Retail franchises.*) A U.S. corporation (X) operates, under a single trade name, a chain of quick-service restaurants throughout the United States. X franchises an unaffiliated French corporation (C) to open a restaurant in France using X's trade name. C agrees to purchase some of its goods from X, maintain certain quality standards, and pay X a yearly royalty based on profits. X does not have an AFN in France by virtue of this franchise arrangement.

Example 16. (*Break-even or loss ventures.*) Four U.S. news-publishing corporations (V, W, X, and Y) establish a membership corporation under New York law (Z). V, W, X, and Y each contributes 25 percent of the capital required by Z and each has 25 percent of the voting power in Z. Z is to gather news for the respective publications of V, W, X, and Y. In this connection, Z will establish and staff various permanent news-gathering offices throughout the world. Z is designed to operate on a break-even basis. The offices established by Z are unincorporated AFNs of V, W, X, Y, and Z even though not themselves operated for profit, since they are directly related to business activities that are for profit.

Example 17. (*U.S. charity as DI.*) A membership corporation (X) is organized under New York law, its principal purpose being to provide funds to educational and charitable institutions. X acquires 15 percent of the voting stock of a foreign manufacturing corporation (Y) from a foreign national. The dividends received by X from Y are all distributed among various educational and charitable institutions, as required by X's charter. Y is an AFN of X since the AFN does not fall within the nonprofit exemption set forth in § 304(c).

B305—Direct Investor

Section 305 defines the term "direct investor" ("DI") generally to mean any person within the United States (defined in § 322) owning or acquiring (directly or indirectly) a 10 percent or greater interest in a corporation or partnership organized under the laws of a foreign country or in a business venture conducted within a foreign country (an "affiliated foreign national," defined in § 304).

A DI may be a multiple entity or several individuals treated as a single person under § 323 (international finance subsidiaries of a direct investor), § 903 (affiliated groups), or § 904 (family groups). The term also includes a person owning less than a 10 percent interest in a particular foreign corporation, partnership or business venture, if (a) such person is a member of an associated group, as defined in § 905, that acts in concert pursuant to an agreement or understanding to own or to acquire a 10 percent interest in the foreign enterprise, or (b) such person owns a direct interest in another DI and an election, consented to by such person, is made with respect to such other DI under § 906(b)(1).

A person within the United States first acquiring the requisite interest in a foreign corporation, partnership, or business venture will be treated as having been a DI in the foreign enterprise immediately preceding the acquisition. Accordingly, initial acquisition of the requisite interest will involve a § 312(a)(1) transfer of capital (see also § 313(d)(2)). Thus, for example, if a U.S. corporation (X), owning no interest in a French corporation (C), acquires 10 percent or more of the outstanding voting stock of C from an unaffiliated foreign national for $1 million in cash, X will be treated as a DI in C immediately prior to the closing of such acquisition and will, therefore, be treated as having made a $1 million transfer of capital to C.

Although acquisition or ownership of a 10 percent voting interest in a foreign corporation, or a 10 percent profits interest in a foreign partnership or business venture, is ordinarily required to constitute the foreign enterprise an AFN of a person within the United States, the Regulations provide that a foreign enterprise in which a lesser interest is held may nevertheless be deemed an AFN (§ 304 (b)(4)). For example, such discretionary authority might be exercised if a U.S. person were to acquire a contingent 10 percent interest in the voting securities of a foreign corporation, or a 10 percent present interest in the capital or earnings of a foreign corporation without voting rights. As a general rule, however, such determination would not be made by OFDI unless the U.S. person actually participates in and exercises a controlling influence over the affairs of the foreign enterprise and transfers funds or other property to the foreign enterprise exceeding $200,000 during any year commencing with 1968.

B306—Direct Investment

§ B306–1 Introduction.

Section 306(a) defines the term "direct investment" for purposes of the regulations. Direct investment means the sum

of a DI's net transfer of capital (defined in § 313(c)) and the DI's share of reinvested earnings of AFNs (defined in § 306(b)) during any period, usually a calendar year (see § 321). A DI governed by the § 503 minimum allowable will calculate direct investment on a worldwide basis. A DI governed by the § 504(a) historical allowable or the § 504(b) earnings allowable will calculate direct investment on a schedular basis.

Deductions in the calculation of net transfer of capital and positive direct investment are permitted, resulting in temporary deferral of a charge against a DI's direct investment allowables, for transactions respectively made with or offset by long-term foreign borrowing. Under § 313(d)(1), proceeds of such borrowing (defined in § 324(c)) actually expended by a DI in making transfers of capital to AFNs are deducted in calculating the net transfer of capital component of direct investment. Similarly, § 306(e)(1) permits deduction of "available proceeds" of such borrowing (defined in § 324(d)) that are "allocated" on the DI's books and records as an offset to positive direct investment.

§ B306–2 Summary.

In addition to defining the term "direct investment," § 306 deals with calculation of "reinvested earnings" of a DI's AFNs and sets forth a number of rules to be followed in deriving the DI's share of such earnings as a component of direct investment.

The major topics covered in § 306 are: Basic definition of direct investment (§ 306(a)); definition of reinvested earnings (§ 306(b)); calculation of AFN earnings or losses (§ 306(c)); branch AFN earnings deemed remitted (§ 306(d)(1)); definitions and rules for dividends (§ 306(d)(2)), and deduction of allocated proceeds of long-term foreign borrowing (§ 306(e)).

§ B306–3 Relation of § 306 to other sections.

Direct investment, as defined in § 306, is the basic point of reference for substantive provisions of the regulations delineating the extent to which U.S. persons may engage in foreign financial transactions, viz, § 201 (general prohibition of direct investment), § 503 (minimum allowable), § 504 (schedular allowables), § 506 (incremental earnings allowable), §§ 1002–1003 (transfers of capital in repayment of borrowing), § 1102 (positive direct investment in Canada), and § 1302 (positive direct investment by U.S.-flag air carriers). The actual calculation of direct investment under § 306 is based, in turn, upon other sections that define certain components and subcomponents of direct investment, viz, § 312 (transfer of capital), § 313 (net transfer of capital), § 505 (transfers between AFNs), § 1103 (exclusion of Canadian AFNs in calculating net transfer of capital), § 1104 (exclusion of Canadian AFNs in calculating reinvested earnings), and § 1301 (exclusion of certain transfers of capital by U.S.-flag air carriers). The provisions of § 203(d)(2) and (3), relating to allocation and reallocation of proceeds of long-term foreign borrowing previously expended or allocated, are also relevant.

The interrelationship of the elements of direct investment and the sections of the regulations defining such elements is intricate. The following diagram summarizes the various components and their bearing on derivation of direct investment in each scheduled area. (The diagram is for illustrative purposes only and is not intended to supersede or modify any provisions of the regulations, of this Bulletin or of applicable instructions to reporting forms.)

COMPUTATION OF DIRECT INVESTMENT

NET TRANSFER OF CAPITAL (§ 313)		REINVESTED EARNINGS (§ 306(b))		
Components		*Components*		
+Transfers of capital: DI to AFNs (§ 312(a)). −Transfers of capital: AFNs to DI (§ 312(b)). −Expended proceeds of long-term foreign borrowing (§ 313(d)(1)). ±Transfers of capital: AFNs to AFNs (§ 505). ±Net transfer of capital: DI to unincorporated AFN, i.e., net increase or decrease in assets (§ 313(b)).	*plus*	DI's share of: +Total earnings (§ 306(c)). −Dividends to DI (§ 306(b)(2)(x)). −Dividends paid by AFNs to AFNs in other areas (§ 306(b)(2)(y)). +Dividends received by AFNs from AFNs in other areas (§ 306(b)(1)(i)). +Profits remitted from unincorporated AFNs in other areas (§ 306(b)(1)(ii)).	*less*	ALLOCATED PROCEEDS OF LONG-TERM FOREIGN BORROWING (§§ 306(e), 203(d)(2) and (3).)

The term "total earnings" (computed pursuant to § 306(c)) is significant for purposes of computing direct investment under § 306(a) and for calculating certain of the allowables provided in Subpart E, viz, §§ 503(b), 504(b)(4), 504(e), and 506(a)(1). Total earnings (or losses) computed in accordance with § 306(c) are adjusted by dividends paid to the DI, interschedular dividends between AFNs, and profit remittances among AFNs in calculating reinvested earnings under § 306(b).

§ B306–4 Application of § 306.

The § 306 (a) and (b) definitions of direct investment and reinvested earnings apply to calculations in all scheduled areas during 1965–66 as well as for subsequent years, and § 306(b) also applies to earnings reinvested in Schedule C during 1964.

The rules for calculating direct investment are modified in §§ 503(b) and 504(e). For 1969 and subsequent years, if the AFNs of a DI governed by the § 503 minimum allowable have, for any calendar year, an aggregate annual loss, the DI must omit this aggregate annual loss in calculating direct investment. On the other hand, a DI governed by one of the § 504 allowables is required to omit only total losses of Schedule C incorporated AFNs in calculating direct investment in that scheduled area.

§ B306–5 Basic definition and calculation of direct investment.

Section 306(a) defines direct investment during any period as the sum of (a) net transfer of capital (defined in § 313(c)) and (b) the DI's share in the reinvested earnings of all incorporated AFNs (defined in § 306(b)).

Direct investment in Canada is excluded from the computation of direct investment under § 306(a). (See §§ 1103–1104.)

The concept of direct investment generally relates to the net change, over the course of a year, in the DI's aggregate equity and debt investment in AFNs in a particular scheduled area. If the DI's aggregate investment at the end of the year in the scheduled area is greater than at the beginning of the year (after deducting investments made with or offset by expended or allocated proceeds of long-term foreign borrowing), the sum of the net transfer of capital and reinvested earnings will be a positive amount, and the DI will have made "positive direct investment" in the scheduled area during that year. Conversely, if the DI's aggregate investment in the scheduled area at the end of a year is less than at the beginning of the year (after deducting investments made with or offset by expended or allocated proceeds of long-term foreign borrowings, the sum of the net transfer and reinvested earnings will be a negative amount, and the DI will have made "negative direct investment" in the scheduled area during that year.

Direct investment is a schedular concept. It does not apply to individual AFNs or countries, but to all AFNs of a DI located in each scheduled area. Since § 503 provides a worldwide allowable, however, a DI governed by this section will report direct investment on a consolidated, worldwide basis.

Direct investment is also an aggregate concept. It does not refer to individual transactions, but to all transactions over a specified period of time, generally a calendar year. (See § 321.)

The following examples illustrate calculation of direct investment under § 306(a):

Example 1. DI has several wholly owned incorporated AFNs in Schedule A. (The number of individual AFNs is not important.) DI has no other AFNs. During 1969 the AFNs together earn $800,000 and pay dividends of $200,000 to DI. DI's share in reinvested earnings, therefore, is $600,000. DI also makes a § 313(a) net transfer of capital to the AFNs of $500,000. DI has made positive direct investment in Schedule A for 1969 of $1,100,000.

In 1970 the same AFNs earn $600,000 and pay no dividends. During that year, however, the AFNs jointly loaned DI $700,000, resulting in a negative net transfer of capital in that amount, by operation of §§ 312(b)(1) and 313(a). Accordingly DI has made negative direct investment of $100,000.

Example 2. DI's only AFNs are two wholly owned incorporated AFNs in Schedule B: X and Y. During 1969 X earns $400,000, and Y has losses of $200,000. No dividends are paid, and DI makes no net transfer of capital.

DI's share of reinvested earnings is $200,000. Positive direct investment for 1969 is also $200,000, since the net transfer of capital was zero.

During 1970 X has earnings of $100,000, and Y has losses of $300,000. X pays DI a dividend of $50,000. Reinvested earnings are negative in the amount of $250,000 (total losses and dividends). DI's net transfer of capital to Schedule B under § 313(a) is $600,000. Positive direct investment for 1970 is, therefore, $350,000 ($600,000 positive net transfer of capital less the $250,000 negative reinvested earnings).

If X and Y had been located in Schedule C and DI had elected a § 504 allowable, § 504(e) would have required the total losses of $200,000 to be omitted from calculation of direct investment. Direct investment would then have been $550,000.

Example 3. DI has a group of wholly owned incorporated AFNs in Schedule C that have subsidiaries (also AFNs of the DI) in Schedules A and B. In 1969 the Schedule C AFNs have earnings of zero and pay no dividends. DI makes no transfers of capital. However, the Schedule C AFNs receive dividends of $300,000 from their subsidiaries in Schedules A and B. As a result, DI has made positive direct investment of $300,000 in Schedule C consisting entirely of reinvested earnings. (Reinvested earnings in a given scheduled area are increased by dividends received by AFNs from AFNs in other scheduled areas, and reinvested earnings are reduced in the scheduled area from which the dividends are paid (see § 306(b).)

§ B306–6 Reinvested earnings of incorporated AFNs.

To compute a DI's share in the reinvested earnings of all incorporated AFNs in a scheduled area during any year, it is first necessary to determine the DI's share of the total earnings (or total losses) of such AFNs during the year, as defined in § 306(c). Total earnings or losses consist of the aggregate earnings or losses of each of the incorporated AFNs in a particular scheduled area. Reinvested earnings are then found by adjusting total earnings to take into account dividens to the DI and interschedular dividends and profit remittances.

(i) *Total earnings.* Earnings or losses of each incorporated AFN should be computed in accordance with accounting principles (including principles of consolidation) generally accepted in the United States and consistently applied by the DI in financial reports for presentation to stockholders. Any material change in accounting procedures followed by a DI should be disclosed on the reporting form filed with OFDI for the period in which the change was made, together with an indication of the effects of such change.

In calculating total earnings of incorporated AFNs, the following considerations merit particular attention:

Dividends: Dividends received by an incorporated AFN from another incorporated AFN, whether in the same or another scheduled area, should not be included in calculating earnings of the recipient AFN. (See § 306(c).)

Profit interest in unincorporated AFN of the DI: If an incorporated AFN has an interest in a partnership or business venture in another scheduled area that is a separate unincorporated AFN under § 304, the incorporated AFN's share in any profits of the unincorporated AFN should not be included in calculating earnings of the incorporated AFN, whether or not any such profits are actually remitted. (See § 306 (c) and (d)(1).)

Interests in United States: If an incorporated AFN has an interest in a U.S. corporation, partnership or business venture that would be a separate AFN of the DI if such U.S. corporation were a foreign national, neither dividends received from such corporation or the share in profits of such partnership or business venture (whether or not any such profits are actually remitted), as the case may be, should be included in calculating earnings of the incorporated AFN.

Foreign taxes: Earnings of incorporated AFNs should be computed net of foreign taxes on income or net worth. Foreign withholding taxes on dividends paid or branch profits distributed should not, however, be deducted except for withholding taxes on dividends received by an incorporated AFN from AFNs in the same scheduled area. (See § 306(c).)

Charge for intangibles: No deduction for amortization or any like charge against earnings should be made with respect to an intangible owned by an AFN, if transfer of the intangible by the DI to the AFN was made on or after January 1, 1968, and was not considered a transfer of capital by virtue of § 312 (c)(11).

Blocked earnings: Earnings that are "blocked" because of exchange controls or other like restrictions imposed by the government of a foreign country should nevertheless be included in earnings. Under certain conditions, OFDI may grant appropriate relief (pursuant to § 801) in these circumstances. (See Appendix A hereto.)

Reserve requirements: No deductions from earnings should be made because of reserves for reinvestment, asset revaluation or legal reserve requirements, whether or not locally required, if they would not be proper charges to income under generally acepted U.S. accounting principles consistently applied.

Valuation: The assets, liabilities, and earnings of an AFN expressed in foreign currency should be converted into U.S. dollar equivalents in accordance with generally accepted U.S. accounting principles consistently applied. Such accounting treatment should also be followed with respect to gain or loss resulting from currency devaluation or revaluation.

Extraordinary gains and losses: Extraordinary gains and losses of an incorporated AFN (including gains or losses resulting from sales by the AFN of interests in other AFNs), calculated in accordance with generally accepted U.S. accounting principles consistently applied, should generally be included in earnings. However, gains, or losses realized by a DI resulting from sale of an interest in an AFN are not included in reinvested earnings under § 306(b) in any scheduled area; rather, they constitute a transfer of capital to the DI under § 312(b)(5).

The following example illustrates calculation of total earnings of incorporated AFNs in a given scheduled area, pursuant to § 306(c):

Example 4. DI has three wholly owned subsidiaries in Schedule C. One subsidiary (D) has a branch (W) in Schedule A and a branch (X) in Schedule C; W is a separate AFN of the DI, but X is not. (See § 304(a)(1)(iii).) Another subsidiary (E) has a wholly owned subsidiary (Y) in Schedule B and another wholly owned subsidiary in (Z) in Schedule C. The third subsidiary (F) has no branches or subsidiaries.

The following occurs during 1969: D earns $1,700,000, $200,000 of which is attributable to earnings of W and $500,000 to earnings of X. Y earns $500,000 and pays a dividend of $300,000 to E. Z earns $200,000, a portion of which is attributable to sale of merchandise to D, and pays a dividend of $100,000 to E. E earns $2,400,000, including the dividends from Y and Z. F incurs a loss of $400,000.

Under § 306(c), total earnings of DI's incorporated Schedule C AFNs (D, E, and F) are $3,300,000 computed as follows (000 omitted):

Earnings of D under § 306(c) (W's earnings of $200 are excluded, since W is in another scheduled area. X's earnings of $500 are not excluded, because X is not a separate AFN.)	$1,500
Earnings of E under § 306(c) (Dividends of $300 from Y and $100 from Z are excluded.)	2,000
Earnings of Z under § 306(c) (Portion attributable to sales to D included.)	200
Loss of F	(400)
Total earnings	3,300

(ii) *DI's share of total earnings.* A DI's share in the total earnings (or losses) of incorporated AFNs in a given scheduled area is the sum of the DI's percentage interest in total earnings (or losses) of each such AFN in that scheduled area.

Example 5. DI has three incorporated AFNs in Schedule C (companies D, E, and F). DI owns 50 percent of the stock of D, 60 percent of the stock of E and 80 percent of the stock of F. D has a branch (W) in Schedule A and a branch (X) in Schedule C; W is a separate AFN of DI, but X is not. (See § 304(a)(1)(iii).) E has a wholly owned subsidiary (Y) in Schedule B and another wholly owned subsidiary (Z) in Schedule C.

The following occurs during 1969: D earns $1,700,000, $200,000 of which is attributable to earnings of W and $500,000 to earnings of X. Y earns $500,000 and pays a dividend of $300,000 to E. Z earns $200,000, a portion of which is attributable to sale of merchandise to D, and pays a dividend of $100,000 to E. E earns $2,400,000 including the dividends from Y and Z. F incurs a loss of $400,000.

DI's share in the total earnings of incorporated Schedule C AFNs is $1,750,000 computed as follows, pursuant to § 306(c) (see table in Example 4 for treatment of earnings of the AFNs' branches of subsidiaries):

	AFN earnings (000 omitted)	*DI's share (000 omitted)*
Earnings of D ($1,500×50%)		$750
Earnings of E ($2,000×60%)		1,200
Earnings of Z ($200×60%)		120
Loss of F ($400×80%)		(320)
DI's share of total earnings		1,750

It should be stressed that in Examples 4 and 5 above, only earnings of DI's Schedule C incorporated AFNs were the subject of consideration. Y's earnings would be included in the calculation of reinvested earnings for DI's Schedule B incorporated AFNs under § 306(b), and the profits of W would be included in DI's net transfer of capital to unincorporated AFNs in Schedule A under § 313(b).

Total earnings should always be carefully distinguished from reinvested earnings and from earnings of unincorporated AFNs.

(iii) *Reinvested earnings.* After computing total earnings of incorporated AFNs and DI's share thereof, the next step in calculating direct investment is to find the DI's share of reinvested earnings. The method of determining reinvested earnings of incorporated AFNs in any scheduled area during a year is

set forth in § 306(b). The DI's share of reinvested earnings in a scheduled area will generally equal the DI's share of total earnings of such AFNs for the year, less all dividends paid during the year by the AFNs to the DI and to AFNs in other scheduled areas, plus dividends received from incorporated AFNs in other scheduled areas and profits remitted from unincorporated AFNs in other scheduled areas.

Under § 306(d)(1), profits of an unincorporated AFN during the year are deemed to have been remitted to the extent that profits exceed the net increase in the net assets of such AFN during the year; if there has been no change, or a decrease, in such net assets during the year, all profits for such year are deemed to have been remitted. Dividends paid by incorporated AFNs to the DI or other AFNs are reported before deduction of foreign dividend withholding taxes; dividends and other profit distributions received by AFNs from AFNs in other scheduled areas are reported after deduction of foreign dividend withholding taxes.

For purposes of the Regulations, dividends include all cash dividends, whether paid out of current or accumulated earnings. Stock dividends or dividends in kind do not qualify as dividends under the Regulations. (See § 306(d)(2).) Distributions in complete or partial liquidation will qualify as dividends, but only to the extent the corporation being liquidated has current or accumulated earnings properly allocable to the distributions. Payments to a DI of amounts previously taxed under the provisions of §§ 551 through 558 and 951 through 981 of the Internal Revenue Code (1954) will qualify as dividends.

Dividends paid by one AFN to another AFN in the same scheduled area do not enter into any of the calculations required by § 306. They are not included in determining earnings of the recipient AFN, they are not deducted in calculating total dividends paid by the recipient AFN, and they are not included as dividends in calculating total dividends paid by the paying AFN. However, any foreign withholding taxes imposed on the payment of such dividends should be deducted in calculating total earnings of incorporated AFNs in the scheduled area involved. For example, DI has a wholly owned subsidiary (X) in Schedule C, that in turn has a wholly owned subsidiary (Y) in Schedule C. X and Y each earns $100,000, Y pays a $50,000 dividend to X on which there is imposed a $15,000 foreign withholding tax, and X pays a $50,000 dividend to DI on which there is also imposed a foreign withholding tax of $10,000. Total earnings of DI's Schedule C incorporated AFNs are $185,000 (i.e., $200,000 minus the $15,000 tax on dividend from Y to X) and DI's share in reinvested earnings of all such AFNs is $135,000 (i.e., $185,000 minus the $50,000 dividend (excluding the $10,000 tax) paid by X to DI).

A dividend will generally be considered as having been paid or received when it first becomes payable on demand. This will ordinarily coincide with the dividend payment date, cases it may coincide with the declaration date. Note that a dividend declared but not paid by an AFN when due is treated as having been paid (thus reducing the DI's share in reinvested earnings of the AFN) and then loaned back to the AFN (resulting in a transfer of capital by the DI to the AFN); subsequent payment of the amount due by the AFN will then be treated as a transfer of capital by the AFN to the DI. The same reciprocal attribution of transfers of capital is applicable to dividends declared by an AFN that are not paid when due to AFNs in another scheduled area.

It should be noted that a DI may elect, on its original Base Period Report (Form FDI-101), to treat dividends received from AFNs within 60 days after the end of any compliance year as having been paid during such year; such practice, if elected, must also be reflected in the calculation of direct investment during the base period years, and cannot be changed without the permission of OFDI.

The following formula may be helpful in applying the § 306(b) definition of reinvested earnings:

$$RE = TE - [(DP + dp) - (dr + pr)]$$

RE = DI's share of reinvested earnings of all incorporated AFNs in a scheduled area.

TE = DI's share of total earnings of all incorporated earnings in the scheduled area.

DP = Dividends declared by AFNs in the scheduled area that are paid or payable to DI.

dp = DI's share of dividends declared by AFNs in the scheduled area that are paid or payable to AFNs in other areas.

dr = DI's share of dividends that are paid or payable to AFNs in the scheduled area by AFNs in other areas.

pr = DI's share of profits remitted to AFNs in the scheduled area from unincorporated AFNs in other areas.

Example 6. DI has two wholly owned and two 60-percent-owned subsidiaries in Schedule C. One wholly owned subsidiary (D) has a branch (V) in Schedule A. The second wholly owned subsidiary (E) has a 50-percent-owned subsidiary (W) in Schedule A. One 60-percent-owned subsidiary (F) has a branch (X) in Schedule A. The branches V and X in Schedule A are separate AFNs. See § 304(a)(1)(iii). The other 60-percent-owned subsidiary (G) has a wholly owned subsidiary (Z) in Schedule A. DI also has wholly owned subsidiary (H) in Schedule A.

In 1969 D earns $800,000 and pays a dividend of $500,000 to DI. Of D's earnings, $300,000 is attributable to profits of V, which had an increase in net assets of $100,000. E earns $500,000 and pays no dividends to DI. Of E's earnings, $200,000 is attributable to a dividend received from W, which itself earns $600,000. F earns $1,000,000 and pays a dividend of $200,000 to DI. Of F's earnings, $200,000 is attributable to profits of X, which had no change in its net assets. G earns $2,000,000 and pays a dividend of $500,000 to DI. Of G's earnings, $400,000 is attributable to a dividend received from Z, which itself earns $900,000. H earns $1,500,000 and pays a dividend of $1,000,000 to DI. Reinvested earnings of DI's incorporated AFNs are computed as follows:

Schedule C reinvested earnings [RE]:

DI's share in the total reinvested earnings of its incorporated Schedule C AFNs (D, E, F, and G) is $1,800,000 computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of earnings of D: $800 less profits of V ($300)	$500
DI's share of earnings of E: $500 less dividend received from W ($200)	300
DI's share of earnings of F: $600 less profits of X ($200×60%)	480
DI's share of earnings of G: $1,200 less dividend received from Z ($400×60%)	960
DI's share of total earnings	2,240
Dividends paid to DI [DP]:	
By D	$500
By E	0
By F	200
By G	500
Total	1,200
Dividends paid to AFNs in other areas [dp]	0
Dividends received and profits remitted [dr+pr]:	
DI's share of profits deemed remitted by V to D under § 306(d)(1): Earnings ($300) less net increase in assets ($100)	$200
DI's share of dividends received by E from W	200
DI's share of profits deemed remitted by X to F under § 306(d)(1) ($200×60%)	120
DI's share of dividend received by G from Z ($400×60%)	240
DI's share of all dividends received and profits remitted	760

Applying the formula $RE = TE - [(DP + dp) - (dr + pr)]$:

$$RE = \$2,240 - [\$1,200 - \$760] = \$1,800$$

Schedule A reinvested earnings [RE]:

DI's share in the total reinvested earnings of its incorporated Schedule A AFNs (H, W, and Z) is $900,000 computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of earnings of H	$1,500
DI's share of earnings of W ($600×50 percent)	300
DI's share of earnings of Z ($900×60 percent)	540
DI's share of total earnings	2,340
Dividends paid to DI and DI's share of dividends paid to AFNs in other areas [DP+dp]:	
Dividend paid by H to DI	$1,000
DI's share of dividend paid by W to E	200
DI's share of dividend paid by Z to G ($400×60 percent)	240
Total	1,440
Dividends received and profits remitted [dr+pr]	0

Applying the formula $RE = TE - [(DP + dp) - (dr + pr)]$:

$$RE = \$2,340 - [\$1,440 - 0] = \$900$$

Example 7. Assume the same facts as in Example 6 above, except that H incurs a loss of $1,000,000 and pays no dividend. DI's share in the total reinvested earnings of Schedule A AFNs is a negative $600,000, computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of loss of H	($1,000)
DI's share of earnings of W	300
DI's share of earnings of Z	540
DI's share of total earnings	(160)

DI's share of dividends paid [dp]:

W to E	$200
Z to G	240
Total	440

RE=TE−[(DP+dp)−(dr+pr)]
RE=−$160−[(0+$440)−0]=−$600

§ B306–7 Deduction from positive direct investment: Allocated proceeds of long-term foreign borrowing.

Under § 306(e), the amount of positive direct investment charged to a direct investor may be reduced by allocating available proceeds of a long-term foreign borrowing (see § 324(d)). Positive direct investment may also be reduced by allocating proceeds of long-term foreign borrowing that were previously expended in making a transfer of capital to another scheduled area (see § 203(d)(2)), and by reallocating proceeds previously allocated to a transfer of capital or positive direct investment in another scheduled area (see § 203(d)(3)).

An allocation of available proceeds to reduce positive direct investment is subject to certain conditions:

The allocation must be reflected on the books and records required to be maintained by the DI under §§ 203(b) and 601.

The allocation and reduction of positive direct investment must be reported on the DI's Form FDI–102F covering the year in which the reduction is made.

At the end of a year in which an allocation is made, proceeds that were allocated may not be held, directly or indirectly, in the form of foreign balances (see § 203(a)(1)), securities of foreign nationals, or any other foreign property.

In succeeding years, allocated proceeds may not be held in the form of foreign property, except that such proceeds may be expended in making transfers of capital to AFNs. Such an expenditure will not be eligible for the deduction from net transfer of capital provided under § 313(d)(1), however.

The concept of allocation is illustrated in the following example.

Example 8. In 1969 DI makes a net transfer of capital to its AFNs in Schedule A in the amount of $800,000, and its share of reinvested earnings of incorporated AFNs in Schedule A is $500,000. DI has made positive direct investment under § 306(a) of $1,300,000. If DI has available proceeds in the amount of $1,300,000 at the end of 1969, and the proceeds are not then held in the form of foreign property, DI may allocate such proceeds to its positive direct investment in Schedule A and reduce the amount of such investment to zero. The allocation and reduction must be reflected on DI's books and records and on Form FDI–102F for the year 1969.

In addition to § 306(e), three other provisions of the regulations relate to deductions for use of proceeds of long-term foreign borrowing. Section 313(d)(1) provides for a deduction from net transfer of capital of the amount of proceeds (defined in § 324(c)) actually expended in making transfers of capital. Section 203(d)(2) and (3), on the other hand, are analogous to § 306(e) insofar as they allow deductions from positive direct investment for allocation of proceeds. Section 203(d)(2) allows a DI to allocate previously expended proceeds (or proceeds allocated during 1968) to a new scheduled area, thus obtaining a deduction from positive direct investment in the new area (with a corresponding § 312(a) transfer of capital to the old area). Section 203(d)(3) allows a DI to reallocate to a new scheduled area proceeds previously allocated under § 306(e) (with a corresponding § 312(a) transfer of capital to the prior area).

For a more detailed analysis of long-term foreign borrowing, see § B324.

§ B306–8 Calculation of direct investment during year of acquisition or disposition of interest in an AFN.

By operation of § 312(c)(1), acquisition by a DI of a debt or equity interest in an AFN from another DI does not give rise to a transfer of capital. However, on and after June 10, 1969, if the acquisition is of an equity interest, the divesting DI's direct investment (calculated without regard to § 313(d)(1)) in the AFN during the year of acquisition and in 1965–66 will be imputed to the acquiring DI in proportion to the interest acquired, as will the divesting DI's share in earnings or losses of the AFN prior to acquisition.

If a DI disposes of an AFN (other than by sale covered by § 312(c)(1), the sale does not affect any transfers of capital between the DI and the AFN preceding the date of disposition. Thus, for example, if DI makes a $1 million transfer of capital to an AFN in January 1969 and sells the AFN in October 1969 to a foreign national for $900,000, DI would be charged with a $100,000 net transfer of capital during 1969 with respect to such AFN.

If a DI sells an interest in an incorporated AFN to a foreign national, reinvested earnings attributable to the interest sold should not be included in computation of the DI's direct investment for the year of sale.

Example 9. DI has a wholly owned incorporated AFN in Schedule A. During 1969 DI sells a 40 percent interest in such AFN to a foreign national. The AFN earns $300,000 and pays no dividends. DI's share of reinvested earnings of the AFN is $180,000 ($300,000×60 percent), regardless of the date of divesiture of the 40 percent interest.

If a DI acquires an interest in an incorporated AFN from a foreign national during a year, the DI must reflect a pro rata share of reinvested earnings in computing direct investment, based on the DI's share of total earnings multiplied by the fraction of the year during which the interest was held.

Example 10. DI reports on a calendar year basis. On April 1, 1969, DI acquires from a foreign national a 100 percent interest in an incorporated AFN that earns $200,000 for the entire year and pays a $50,000 dividend on March 1 and a $75,000 dividend on September 1. DI's share of total earnings is $150,000 ($200,000×¾). DI's share of reinvested earnings is $75,000 ($150,000−$75,000). Note that the dividend paid prior to DI's acquistion is not reflected in the calculation of DI's reinvested earnings.

Example 11. During 1969 DI acquires from a foreign national the following interests in an AFN: 25 percent on January 1, an additional 30 percent on March 1 and an additional 20 percent on September 1. The AFN earns $1,200,000 during 1969 and pays no dividends. DIs share of reinvested earnings in the AFN for 1969 is $680,000:

$1,200,000×(12/12)×25% equals	$300,000
$1,200,000×(10/12)×30% equals	300,000
$1,200,000×(4/12)×20% equals	80,000
Total	680,000

If earnings of the AFN acquired have fluctuated substantially during the year, the foregoing rule for determining the DI's share may be modified by OFDI upon application for specific authorization pursuant to § 801.

B312—Transfers of Capital

§ B312–1 Introduction.

The major operative concept of the regulations is "direct investment," defined in § 306(a) as the sum of a DI's net transfer of capital and the DI's share of reinvested earnings of incorporated AFNs. Computation of a DI's net transfer of capital (defined in § 313) depends, in turn, upon the computatiton under § 312 of all transfers of capital from the DI to AFNs and all transfers of capital from AFNs to the DI. Section 312 sets forth rules and definitions for determining whether a given transaction constitutes a transfer of capital.

In general, a transfer of funds or other property that increases a DI's aggregate equity and debt investment in an AFN (or decreases an AFN's aggregate equity and debt investment in a DI) is a "positive" transfer of capital, i.e., a transfer by the DI to the AFN. Conversely, a transfer of funds or other property that decreases a DI's aggregate equity and debt investment in an AFN (or increases an AFN's aggregate equity and debt investment in a DI) is generally a "negative" transfer of capital, i.e., a transfer by the AFN to the DI.

§ B312–2 Summary.

Under § 312, transfers of capital by a DI to an AFN are defined in subsection (a), transfers of capital by an AFN to a DI are defined in subsection (b), certain transactions that are not considered transfers of capital are described in subsection (c), and the definition of "debt obligation" or "debt interest" is set forth in subsection (d). Generally, transactions occurring during base period years and transactions occurring after the effective date of the regulations are treated similarly in determining whether a transfer of capital has been made.

Under § 312(a), any transfer of funds or other property (without regard to the situs of the property) by, on behalf of, or for the benefit of a DI, directly or indirectly to, on behalf of, or for the benefit of an AFN, is a transfer of capital by the DI to the AFN. Also, any transaction or occurrence as a result of or in connection with which a DI directly or indirectly acquires or increases a debt or equity interest in an AFN, or the AFN directly or indirectly disposes of or reduces a debt or equity interest in the DI, is generally a transfer of capital by the DI to the AFN.

Under § 312(b), certain enumerated transactions or occurrences as a result

of or in connection with which an AFN directly or indirectly acquires or increases a debt or equity interest in a DI, or the DI directly or indirectly disposes of or reduces a debt or equity interest in the AFN, are defined as transfers of capital by the AFN to the DI.

The language of subsection (a) of § 312 is substantially broader than that of subsection (b). Also, the specific transactions enumerated in subsection (a) as transfers of capital by a DI to an AFN do not purport to be all-inclusive; the transactions listed in subsection (b), on the other hand, are defined as the only transactions which are considered transfers of capital by an AFN to a DI.

A current transaction, involving immediate cash payment for goods sold or services rendered, is not a transfer of capital. If a DI sells goods on credit or renders services on account to an AFN, the sale of goods or performance of services involves a transfer of capital by DI to the AFN, since it increases DI's debt investment in the AFN. Subsequent payment on account by the AFN is a transfer of capital by the AFN to DI, since DI's debt investment in the AFN is thereby decreased.

Aggregate transfers of capital by a DI to all AFNs in a scheduled area during a year, less aggregate transfers of capital by such AFNs to the DI during the year, is the "net transfer of capital" by DI to the scheduled area during such year. (See § 313.) A DI electing to be governed by schedular allowables under § 504 will compute net transfers of capital on a schedular basis. A DI electing to be governed by the minimum allowable under § 503 will compute a single net transfer of capital on a worldwide basis. In either case, the net transfer of capital may be a positive or negative amount; it will be a positive amount if the aggregate of transfers of capital by DI to AFNs exceeds the aggregate of transfers or capital by AFNs to DI.

"Direct investment" is likewise computed on an annual basis; it consists of a DI's net transfer of capital and the DI's share in the reinvested earnings of its incorporated AFNs. (See § 306.) A DI electing to be governed by schedular allowables (§ 504) will compute direct investment on a schedular basis. A DI electing to be governed by the "minimum" allowable will compute direct investment on a worldwide basis as provided in § 503(b). In either case, direct investment may be a positive or negative amount, depending on the amount of net transfer of capital and reinvested earnings.

Particular transactions constituting transfers of capital during a year have no independent significance under the regulations. A transfer of capital has significance only with respect to the computation, on an annual basis, of a DI's net transfer of capital and direct investment.

If proceeds of long-term foreign borrowing have been expended in transfers of capital (see § 313(d)(1)) or allocated to positive direct investment (see § 306(e)), repayment of the borrowing will be a transfer of capital by the DI. (See § 312(a)(7).) Positive direct investment attributable to such a transfer of capital may be authorized by § 1002, provided the certification requirements of that section have been met.

Since positive direct investment in Canada is generally authorized without any limitation as to amount (see § 1102), transfers of capital by a DI to Canadian AFNs, and the resulting positive net transfer of capital and positive direct investment, may be made in unlimited amounts without contravening the regulations. However, a transfer of funds or other property by a Canadian AFN to a non-Canadian AFN of the DI will, under certain circumstances, be treated as a transfer of capital by the Canadian AFN to the DI, and as a further transfer of capital by the DI to the non-Canadian AFN. (See § 505.) Furthermore, if an interest is acquired in a Canadian AFN from another AFN, the transfer of capital is deemed to have been made by DI to the latter AFN; and if a DI acquires a Canadian AFN from any foreign national (other than another AFN), an appropriate portion of the transfer of capital by DI will be allocated among any non-Canadian second-tier AFNs owned by the Canadian AFN.

A net transfer of capital by a DI to unincorporated AFNs in any scheduled area during any period is computed in the manner set forth in § 313(b).

Transfers of funds or other property between AFNs of a DI are treated as set forth in § 505. In general, a transfer by one AFN to another AFN is treated as a transfer of capital by the transferor AFN to the DI, and a further transfer of capital in the same amount by the DI to the transferee AFN, provided that (a) at least one of the AFNs is an affiliate of the DI (i.e., the DI owns, alone or with other affiliates, a greater than 50-percent direct interest in the AFN) and (b) the transfer of funds or other property would be a transfer of capital under § 312(a) if actually made by the DI. (See § 505(a).) Extension of a trade credit for less than 1 year by one AFN to another AFN in the ordinary course of business normally will not involve a transfer of capital, provided neither AFN is Canadian. (See §§ 505(b), 1103(c).)

§ B312–3 Valuation of transfers of capital.

The amount of a transfer of capital is ordinarily determined in accordance with generally accepted U.S. accounting principles consistently applied, but in no event will the amount be less than the value of the transferred property at the time of the transfer as shown on the books and records of the transferor for financial reporting purposes. Thus, for example, if a transfer involves an export credit sale by a DI to an AFN, the amount of the transfer will ordinarily be the intercompany billing price. If transfers of property are valued by a DI at amounts that vary materially from the export declaration value of the property (if applicable), the DI's quarterly report including the transfers should contain a note to such effect and an appropriate explanation of the basis therefor.

A transfer of capital arising from repayment of a foreign currency loan from a DI to an AFN or from an AFN to a DI must be reflected as the actual dollar equivalent at the rate of exchange prevailing at the time of repayment, regardless of intervening devaluation or revaluation of the foreign currency. Likewise, a transfer of capital arising from repayment by the DI of an AFN's foreign currency borrowing pursuant to the DI's guarantee thereof, or a transfer of funds by the DI to the AFN to enable the latter to repay a foreign currency borrowing, will be charged in the actual dollar equivalent at the rate of exchange prevailing at the time of repayment. On the other hand, a transfer of capital arising from repayment by a DI of its own foreign currency long-term foreign borrowing will be charged at the dollar equivalent at the time of the original borrowing, regardless of intervening devaluation or revaluation of the foreign currency. (For all purposes under the regulations, proceeds of a long-term foreign borrowing will also remain the dollar equivalent of the original borrowing, and partial repayment will reduce outstanding proceeds pro rata.)

§ B312–4 Acquisition of interest in an AFN.

Acquisition of an equity or profit interest in a foreign corporation, partnership or business venture (defined in § 304) by a person within the United States (defined in § 322) will involve a transfer of capital by such person under § 312(a)(1), and will be included in the calculation of the net transfer of capital to unincorporated AFNs under § 313(b), if the following conditions are satisfied:

The person from whom the acquisition is made is either a foreign national (defined in § 302), including the foreign corporation, partnership, or business venture in which the interest is acquired, or another person within the United States that is not, at the time of the acquisition, a DI in the foreign corporation, partnership, or business venture;

The person making the acquisition is, at the time of the acquisition, a DI in the foreign corporation, partnership or business venture under §§ 305, 905(b)(1) (members of an associated group treated as separate DIs) or 906(b)(3) (owners of a DI electing to be treated themselves as DIs), or becomes a DI as a result of or in connection with the acquisition; and

The acquisition is made for value other than a transfer of intangibles as described in § 312(c)(11).

If the acquisition is from a DI in the foreign corporation, partnership or business venture, no transfer of capital is involved (§ 312(c)(1). Also, under certain conditions, OFDI will specifically authorize positive direct investment attributable to transfers of capital arising from a related series of equity acquisitions in a foreign corporation from non-DIs within the United States. A specific authorization may likewise be granted, under certain conditions, for positive direct investment attributable to creation of a DI-AFN relationship by acquisition of a foreign corporation's assets in exchange for property (e.g., stock) of the

new DI, where the foreign corporation is to be liquidated in a related transaction by distribution of the property received (e.g., stock of the DI purchasing the assets) to persons within the United States.

If acquisition of an equity interest involves a transfer of capital by the DI, the transfer of capital will generally be deemed to have been made to the AFN in which the interest is acquired. There are, however, two exceptions to this rule. First, if the interest is acquired from another AFN of the DI, the transfer of capital will be deemed to have been made to the selling AFN. Second, if (a) the interest is acquired from an unaffiliated foreign national after December 31, 1967, (b) the AFN in which the interest is acquired first become an AFN as a result of the acquisition, and (c) such AFN has an interest in other foreign corporations, partnerships or business ventures that become separate AFNs of the DI as a result of the acquisition, the transfer of capital will be allocated among the separate AFNs in a manner reasonably reflecting the respective values of each direct and indirect interest acquired. As a general rule, an allocation based on the respective book values of the foreign corporations, partnerships and business ventures involved will be acceptable.

Example 1. On June 1, 1969, a U.S. citizen and resident (X), who owns no voting stock in a foreign corporation, purchases 10 percent of the outstanding voting stock of a French corporation (C) from a citizen and resident of the United Kingdom for $1,000,000 cash. C has no subsidiaries or branches in Schedule A or B that would constitute separate AFNs under § 304.

(a) Under the facts as presented, X has made a $1,000,000 transfer of capital to C under § 312(a)(1).

(b) If X had purchased ony 9 percent of the voting stock of C, no transfer of capital would be involved unless or until (a) additional stock acquisitions give rise to a DI-AFN relationship or (b) OFDI determines that such relationship does, in fact, exist. (See §§ 305, 313(d)(2); see also § 304(b)(4).)

(c) If X purchased only 9 pecent of the voting stock of C, but X were a member of an affiliated, associated or family group, and another member or members of the group owned or acquired an additional 1 percent or more of the voting stock of C, X's acquisition would have involved a transfer of capital. (See §§ 903–905.)

(d) If X had purchased only 9 percent of the voting stock of C, but X acquired an additional 1 percent or more of the voting stock of C between June 2, 1969, and May 31, 1970, X's net transfer of capital to Schedule C in 1969 or 1970 (depending on when the additional stock was acquired) would be increased by the $1,000,000 expended in purchasing the 9 percent interest on June 1, 1969. (See § 313(d)(2).)

(e) If X had purchased 10 percent of C's outstanding preferred stock that has no voting rights (other than contingent voting rights not presently exercisable), instead of 10 percent of the voting stock, X would not have made a transfer of capital to C. (See § 304(b)(2)(i).)

(f) If X purchased 10 percent of the voting stock of C and subsequently purchased nonvoting preferred stock of C for $1,000,000, purchase of the preferred stock would involve a $1,000,000 transfer of capital to C. (See § 312(a)(1).)

(g) If X purchased nonvoting preferred stock of C for $1,000,000 and subsequently, within a 12-month period, purchased 10 percent of the voting stock of C, X's net transfer of capital to Schedule C during the year when the voting stock was acquired would be increased by the $1,000,000 expended in purchasing the preferred stock. (See § 313(d)(2).)

(h) If X had purchased C's voting stock from a Panamanian AFN (P), instead of from the nonaffiliated U.K. resident, the purchase would involve a transfer of capital to P, since acquisition of an equity interest in an AFN from another AFN is treated as a transfer of capital to the selling AFN.

(i) If C had a wholly owned subsidiary in the United Kingdom (B) with net assets of $600,000, and a branch in Brazil (A) with net assets of $400,000 (calculated in accordance with § 313(b)), and C itself had net assets of $1,000,000 (exclusive of debt and equity interests in B and A), X's purchase of 10 percent of C's voting stock from the United Kingdom resident for $1,000,000 would involve a transfer of capital required to be allocated among A, B, and C. The $1,000,000 transfer of capital made by X might be allocated $500,000 to C (i.e., 50 percent of $1,000,000), $300,000 to B (i.e., 30 percent of $1,000,000), and $200,000 to A (i.e., 20 percent of $1,000,000), or might be allocated among C, B, and A in any other manner fairly reflecting the interests acquired in C, B, and A.

(j) If C had a wholly owned subsidiary in the United Kingdom (B) with net assets of $600,000, and a branch in Brazil (A) with net assets of $400,000, and C itself had net assets of $1,000,000 (exclusive of its interests in A and B), X's purchase of 10 percent of C's voting stock from a Panamanian AFN (P) for $1,000,000 would involve a $1,000,000 transfer of capital to P, since no allocation among AFNs is made when the acquisition is from another AFN.

(k) If X had inherited 10 percent of the outstanding voting stock of C, or had received the stock as an inter vivos gift from a relative residing in the United Kingdom, X would not have made a transfer of capital, since he would not have transferred funds or other property in connection with the acquisition of the equity interest in C.

(l) If X, after acquiring 10 percent of the outstanding voting stock of C, transfers equipment and machinery valued at $20,000 to C in exchange for additional stock of C, X has made a $20,000 transfer of capital to C. (See § 312(a)(1).)

(i) *Equity financing.* A DI's acquisition of an AFN from an unaffiliated foreign national in exchange for stock of the DI involves a transfer of capital to the AFN in the amount of the value of DI's stock on the date of the transfer. Deferral, in whole or in part, of a charge to DI's allowables for positive direct investment attributable to such transfer of capital may be specifically authorized by OFDI under certain circumstances and subject to certain conditions. (See § B801 and Part I.E. of Appendix A.)

(ii) *Unincorporated AFNs.* Acquisition of an interest in an unincorporated AFN will be reflected as an increase in DI's share of the AFN's aggregate net assets, and will have significance under the regulations only insofar as it contributes to yearend positive net transfer of capital or positive direct investment. Acquisition of an interest in an incorporated AFN will be reflected as a transfer of capital under § 312(a)(1); similarly, it will have significance only insofar as a positive net transfer of capital or positive direct investment results. Although earnings and losses of incorporated AFNs are reflected as reinvested earnings and not in the determination of a DI's net transfer of capital, while earnings and losses of unincorporated AFNs are taken into account in determining a DI's net transfer of capital, the disparity arising from this difference in treatment of incorporated and unincorporated AFNs is minimized under the Program, since direct investment is the sum of the net transfer of capital plus reinvested earnings.

The following instances of similar or identical treatment of unincorporated and incorporated AFNs in transactions involving transfers of capital should be noted:

The same rules regarding valuation of the interest acquired apply, whether the AFN is unincorporated or incorporated.

The same rule and exceptions thereto apply to determination of the AFN to which the transfer of capital will be deemed made, whether the acquisition is of an equity interest or of a profit interest. Normally, the transfer of capital will be to the acquired AFN. However, if the acquisition is made from another AFN, the transfer of capital will be to the selling AFN. Thus, DI's acquisition of an unincorporated AFN from an incorporated AFN will be reflected as a transfer of capital to the incorporated AFN, and not as an increase in the DI's share of the unincorporated AFN's aggregate net assets. Nevertheless, for future transactions the DI will be deemed to have the share in such AFN's net assets as was acquired on the date of acquisition. Also, if (i) the interest in the AFN is acquired after December 31, 1967, (ii) the interest is not acquired from another AFN, (iii) the AFN in which the interest is acquired is not, at the time of acquisition, an AFN of DI but becomes an AFN as a result of or in connection with the acquisition, and (iv) such AFN owns an interest or interests in other foreign entities that become separate AFNs of DI as a result of or in connection with the acquisition, the transfer of capital will be allocated among all of the separate AFNs in a manner reasonably reflecting the respective values of each direct and indirect interest acquired.

In calculating the amount of net transfer of capital by a DI during any period, there is deducted an amount equal to proceeds of long-term foreign borrowing actually expended in transfers of capital to incorporated AFNs or actually transferred to unincorporated AFNs. (See § 313(d)(1).)

§ B312–5 Acquisition of an AFN's debt obligation.

Acquisition by a DI of an AFN's debt obligation, regardless of the nature of the transaction or occurrence giving rise to the obligation (e.g., a loan or advance by the DI to an AFN on open account or otherwise), involves a transfer of capital by the DI to the AFN in an amount equal to the amount of the obligation so acquired. If, however, a debt obligation of an AFN is acquired by a DI from another AFN, a transfer of capital will be deemed to have been made by the DI to the selling AFN in an amount equal to the cost of the obligation to the selling AFN; any gain or loss realized by the selling AFN will be included in calculating earnings of that AFN for the period involved.

The exemptions provided in § 312(c)(1) (relating to acquisitions from DI's) and § 312(c)(11) (relating to transfers of intangibles), and the provisions of § 313(d)(1) (relating to deduction of

proceeds of long-term foreign borrowing), are applicable to acquisiton of debt obligations as well as to acquisition of equity interests.

Example 2. The foregoing concepts are illustrated by the alternative transactions considered below. In each instance, assume that DI has a 50-percent interest in a Mexican AFN (A).

(a) DI lends A $500,000 against A's 3-year term note and advances an additional $500,000 to A on open account. DI has made two $500,000 transfers of capital A under § 312(a)(1). Repayments of each indebtedness by A will involve transfers of capital from A to DI under § 312(b)(3), in the amounts repaid.

(b) DI sells merchandise to A for resale and bills A for $100,000 payable within 60 days. DI has made a $100,000 transfer of capital to A under § 312(a)(1). A repays DI during the same reporting period. The transfer of capital under § 312(b)(3) from A to DI will offset DI's transfer of capital to A, and no net transfer of capital will result from the transactions. It should be recognized that the transfer of capital from DI to A in this instance does not arise from the transfer of merchandise, but rather from the extension of credit involved in the transaction. If the total amount of credit outstanding in connection with the sale of merchandise by a DI to its AFNs increases during a year, OFDI may issue a specific authorization for positive direct investment attributable to such increase in outstanding credit, subject to certain conditions (see Part I.C. of Appendix A, and Appendix E, hereto).

(c) DI ships merchandise on consignment to A for resale. A is to pay DI $100,000 when all the merchandise is sold. The shipment has the same effect under the regulations as a sale on credit, and involves a $100,000 transfer of capital by DI to A at the time of consignment.

(d) DI renders management services to A, as a result of which A owes DI $10,000. DI has made a $10,000 transfer of capital to A under § 312(a)(1). Repayment of the indebtedness will be a transfer of capital from A to DI under § 312(b)(3).

(e) DI licenses A to manufacture and sell certain products for a royalty of 5 percent of A's gross sales of such products. Any accrual of unpaid royalties will involve a transfer of capital under § 312(a)(1).

(f) A foreign bank lends $100,000 to A against A's 3-year note bearing interest at the prevailing rate. DI's acquisition of the note from the bank for $95,000 will involve a $95,000 transfer of capital by DI to A under § 312(a)(1). Repayment of the note by A will involve a $100,000 transfer of capital by A to DI under § 312(b)(3).

(g) A declares a dividend to DI that is not actually remitted on the date payable. DI has acquired a debt obligation of A, and has made a transfer of capital to A under § 312(a)(1). Actual payment of the dividend will be a transfer of capital by A to DI under 312(b)(3). Note that, for purposes of calculating reinvested earnings, however, the dividend is deemed to have been paid on the date it becomes payable. (See § 306(d)(2).)

(h) Renewal of a loan from DI to A in a previous year will not involve a transfer of capital, since renewal is not deemed repayment of the old obligation or creation of a new obligation. However, accrual of unpaid interest on the loan will involve a transfer of capital to A under § 312(a)(1). Subsequent payment of such accrued interest will be a transfer of capital by A to DI under § 312(b)(3).

(i) DI sends A certain equipment to be repaired by A and returned to DI. No transfer of capital is involved.

(j) Semiprocessed goods or raw materials are shipped by DI to A for processing or testing, and such goods or materials (title to which is retained by DI) will be returned to DI after processing or testing. No transfer of capital is involved. Payments by DI for the services rendered by A will not involve transfers of capital, but may be reflected in earnings of A.

§ B312–6 Contributions by a DI to capital of AFNs.

Section 312(a)(2) is intended to cover a transfer of funds or other property by a DI to an AFN that is not reflected on the books and records of the DI or the AFN as either an acquisition of equity interest by the DI or creation of a debt obligation from the AFN to the DI. Thus, for example, if no stock is issued and no debt obligation is created in return for machinery shipped by a DI for use of an AFN, the DI will be deemed to have made a contribution of capital to the AFN (a transfer of capital under § 312(a)(2)) in the amount of the value of the machinery. (Long-term lease of property by a DI to an AFN will also involve a transfer of capital under § 312(a)(8).)

Increases in capital of an AFN, whether incorporated or unincorporated, that do not have a transactional basis are not ordinarily treated as transfers of capital to the AFN. Thus, for example, if marketable securities owned by AFN increase in value, or fixed assets of an AFN are reappraised to increase their value, no transfer of capital to the AFN will result. Similarly, no transfer of capital will result if an incorporated AFN capitalizes retained earnings.

Expenses incurred by a DI in rendering services primarily for the benefit of an incorporated AFN will not result in transfers of capital, under § 312(a)(2) or otherwise, provided such expenses are charged to the DI under generally accepted U.S. accounting principles consistently applied. If such expenses are charged to the AFN and the DI is not compensated therefor, transfers of capital under § 312(a)(1) or (2) will result.

§ B312–7 Repayment of DI's indebtedness to an AFN.

Any repayment by a DI of indebtedness to an AFN will involve a transfer of capital by the DI to the AFN under § 312(a)(3), provided the AFN is still an AFN of the DI at the time of repayment. If the indebtedness is created in a transaction involving a transfer of capital from an AFN to a DI under § 312(b)(1), and is repaid by the DI during the same compliance period, no net transfer of capital will result.

§ B312–8 Reduction of an AFN's equity interest in a DI.

Under § 312(a)(4), reduction of an AFN's equity interest in a DI as a result of a redemption of stock, liquidating dividend (whether or not any part is allocable to earnings of the DI), or like transaction is a transfer of capital to the AFN. Thus, for example, if an AFN purchases stock of a DI from the DI for $1 million and the DI subsequently redeems the stock for $1 million, the AFN's purchase involves a $1 million transfer of capital to the DI under § 312(b)(1) and the DI's redemption involves a $1 million transfer of capital to the AFN under § 312(a)(4).

§ B312–9 Disposition of an equity or debt interest in a DI held by an AFN.

Whereas § 312(a)(4) encompasses those cases where an equity interest in a DI held by an AFN is reduced or liquidated by virtue of a redemption, liquidating dividend or like transaction, § 312(a)(5) covers those cases where such an equity or debt interest of a DI is sold or otherwise transferred by an AFN to another person. Such disposition will involve a transfer of capital by the DI to the AFN only if (a) the interest is sold back to the DI, or (b) the selling AFN is an affiliate of the DI (as defined in § 903(a)), or (c) the interest is sold to another AFN that is an affiliate of the DI. (See § 312(c)(2).) For example, an AFN that is an affiliate of a DI purchases stock of the DI from the DI for $1 million and subsequently sells the stock to an unaffiliated foreign national for $1.2 million. The AFN's purchase involves a $1 million transfer of capital from the AFN to the DI under § 312(b)(1). Subsequent sale of the stock involves a $1 million transfer of capital to the AFN under § 312(a)(5), and a $200,000 capital gain to be reflected in calculation of the AFN's earnings.

§ B312–10 DI's satisfaction of an AFN's debt obligation.

Under § 312(a)(6), any payment by a DI to satisfy an obligation in respect of which an AFN is the primary obligor will involve a transfer of capital by the DI to the AFN. Thus, for example, payment by a DI of an AFN's rent, salary expenses, advertising expenses, legal fees, auditing fees, or other expenses will involve transfers of capital to the AFN. Similarly, if a DI guarantees an obligation owed by an AFN to another person, payment by the DI of any part of the principal amount of such obligation and payment of interest with respect thereto that has accrued prior to the AFN being relieved of or defaulting upon the obligation, will involve a transfer of capital by the DI to the AFN.

The making of a guarantee by a DI does not itself involve a transfer of capital. (See § 312(c)(7).) However, a DI's assumption of an AFN's obligation in a transaction in which the AFN is relieved of liability will involve a transfer of capital by the DI to the AFN, while subsequent payments of the obligation will not involve transfers of capital. Payment by a DI of interest on the obligation of an AFN after the DI has become primarily liable for the obligation does not involve a transfer of capital by the DI to the AFN. (See § 312(c)(8).)

§ B312–11 Repayment of a DI's long-term foreign borrowing.

Repayment by a DI of a long-term foreign borrowing involves a transfer of capital by the DI under § 312(a)(7), if proceeds of the borrowing were:

Expended by DI in making a transfer of capital on or after January 1, 1965; or

Allocated to a transfer of capital made by the DI during 1968; or

Allocated to positive direct investment made during any year commencing with 1969.

A transfer of capital under § 312(a)(7) is deemed to have been made to the scheduled area in which proceeds of the DI's borrowing were expended or are allocated at the time of the repayment. Positive direct investment attributable to a transfer of capital under § 312(a)(7) is generally authorized by § 1002(a), subject, in certain instances, to the certification requirements of § 1002(b).

§ B312–12 Lease of property by a DI to an AFN.

Under § 312(a)(8), a lease of property by a DI to an AFN is considered a transfer of capital to the AFN if the property has a useful life at the time of the lease of 1 year or more, and is not required or expected to be returned to the DI in less than 1 year. This rule recognizes that long-term leases are substantially similar in economic effect to outright transfers. Accordingly, such long-term leases of property by a DI to an AFN will be considered transfers of capital, without regard to the nature or expected use of the property, while a transfer of capital from the AFN to the DI will be recognized under § 312(b) at the time the property is returned to the DI.

Payment of current rentals under such a long-term lease will not be considered a transfer of capital by the AFN to the DI (§ 312(c)(9)), since rental payments are deducted in calculating the AFN's earnings. A sublease will be treated, under these provisions, in the same manner as an original lease.

Example 3. DI leases machinery and equipment to an incorporated AFN (X) for a 10-year term for a rental of $1,000 per year. The machinery and equipment have an aggregate value of $12,000 at the time the lease is made. At the end of 10 years, the machinery and equipment will be returned to DI, at which time it will have a value of $2,000. DI has made a $12,000 transfer of capital to X at the time of the lease and X will make a $2,000 transfer of capital to DI when the property is returned. The $1,000 annual rental payments will not constitute transfers of capital from X to DI.

§ B312–13 Inducements for loans to a DI or to an AFN.

Under § 312(a)(9), a DI's pledge, hypothecation, or transfer of foreign balances (defined in § 203(a)(1)), or of equity securities of a foreign corporation (other than equity securities of an AFN), will involve a transfer of capital by the DI if the pledge, hypothecation, or transfer is made to or with a foreign national (a) to induce a loan to an AFN, or (b) to induce a loan to the DI that qualifies as a long-term foreign borrowing and the proceeds of which are invested in an AFN. The amount of the transfer of capital for purposes of § 312(a)(9) is the lesser of (a) the value of the foreign balances or equity securities or (b) the amount borrowed by or invested in the AFN. The transfer of capital occurs as of the date the funds are borrowed by or invested in the AFN.

A pledge or hypothecation constituting a transfer of capital under § 312(a)(9) will, upon release, be considered a transfer of capital to the DI under § 312(b) in the amount of the DI's initial transfer of capital. If, on the other hand, the property pledged or hypothecated is not released but is applied to payment of the secured indebtedness, no additional transfer of capital by the DI will result therefrom.

Example 4. DI deposits $1,000,000 (cash or securities) with a foreign bank as an inducement (or collateral) for an $800,000 loan by the bank to an AFN (X). The deposit is an $800,000 transfer of capital by DI to X. If cash was deposited, only the $200,000 excess over the amount of the loan would constitute a liquid foreign balance (see § B203–4). The result would be the same if the deposit were made as collateral for an $800,000 long-term borrowing by DI from the foreign bank and the proceeds of the borrowing were loaned by DI to X. (The loan by DI to X would involve a transfer of capital, with a corresponding deduction from net transfer of capital by operation of § 313(d)(1).) Similarly, if the collateral itself represented proceeds of a long-term foreign borrowing, a deduction under § 319(d)(1) would also be taken in respect of the transfer of capital involved in the pledge. No transfer of capital under § 312(a)(9) would be involved if the pledge or deposit were made as collateral for a short-term borrowing by DI. DI's loan of the proceeds of the short-term borrowing to X would involve a transfer of capital, but no deduction under § 313(d)(1) could be taken.

Example 5. DI deposits $1,000,000 with the home office of a domestic bank, as security for a $1,000,000 loan by a foreign branch of the bank to an AFN (X). The deposit is not a transfer of capital, since it was not placed with a foreign national, but does constitute a guarantee by DI of X's borrowing. (In this connection, positive direct investment attributable to a subsequent transfer of capital pursuant to DI's guarantee (under § 312(a)(6)) will be authorized by § 1002(a)(5), provided DI has complied with the certification requirements of § 1002(b).)

Example 6. DI pledges equity securities of U.S. corporations, together with equity securities of an AFN, with a foreign bank as collateral for a loan by the bank to another AFN (X) or, alternatively, as collateral for a long-term borrowing by DI from the foreign bank. The pledge is not a transfer of capital in either instance, since the securities pledged are not those of an unaffiliated foreign national. (However, the pledge of securities as collateral for the loan to X would be considered a guarantee by DI of X's obligation.)

Example 7. DI deposits $1,000,000 with a foreign bank pursuant to an arrangement whereby the bank lends $1,000,000 to an AFN (X). The deposit constitutes a $1,000,000 transfer of capital by DI to X, whether or not the bank has a legal right to resort to the deposit should there be default by X. However, if DI's deposit was not specifically to induce the loan to X, but rather was a deposit in the ordinary course of business, there would be no transfer of capital even though DI and the bank agreed that the funds would stay on deposit while the loan was outstanding. In this case, the funds on deposit would constitute a liquid foreign balance.

§ B312–14 Indirect transfers by a DI to an AFN.

It is important to recognize that § 312(a) focuses on the substance rather than the form of transactions. Transactions that do not come precisely within the language of any of the subparagraphs of § 312(a), but nevertheless are undertaken by a DI for the benefit of an AFN, may involve a transfer of capital by the DI to the AFN even though the transactions are effected through nominees, financial conduits or other intermediaries. While the outcome of each transaction will depend on the specific facts and circumstances involved, DIs should recognize the general rule that transactions effected indirectly with an AFN will be treated under the Regulations as if effected directly by the DI.

§ B312–15 Transfers of capital by an AFN to a DI.

The provisions of § 312(b), relating to transfers of capital by an AFN to a DI, are roughly parallel to the provisions of § 312(a)(1)–(6), relating to transfers from a DI to an AFN. Thus, with certain exceptions, any transaction that would involve a transfer of capital by a DI to an AFN under subparagraphs (1) through (6) of § 312(a) will involve a transfer of capital by the AFN to the DI under § 312(b) if the position of the parties is reversed (e.g., the AFN, rather than the DI, is the lender). The following points, however, deserve specific mention.

Under § 312(a)(1), acquisition of an equity or debt interest in an AFN will ordinarily involve a transfer of capital by the DI, regardless of the identity of the person from whom the interest is acquired; the only exception is an acquisition from another DI. Under § 312(b), on the other hand, acquisition by an AFN of an equity or debt interest in a DI involves a transfer of capital by the AFN only if the person from whom the interest is acquired is the DI itself (§ 312(c)(3)). Thus, for example, if an AFN lends $100,000 to a DI, a $100,000 transfer of capital from the AFN to the DI is involved under § 312(b)(1). If the loan were made to the DI by a bank and the AFN subsequently acquired the debt obligation, no transfer of capital to the DI would be involved; however, satisfaction of the obligation by the DI would involve a $100,000 transfer of capital to the AFN under § 312(a)(3).

Disposition by an AFN of an equity or debt interest in a DI involves a transfer of capital by the DI under § 312(a)(5) if the selling AFN is an "affiliate" (defined in § 903(a)), or if the transferee is the DI or another AFN that is an affiliate of the DI. Under § 312(b)(5), however, disposition by a DI of an equity or debt interest in an AFN involves a transfer of capital to the DI only if the transferee is either (a) a foreign national or (b) a domestic bank or nonbank financial institution subject to the Voluntary Foreign Credit Restraint Program (administered by the Board of Governors of the Federal Reserve System) and the transfer is charged against the ceiling of such bank or is treated as a covered asset of such institution under that Program (§ 312(c)(4)). Thus, if a DI lends $100,000 to an AFN (resulting in a $100,000 transfer of capital to the AFN) and discounts the AFN's note for $98,000 with a domestic bank, a $98,000 transfer of capital by the

AFN to the DI will result if the bank is subject to the Voluntary Foreign Credit Restraint Program and the note is charged against the bank's ceiling under that Program. The result would be the same if the note is discounted with a foreign bank (including a foreign branch of a domestic bank) or another foreign national. If the DI's disposition of the note did not involve a transfer of capital under § 312(b)(5), satisfaction of the note by the AFN would involve a transfer of capital to the DI.

When a DI disposes of a debt or equity interest in an AFN (under circumstances constituting a transfer of capital to the DI under § 312(b)(5)), the transfer of capital to the DI is the full value of consideration received therefor, whether the transaction results in a gain or a loss to the DI. However, liquidation of an unincorporated AFN should be reflected in accordance with § 313(b) as a decrease in net assets of such AFN, based on valuation of such net assets at the end of the preceding year.

A transfer of capital under § 312(b)(5) will generally be deemed to have been made to the DI by the AFN that issued the debt or equity interest disposed of. There are, however, two exceptions to this rule. First, if the debt or equity interest in an AFN is sold by a DI to another AFN, the transfer of capital is deemed to have been made to the DI by the latter AFN. Second, if an equity interest in an AFN is both acquired from and sold to unaffiliated foreign nationals after December 31, 1967, and at the time of the disposition the AFN involved has subsidiaries or branches in other scheduled areas that are separate AFNs under § 304, the transfer of capital to the DI should be allocated among all such AFNs in a manner fairly reflecting the respective values of all direct and indirect interests in the AFNs disposed of. As a general rule, an allocation based on the book value of each AFN will be acceptable.

Sale of an AFN to an unaffiliated foreign national during a year does not affect any transfers of capital between the DI and the AFN preceding the date of disposition. Thus, if a DI makes a $1 million transfer of capital to an AFN in the beginning of 1969 and in December sells all equity interest in the AFN to an unaffiliated foreign national for $900,000 in cash, the DI has made a positive net transfer of capital of $100,000 during 1969 to the scheduled area of the AFN (assuming no other relevant transactions during 1969).

§ B312–16 Sale of an AFN to an unaffiliated foreign national with deferred payment.

If a DI receives a long-term debt obligation of an unaffiliated foreign national as consideration for an interest in the AFN disposed of, no transfer of capital to the DI will result from the disposition until the obligation is paid or is sold by the DI to another unaffiliated foreign national for cash or other property (other than a long-term debt obligation).

Example 8. DI sells 50 percent of the stock of a wholly owned French corporation (C) to an unaffiliated foreign national (F) for $1,000,000 in cash. C has no subsidiaries or branches outside Schedule C. DI had originally acquired all of the stock of C for $100,000.

(a) Under the facts as presented, the sale involves a $1,000,000 transfer of capital from C to DI, pursuant to § 312(b)(5).

(b) If F had given DI a 5-year note for $1,000,000, instead of cash, the transfer of capital from C to DI would occur when the note is paid or is sold by DI to another unaffiliated foreign national for cash or other property (other than a long-term debt obligation).

(c) If F had been an AFN of DI located in Schedule B, the sale of C for cash would involve a $1,000,000 transfer of capital from F to DI.

(d) If F had been an AFN of DI located in Schedule B and paid DI with a 5-year note for $1,000,000, DI's exchange of stock in C for a debt obligation of F would not involve a transfer of capital. However, payment of the note by F would involve a transfer of capital from F to DI, pursuant to § 312(b)(3).

(e) If C had a subsidiary in Schedule A (X), a branch in Schedule B (Y) that was a separate AFN of DI, and a subsidiary in Schedule C (Z), the transfer of capital to DI involved in a cash sale of C to an unaffiliated foreign national would be allocated among C, X, Y, and Z in a manner reasonably reflecting the respective values of each direct and indirect interest disposed of by DI. If C were sold to another AFN for cash, no allocation of the transfer of capital to DI would be made among the second-tier AFNs; the transfer of capital under § 312(b)(5) would be from the acquiring AFN to DI.

(f) The fact that DI had originally acquired C with proceeds of a long-term foreign borrowing would not alter any of the above results.

§ B312–17 Triangular and parallel foreign financing.

Triangular loan arrangements are generally those in which a loan by a DI to an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by such foreign national to an AFN. Parallel loan arrangements are generally those in which a loan by a DI to a U.S. subsidiary of an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by such foreign national to an AFN.

As stated in the Memorandum for Direct Investors issued September 24, 1969 (Appendix B hereto), each such type of arrangement will generally give rise to a transfer of capital by the DI to the AFN at the time and in the principal amount of the foreign loan to the AFN. However, such Memorandum indicates that relief will be available (in the form of a specific authorization to exclude the current charge against allowable resulting from such transfer of capital) in cases where assurance can be given that there will be no contravention of the objectives of the Program, i.e., that the proceeds of the DI's loan (a) will be invested or retained in the United States, (b) will not be used as a substitute for funds that the unaffiliated foreign national or its U.S. subsidiary otherwise intended to provide from sources outside the United States, and (c) will not enable the unaffiliated foreign national or its U.S. subsidiary to make transfers of funds from the United States that would not have occurred in the absence of such loans by the DI.

§ B312–18 Certain transactions not involving a transfer of capital; § 312(c).

Section 312(c) sets forth particular transactions not deemed to involve transfers of capital although technically encompassed by the language of § 312 (a) or (b).

Under § 312(c)(1), acquisition by a DI of a debt or equity interest in an AFN (as described in § 312(a)(1)) will not be deemed to involve a transfer of capital if the acquisition is made from another DI. The selling party must be a DI at the time of the sale, but may cease to be a DI as a result of the transaction. Under certain conditions, OFDI may specifically authorize positive direct investment in excess of applicable allowables attributable to acquisition by a DI of an interest in an AFN from a person within the United States that is not a DI (i.e., a person holding less than 10-percent interest in the foreign national). OFDI may also specifically authorize positive direct investment in excess of applicable allowables attributable to acquisition of assets of a U.S.-owned incorporated foreign national that will be liquidated by sale of the assets in a related transaction to U.S. persons.

If a DI acquired an interest in an AFN from another DI prior to June 10, 1969, and the divesting DI ceased to be a DI as to that AFN as a result of the acquisition, both net transfer of capital by the divesting DI in the year of acquisition and direct investment by the divesting DI during the base period are deemed to have been made by the acquiring DI. If the divesting DI does not cease to be a DI as to the AFN as a result of the acquisition, only the net transfer of capital in the year of acquisition and the base-period direct investment that are allocable to the interest transferred will be deemed to have been made by the acquiring DI.

Under § 312(c)(1), as effective June 10, 1969, if a DI acquires an equity interest in an AFN from another DI, the divesting DI's direct investment in the year of the acquisition and during 1965–66 is deemed to have been made by the acquiring DI, to the extent allocable to the interest transferred. Similarly, the divesting DI's share in the AFN's earnings or losses prior to acquisition is attributed to the acquiring DI, to the extent allocable to the interest transferred. In calculating the divesting DI's direct investment in the AFN, deductions from net transfer of capital may not be made pursuant to § 313(d)(1). The acquiring and divesting DIs must file revised Forms FDI–101 and FDI–102F for the year preceding the year of acquisition, reflecting the above treatment, in order for the acquisition to be covered by § 312(c)(1).

If a DI acquires a debt obligation of an AFN from another DI in the same AFN, no transfer of capital is involved and no allocation of direct investment between the DIs is made.

Pursuant to § 312(c)(2), disposition of an equity or debt interest in a DI by an AFN involves a transfer of capital by the DI to the AFN under § 312(a)(5) only if (a) the interest is sold back to the DI, or (b) the selling AFN is an affiliate of the DI, or (c) the interest is sold to another AFN that is an affiliate of the DI.

Pursuant to § 312(c)(3), acquisition by an AFN of an equity or debt interest in a DI is not a transfer of capital to the DI under § 312(b)(1) unless the acquisition is from the DI.

Pursuant to § 312(c)(4), transfer by a DI of an equity or debt interest in an AFN is not a transfer of capital by the AFN to the DI under § 312(b)(5) unless the transfer is made to a foreign national or is subject to the Federal Reserve Board's Voluntary Foreign Credit Restraint Program.

Under § 312(c)(5), increase of equity interest in an incorporated AFN resulting from reinvestment of the AFN's earnings does not involve a transfer of capital. Reinvestment of the DI's share of an incorporated AFN's earnings does, however, constitute an element of direct investment, as defined in § 306(a).

Under § 312(c)(6), increase or decrease in the value of an AFN's assets resulting from reappraisal of such assets does not involve a transfer of capital.

Under § 312(c)(7), a DI's guarantee of borrowing by an AFN does not itself involve a transfer of capital. (For a definition of the term "guarantee", see § 1001(c).) However, payments pursuant to a guarantee may involve transfers of capital under § 312 (a)(6) or (b)(6). Positive direct investment attributable to a DI's performance under a guarantee of an AFN's obligation will be authorized in excess of applicable allowables, provided that in the case of a guarantee made on or after January 1, 1968 the DI has complied with applicable certification requirements of § 1002(b).

Under § 312(c)(8), payment by the primary obligor of interest currently due, or fees or commissions in connection with borrowings, does not involve a transfer of capital. Prepayments of interest pursuant to customary lending practices or commercial transactions likewise do not involve transfers of capital. (The fees or commissions referred to above include commitment and termination fees, premiums, underwriters' commissions, original issue discounts, broker-dealer fees, legal and accounting fees, and other like items.) Thus, for example, an AFN's payment of interest on a loan from a DI, or vice versa, does not involve a transfer of capital if the interest is paid when due. If not paid when due, however, an additional debt obligation will be created, involving a transfer of capital from the obligee to the obligor under § 312 (a)(1) or (b)(1) and a transfer of capital in the opposite direction under § 312 (a)(3) or (b)(3) when the additional obligation is paid. It should be noted that the exemption under § 312(c)(8) applies only to the primary obligor. Thus, payments by a DI, pursuant to a guarantee of an AFN's borrowing, of interest, commissions and fees owed by the AFN, are transfers of capital to the AFN under § 312(a)(6).

Under § 312(c)(9), payment of rental currently due under a lease, or prepayment of rental if customary under leases of the type involved, does not involve a transfer of capital. However, a lease of property by a DI to an AFN may involve a transfer of capital under § 312(a)(8).

Under § 312(c)(10), payment of royalties currently due by a licensee does not involve a transfer of capital, absent circumstances indicating that such payments are essentially equivalent to transfers of capital and are merely disguised as royalty payments. Likewise, prepayment of royalties will not be treated as transfers of capital if such prepayments are customarily made by licensees under similar license agreements. As in the case of interest payments, the exemption under § 312(c)(10) applies only to payments by a primary obligor.

Section 312(c)(11) provides, as a general rule, that a transfer of any of the following items does not involve a transfer of capital by a DI to an AFN, or vice versa: Patents, copyrights, trademarks, trade names, trade secrets, technology, proprietary processes, proprietary information, and similar intangibles, and any rights, interests, contracts or applications relating to the foregoing items. These exemptions are applicable regardless of the form of the transfer, or the consideration received in exchange therefor. However, DI's transfer of any of the foregoing intangibles to an AFN on or after January 1, 1968, in exchange for a debt or equity interest in the AFN, is considered a transfer of capital by the DI if (a) the transfer represents a substantial departure from a previously established practice of the DI with respect to exploitation of intangibles of the type transferred, and (b) the intangible transferred was, prior to the transfer, a substantial source of royalty or other like fixed or determinable, annual or periodic, income.

If a post-January 1, 1968, transfer of an intangible does not involve a transfer of capital because of the foregoing rule, no deduction for amortization or any like charge with respect to the intangible transferred may be made against earnings in calculating the transferee AFN's earnings. Also, even if a transfer of intangibles does not involve a transfer of capital, a person within the United States making such transfer may become a DI if a 10-percent interest (as defined in § 304) in the foreign enterprise is received in exchange for the transfer.

The determination whether transfer of an intangible represents a substantial departure from previously established practice and whether the intangible transferred was a substantial source of royalty or like income will depend on the facts and circumstances in each case.

§ B312–19 Unenumerated transactions not involving a transfer of capital.

Certain other transactions not enumerated in § 312(c) will be deemed not to involve transfers of capital between a DI and an AFN, even though a foreign enterprise may become or cease to be an AFN as a result of the transactions. However, if a foreign enterprise ceases to be an AFN as a result of any such transaction, this will not change the amount of direct investment chargeable to the DI during the base period in the appropriate scheduled area. The transactions referred to are as follows:

Acquisition by a DI, from an AFN or unaffiliated foreign national, of stock or assets of a foreign corporation, partnership or business venture in exchange for stock of an AFN;

Contribution by a DI of stock or assets of an AFN to capital of another AFN;

Merger of one incorporated AFN into another incorporated AFN of the same DI, or consolidation of AFNs of the same DI, or merger or consolidation of an AFN into or with the DI;

Division of an AFN into two or more entities; and

Recapitalization of an AFN involving an exchange of stock for stock, debt for debt, stock for debt, or debt for stock.

§ B312–20 International construction projects.

Commencing with 1969, bid preparation expenditures in connection with international construction projects are to be excluded from computation of a DI's net transfer of capital, whether such expenditures have been incurred by the DI or it has advanced funds for such purpose to an AFN. However, such expenditures may not subsequently be deducted in computing earnings of incorporated AFNs or aggregate net assets of unincorporated AFNs. Specific authorizations with respect to transfers of capital to foreign construction projects may also be granted in appropriate circumstances under § 801 (see Appendices C and D hereto).

B313—Net Transfer of Capital

§ B313–1 Introduction.

Net transfer of capital as defined in § 313(c) is one of the components of direct investment (§ 306). Net transfer of capital under § 313(c) consists of:

The net transfer of capital to incorporated AFNs in a scheduled area (§ 313(a)); plus

The net transfer of capital to unincorporated AFNs in the scheduled area (§ 313(b)); less

Expended proceeds of long-term foreign borrowing in the scheduled area (§ 313 (d)(1)).

Section 313(d)(2) provides that transfers in connection with the acquisition of AFNs, including transfers during the 12-month period preceding any such acquisition, must be included in computing net transfer of capital.

Net transfer of capital to incorporated AFNs under § 313(a) consists of all § 312 (a) transfers of capital from the DI to AFNs, less all § 312(b) transfers from AFNs to the DI. The net transfer of capital to unincorporated AFNs under § 313 (b) equals the DI's share in any net increase or decrease in the aggregate net assets of its unincorporated AFNs.

While § 313 provides the basic definition of net transfer of capital, § 505 contains additional rules essential to the application of § 313, viz:

Transfers involving certain unincorporated AFNs are treated as transfers of capital by the immediate parents or to the immediate parents of such AFNs (§ 505(a) (1), (2), and (3)):

A DI is charged with the net change in assets of an unincorporated AFN under § 313(b) only if the immediate parent of such AFN is the DI or another AFN that is a § 903(a) affiliate of the DI (§ 505(a)(4));

A change in net assets of an unincorporated AFN that is not attributable to earnings or losses results in a corresponding § 312 (a) or (b) transfer of capital between the DI and the immediate parent of such AFN, provided the immediate parent is an incorporated AFN and a § 903(a) affiliate (§ 505(a) (5) and (6));

Certain short-term trade credits between non-Canadian AFNs are, in effect, excluded from the calculation of net transfer of capital (§§ 505(b), 1103(c)); and

Transfers between two incorporated AFNs, if either is a § 903(a) affiliate, result in a § 312(b) transfer by the transferor AFN to the DI and a § 312(a) transfer by the DI to the transferee AFN (§ 505(a)(3)).

The rules set forth in § 313 apply to the base period as well as to subsequent years.

§ B313–2 Net transfer of capital to incorporated AFNs.

Under § 313(a), a DI's net transfer of capital to all incorporated AFNs in any scheduled area during any period consists of:

Aggregate transfers of capital during such period by the DI to such AFNs (as described in §§ 312(a) and 505); less

Aggregate transfers of capital during such period by such AFNs to the DI (as described in §§ 312(b) and 505).

The following examples illustrate this concept.

Example 1. During 1969, DI transfers $1,000,000 to an incorporated subsidiary in Schedule A (AFN) as an advance on open account, $500,000 as a contribution to capital, and $400,000 resulting from an increase in accounts receivable due from AFN to DI. In the same year, AFN repays $1,100,000 of a $2,000,000 loan received from DI in 1967. DI has no other incorporated AFNs in Schedule A. DI's net transfer of capital during 1969 to AFN is $800,000, calculated as follows (000 omitted):

Transfers by DI under § 312(a):	
Advance on account to AFN	$1,000
Contribution to capital of AFN	500
Increase in accounts receivable from AFN	400
Total	1,900
Transfers to DI under § 312(b):	
Repayment of loan by AFN	(1,100)
Net transfer (positive)	800

Example 2. At the beginning of 1969, DI has two wholly owned incorporated AFNs in Schedule A (X and Y). In March 1969, DI purchases all the stock of a Brazilian corporation (Z) from an unaffiliated foreign national for $2,000,000 in cash. The following transactions also occur during 1969: DI lends $1,000,000 to X on open account and leases equipment valued at $500,000 to X for a term of 3 years; X redeems (at cost) an issue of preferred stock held by DI for $500,000; Y repays a 1966 loan from DI of $3,000,000; Y declares a $200,000 dividend to DI, payable on December 15 but not remitted during 1969, and DI repays a $1,000,000 loan owed by Y to a U.S. bank, together with accrued interest and other charges aggregating $100,000. DI's net transfer of capital during 1969 to its incorporated Schedule A AFNs (X, Y, and Z) is $1,300,000, computed as follows (000 omitted):

Transfers by DI under § 312(a):	
Purchase of Z	$2,000
Open account loan to X	1,000
Lease of equipment to X	500
Dividend not paid by Y when due	200
Payment on Y's loan	1,100
Total	4,800
Transfers to DI under § 312(b):	
Redemption by X	(500)
Repayment of loan by Y	(3,000)
Total	(3,500)
Net transfer (positive)	1,300

§ B313–3 Net transfer of capital to unincorporated AFNs.

(i) *General.* Under § 313(b), a net transfer of capital by a DI to all unincorporated AFNs in any scheduled area during any period is defined as the DI's share of the aggregate net increase or decrease during such period in the aggregate net assets of such AFNs. Computation of net assets should take into account all assets (wherever located) and liabilities allocable to the AFN under generally accepted U.S. accounting principles consistently applied, whether such assets and liabilities are recorded in the AFN's legal books of account or in other books of account (including those of the parent AFN).

(ii) *Rules applicable to § 313(b).* In calculating the net change in net assets of an unincorporated AFN the following rules apply:

There should be excluded from liabilities all equity interests in and debt obligations of the unincorporated AFN that are held by the DI and other AFNs of the DI; likewise, there should be excluded from assets all equity interests in and debt obligations of the DI and other AFNs that are held by the unincorporated AFN (§ 313(b) (1) and (2)).

The foregoing rule does not apply with respect to short-term trade credits. That is, if another AFN extends a short-term trade credit to an unincorporated AFN of the same DI, the trade credit should be included as a liability of the unincorporated AFN for the purposes of § 313 (b). The asset received and the liability incurred will net out, and there will be no change resulting therefrom in the AFN's net assets. Note that this is the result prescribed by § 505(b), i.e., short-term trade credits extended or received by an unincorporated AFN (to or from another AFN) should not be taken into account under § 313(b).

On the other hand, if either the AFN extending the credit or the AFN receiving the credit is Canadian, § 505(b) is inapplicable (§ 1103(c)). Thus, if an unincorporated AFN in Schedule C receives a short-term trade credit from a Canadian affiliate of the DI, the liability so incurred will be excluded and the AFN's net assets will include the amount of the credit for purposes of § 313(b).

Any increase or decrease in net assets of an unincorporated AFN resulting from changes in the valuation of such assets during the period involved (such as unrealized gains or losses), should be eliminated from the calculation under § 313(b). However, depreciation of tangible assets should be taken into account to the extent such depreciation is reflected in the calculation of the unincorporated AFN's earnings.

§ B313–4 DI's share of net change in assets under § 313(b).

(i) *Direct ownership.* Where a DI directly owns an unincorporated AFN (e.g., a branch of the DI), the DI's share in the net change in net assets will equal the profits (or losses) of the AFN plus all transfers of capital made by the DI (or other AFNs of the DI) to the AFN less all remittances made by the AFN to the DI. When the DI does not own all of the unincorporated AFN, transfers between the AFN and its other owners and such other owners' share of the AFN's profits or losses are not included in calculating the DI's share in the net change in the AFN's net assets.

Example 3. DI has two branches in Schedule A (X and Y). Net assets of X and Y at the beginning of 1969 are $200,000 and $300,000, respectively. During 1969, X incurs a loss of $100,000 and DI transfers $50,000 to X on open account; Y earns $90,000, remitting $30,000 to DI; and DI spends $500,000 for construction of a factory in Schedule A, which becomes an unincorporated AFN (branch) (Z) of DI. At the end of 1969, X and Y have net assets of $150,000 and $360,000, respectively. DI's net transfer of capital during 1969 to its unincorporated Schedule A AFNs is $510,000 ($50,000 net decrease in X's assets plus $60,000 net increase in Y's assets plus $500,000 net increase in Z's assets).

Example 4. In March 1969, DI's unincorporated AFN in Schedule A (Y) invests $50,000 of its own funds in a parcel of local real estate having a fair market value of $100,000 at the end of 1969. Assuming no other relevant transactions, Y's net assets would remain unchanged for purposes of the regulations, since unrealized gains are not taken into account under § 313(b).

Example 5. During 1969, a U.S. corporation (X) enters into a joint venture agreement with an unaffiliated foreign corporation (Y) to operate a factory in Schedule C. Y contributes an existing plant in Schedule C and equipment, valued in the aggregate at $10,000,000. X contributes patents and technology valued at $5,000,000 (under circumstances exempting the contribution from treatment as a transfer of capital under section 312(c)(11)) and $5,000,000 in cash for working capital. X and Y each has a 50-percent-profit interest in the joint venture. During 1969, a wholly owned subsidiary of X in Australia (B) lends $3,000,000 to the joint venture, repayable at the end of 5 years. Also during 1969, the joint venture realizes $500,000 in gross revenues, spends $300,000 for operating expenses and depreciates its plant and equipment by $200,000. At the end of 1969, the joint venture has $8,200,000 in cash, patents valued at $5,000,000, plant and equipment valued on its books at $9,800,000, and no liabilities other than the $3,000,000 liability to B. X's net transfer of capital during 1969 to its unincorporated AFNs in Schedule C is $8,000,000, calculated as follows (000 omitted):

Net assets of joint venture as of Jan. 1, 1969	0
Net assets of joint venture as of Dec. 31, 1969 (the $3,000 loan by B is not included as a liability of the joint venture under § 313(b)(1)):	
Plant and equipment	$9,800
Patents and technology	5,000
Cash	8,200
Total	23,000
Increase in net assets during 1969	23,000
X's share in net increase:	
Net increase	23,000
Less:	
Plant and equipment contributed by Y	10,000
Patents and technology	5,000
Net transfer of capital by X	8,000

Note that the loan by B to the joint venture involves a transfer of capital by B to X under § 505(a) (1) and (2).

Example 6. DI is a partner in a partnership organized under German law and doing business only in Germany. DI has a 50-percent share in the partnership profits. The other partners (X and Y), each of whom has a 25-percent interest, are residents and citizens of Germany. At the beginning of 1969, the partnership has net assets of $1,000,000. During 1969 the partnership earns $100,000 and distributes $20,000 to DI and $10,000 to each of X and Y. Also during 1969, DI lends $200,000 to the partnership on open account. At the end of 1969, the partnership has net assets of $1,260,000 (excluding liabilities to DI). DI's net transfer of capital during 1969 to its unincorporated Schedule C AFN is $230,000 (i.e., DI's $50,000 share of profits plus the $200,000 loan, less the $20,000 remitted to DI).

Had the partnership incurred a loss of $50,000 and made no distributions to the partners, the net assets at the end of 1969 would be $1,150,000 (excluding liabilities to DI), and DI's net transfer of capital during 1969 to its unincorporated Schedule C AFN would be $175,000 (i.e., the $200,000 loan less DI's $25,000 share of the loss).

(ii) *Indirect ownership.* Section 505(a)(4) provides that in calculating a DI's net transfer of capital to unincorporated AFNs under § 313(b), there shall be included the net change in assets of an unincorporated AFN only if the immediate parent of the AFN is the DI or another AFN that is an "affiliate" of the DI under § 903(a). (An "affiliate" is defined in § 903(a) as any person, other than an individual, in which the aggregate of direct interests held by the DI and by any other of its affiliates exceeds 50 percent.)

In cases where an unincorporated AFN's immediate parent is an "affiliate" AFN of the DI, the DI's share in the net change in the assets of the unincorporated AFN is equal to the immediate parent's share, multiplied by the DI's percentage interest in such immediate parent.

Example 7. DI has a wholly owned subsidiary in Germany (C) that has a branch in Brazil (A). At the beginning of 1969, A's balance sheet is as follows (000 omitted):

Assets

Cash	$75
Customer receivables	140
Inventory	360
Fixed assets (net)	400
Total	975

Liabilities and net assets

Trade payables (liabilities)	$210
Home office (net assets)	765
Total	975

During 1969, A earns $25,000 and DI and C each make cash advances to A of $75,000. On August 1, 1969, a wholly owned subsidiary of DI in Australia (B) sells $50,000 of inventory to A on 6-month credit terms. At the end of 1969, A's balance sheet is as follows (000 omitted):

Assets

Cash	$340
Customer receivables	175
Inventory	410
Fixed assets (net)	325
Total	1,250

Liabilities and net assets

Trade payables [1]	$310
Home office account (net assets) [2]	940
Total	1,250

DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs is $175,000 (i.e., the increase in home office account (net assets) from $765,000 to $940,000 during 1969). However, DI will have a $75,000 negative net transfer of capital to Schedule C (i.e., the $75,000 deemed transferred by DI to C by operation of § 505 (a)(1) and (a)(2), less the $150,000 deemed transferred by C to DI by operation of § 505(a)(6)).

If DI owned only 80 percent of C's voting stock, DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs would be $140,000 (i.e., $175,000 × 80 percent). However, DI would have a $45,000 negative net transfer of capital to Schedule C (the $75,000 deemed transferred by DI to C by operation of § 505 (a)(1) and (a)(2), less the $120,000 deemed transferred by C to DI by operation of § 505(a)(6)).

If DI were to own only 50 percent of C's voting stock, DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs would be zero (see § 505(a)(4)). In this event, however, DI will have a $75,000 positive net transfer of capital to Schedule C, deemed transferred by DI to C by operations of § 505 (a)(1) and (a)(2).

§ B313–5 Special treatment of certain § 312(a) transfers in computing net transfer of capital to unincorporated AFNs.

In computing net transfer of capital to unincorporated AFNs under § 313(b), certain § 312(a) transfers of capital require separate consideration.

(i) *Repayment of long-term foreign borrowing.* Section 312(a)(7) provides that when a DI satisfies, in whole or in part, a long-term foreign borrowing (whenever made), and the proceeds of such borrowing were either expended in making transfers of capital on or after January 1, 1965, or were allocated to positive direct investment, such repayment constitutes a transfer of capital to the scheduled area or areas in which the proceeds were expended or allocated at the time of repayment and with respect to which a deduction (against net transfer of capital or positive direct investment, as the case may be) was taken pursuant to §203(d), § 306(e), or § 313(d)(1).

Example 8. In January 1968, DI makes a long-term foreign borrowing of $5,000,000 from a London bank, the proceeds of which are used to construct a factory in Chile (Schedule A) resulting in a net increase in net assets of DI's Schedule A AFN in 1968 of $5,000,000 (from $0 to $5,000,000). DI deducts this expenditure from 1968 net transfer of capital to Schedule A, pursuant to § 313(d)(1). In 1969, the AFN has earnings of $450,000, and transfers $200,000 to DI. The net increase in net assets is, therefore, $250,000. On December 1, 1969, DI repays $1,000,000 to the London bank. Accordingly, DI's net transfer of capital to Schedule A in 1969 is $1,250,000 ($250,000 net increase in the Chilean factory's net assets, plus repayment of $1,000,000 that had previously been expended in, and deducted from, net transfer of capital to Schedule A).

(ii) *Offshore drilling rigs.* When a vessel directly owned by a person within the United States is used as part of an offshore drilling operation (i.e., a branch of a DI), it is assigned a value of zero for purposes of computing any net change in net branch assets.

Example 9. In January 1969, DI began drilling operations off the coast of Australia. This venture constitutes an unincorporaed Schedule B AFN. In February 1969, DI sends its U.S.-flag barge to the worksite, and the barge is used during 1969 in drilling operations. Although transfer of the barge constitutes a transfer of capital to the AFN under § 312(a), the barge is assigned a value of zero for purposes of computing the net assets of the AFN. The same rule would also apply to other U.S.-flag vessels used in support of the offshore drilling operations (such as supply or crew vessels). Note that since such vessels are deemed to have a value of zero, no deductions for depreciation of such vessels may be taken.

§ B313–6 Deduction for expended proceeds of long-term foreign borrowing.

In calculating a DI's net transfer of capital to a scheduled area during any period (including the base period years of 1965 and 1966), the DI should deduct an amount equal to the proceeds of long-term foreign borrowings (defined in § 324(c)) expended during such period in making transfers of capital to AFNs in the scheduled area (§ 313(d)(1)).

To be deductible under § 313(d)(1), the borrowing must qualify as a long-term foreign borrowing of the DI under § 324 (borrowings by AFNs will not qualify for the deduction).

Under § 324(c), the gross amount of proceeds borrowed is deductible in calculating net transfers of capital. In effect, therefore, DI is treated as having paid the interest and other charges on the borrowing out of its own funds (such payment not involving a transfer of capital).

Example 10. In March 1969, a U.S. corporation (X), previously having no AFNs, acquires all the stock of a corporation in Argentina from an unaffiliated foreign national (Y). The purchase price is $1,000,000, $500,000 payable in cash at closing and the

[1] Including the payable of $50 [thousand] owed to B. If the credit terms extended by B had been for more than 12 months, the amount due would be included under the home office account rather than in "trade payables." DI's net transfer to A would, therefore, be increased by $50 [thousand] and result in a $50 [thousand] negative net transfer of capital to Schedule B (see § 505(b) and 505(a)(2)).

[2] Including payable of $75 [thousand] owed to DI.

balance payable in equal annual installments of $100,000 thereafter. Each installment is represented by a promissory note of X, with respect to which Y makes the necessary written representations referred to in § 324(e)(4). X's net transfer of capital to Schedule A during 1969 is, therefore, $500,000 (i.e., the $1,000,000 purchase price, minus $500,000 proceeds of the long-term foreign borrowing). Each principal payment by X on the outstanding notes will constitute a transfer of capital to the AFN under § 312(a)(7), and must be so reflected in calculating X's net transfer of capital to Schedule A in 1970 and in each subsequent year of payment.

Example 11. DI has a wholly owned subsidiary in France (C). On June 1, 1969, DI purchases equipment from an unaffiliated foreign national (X). The purchase price is $1,000,000 all of which is to be paid on May 31, 1970. DI gives X its promissory note for $1,000,000, payable on that date, but is unable to induce X to make the representations required by § 324(e). DI then transfers the equipment to AFN as a contribution to its capital. DI has made a § 312(a)(2) transfer of capital to Schedule C during 1969 that cannot be deducted from net transfer of capital for the year pursuant to § 313(d)(1), since the deferred payment does not meet any of the § 324(e) requirements to constitute it a long-term foreign borrowing. (If the purchase had been made prior to June 10, 1968, on a 1-year note, DI's note would have constituted a long-term foreign borrowing; the transfer of capital occurring upon transfer of the equipment to C would have been deductible from net transfer of capital in 1968 pursuant to § 313(d)(1); and the transfer of capital would not have been charged in Schedule C until the following year, when DI would have satisfied the 1-year note, pursuant to § 312(a)(7).)

§ B313–7 Step acquisitions.

In calculating a DI's net transfer of capital to all AFNs in a scheduled area during any period (including the base period years of 1965 and 1966), the DI should include (a) all transfers of funds or other property as a result of which the DI acquires an AFN and (b) all transfers of funds or other property to, on behalf of, or for the benefit of such AFN made by, on behalf of, or for the benefit of such DI within 12 months prior to the date of the transfer by which it became a DI in such AFN.

Example 12. On November 1, 1969 a U.S. corporation (X) having no AFNs acquires 8 percent of the voting stock of a French corporation (C) from an unaffiliated foreign national for $1,000,000 in cash. On December 1, 1969, X lends C $500,000. On March 1, 1970, X acquires an additional 2 percent of C's voting stock from a second unaffiliated foreign national for $250,000 in cash. X's net transfer of capital during 1969 to Schedule C is zero. X's net transfer of capital during 1970 to Schedule C is $1,750,000.

If the initial purchase of X's voting stock had been made on February 1, 1969, there would still be no net transfer of capital in 1969, and X's net transfer of capital during 1970 to Schedule C would be $750,000 (i.e., the $250,000 transfer of capital that gave rise to the DI-AFN relationship plus the $500,000 lent to C within 12 months prior thereto).

Example 13. On January 1, 1969, a U.S. corporation (X), having no AFNs, enters into a construction contract with an unaffiliated foreign national (Y) whereby X is to construct a factory for Y in a Schedule C country. On March 1 a project office is opened and preliminary survey work on the project is commenced. On April 1, 1969, X sends equipment, machinery and supplies valued at $1,000,000 to the project site. At the time the project office was opened, X reasonably expected that the work would be completed by the end of February 1970. Thus, the project is not an AFN of X (see § 304(d)(ii)). At the end of 1969, net assets of the project are $1,000,000, but there has been no net transfer of capital to Schedule C during 1969 since the project is not an AFN. Significant difficulties of an unexpected nature are encountered, and during 1970, X sends additional equipment, machinery and supplies valued at $1,000,000 to the project site. At the end of 1970, the net assets employed in the project amount to $2,000,000. Work on the project is not in fact completed until March 1, 1971. Accordingly, since work on the project was not in fact completed within 12 months from the date it commenced, the project is an AFN of X commencing January 1, 1970, and, because of the provisions of § 313(d)(2), X has made a positive net transfer of capital of $2,000,000 to Schedule C during 1970.

§ B313–8 Net transfer of capital to all AFNs in a scheduled area.

Under § 313(c), a DI's net transfer of capital to all AFNs in a scheduled area during any period is calculated by adding the DI's net transfer of capital to all incorporated AFNs in the scheduled area during such period (i.e., the result of the calculation under § 313(a)) and the DI's net transfer of capital to all unincorporated AFNs in the scheduled area during such period (i.e., the result of the calculation under § 313(b)). If the calculation produces a positive result, the DI is said to have made a "positive net transfer of capital" to the scheduled area; if a negative figure results, the DI is said to have made a "negative net transfer of capital" to the scheduled area.

B321—Calendar Year and Fiscal Year

The term "year", as used in the regulations, is defined in § 321(a) to mean a calendar year except for DIs securing permission under § 321(b) to measure compliance on the basis of their normal fiscal year. Although, in appropriate cases, a fiscal year DI may be permitted to comply with the substantive provisions of the Regulations on such basis (§ 321(b)), all DIs (including all fiscal year DIs) are required to submit cumulative quarterly reports (Form FDI–102) and the annual report (Form FDI–102F) on a calendar basis. DIs receiving permission to measure compliance on a fiscal year basis must file an additional annual compliance report covering operations for such fiscal year.

DIs may request permission to comply with the regulations on a fiscal year basis by applying for a specific exemption under § 801. The applicant must demonstrate that by reason of the nature of its business, accurate reflection of total annual operations for purposes of the regulations can only be on the basis of its fiscal year. DIs maintaining normal books and records on a calendar year basis are not eligible for relief under § 321(b) merely because one or more AFNs operate on a fiscal year basis. DIs should refer to the general instructions to Forms FDI–102 and 102F with respect to reporting earnings of AFNs that operate on the basis of a fiscal year different from the DI's.

B322—Person Within the United States

§ B322–1 Introduction.

The regulations apply only to DIs, and a person is not a DI unless he (or it) is a "person within the United States," as defined in § 322. (The term "United States" is defined in § 318.)

§ B322–2 Individuals.

(i) *Residence.* Section 322(a)(1) provides that a resident of the United States is a person within the United States. This rule applies without regard to citizenship.

The determination whether a person is a "resident" of the United States depends on the facts and circumstances of each particular case. In general, a permanent place of abode within the United States or physical presence in the United States for more than 183 days during the year will be conclusive. However, aliens will not be considered residents of the United States if they have no intention to remain in the United States permanently or for an indefinite period. Thus, for example, an alien present in the United States as a student, an entertainer on tour, an athlete competing in one or more athletic contests, a patient undergoing medical treatment, or a traveler will not be treated as a resident of the United States. Residence in the United States will be treated as continuous notwithstanding occasional trips out of the country during such residence.

(ii) *Center of economic interest.* Section 322(a)(2) provides that a citizen of the United States residing abroad is nevertheless a person within the United States, if the center of his economic interests is located within the United States. Whether a U.S. citizen's center of economic interests is located within the United States depends on the particular facts and circumstances of each case. Among the factors that will be considered are the length of time residence has been outside the United States, the person's intention concerning future residence, the relative values of investments in the United States and in foreign countries, and the nature of the U.S. investments (i.e., whether passive portfolio investments or active participation in business is involved).

Example 1. A U.S. citizen (X) becomes a resident of a foreign country in February 1968. X owns all the stock of a U.S. corporation (Y). After X becomes a nonresident of the United States, he nevertheless continues actively to participate in Y's business and makes frequent trips to the United States for this purpose. X's only other investments are of a portfolio and short-term debt nature. X is a person within the United States.

Example 2. A U.S. citizen (X) owns a retail merchandising business in the United States. Upon reaching age 65, X sells his business to an unrelated person within the United States and purchases an annuity from a U.S. insurance company. In January 1968, X sells his home in the United

States and he and his wife move to Iceland, X's ancestral homeland, where he establishes a permanent residence. X's grown children continue to live in the United States. X continues to maintain bank accounts in the United States, into which periodic payments from the proceeds of his annuity are made. X also continues to own a small parcel of undeveloped real estate in the United States, purchased many years ago for investment. X is not a person within the United States.

Example 3. A U.S. citizen (W), resident in a foreign country for many years, owns 75 percent of the stock of X and Y, both U.S. corporations. Y owns 75 percent of Z, a third U.S. corporation. X owns all the share capital of 6 foreign corporations and has 12 branch operations in foreign countries, and Y owns all the share capital of six different foreign corporations and has 10 branch operations in foreign countries. X, Y, and Z all have substantial manufacturing or selling operations in the United States. The products of X, Y, and Z are sold both in the United States and in foreign countries. Total sales of X, Y, and Z and their 12 foreign affiliated corporations and 22 foreign branches amount to several million dollars annually. All major policy decisions of X, Y, and Z and their affiliated foreign nationals are made by W, who maintains no fixed office abroad.

Decisions on particular matters within the policy guidelines laid down by W are made at the head offices of the three U.S. corporations and are relayed to all domestic and foreign operations from such head offices, subject only to the periodic review of W. W conducts no significant separate foreign business activities aside from those conducted through his direction of the affairs of X, Y, and Z corporations. W is a person within the United States.

Example 4. A U.S. citizen (X) owns all the stock of Y, a U.S. corporation with extensive, worldwide foreign operations. In 1965, X establishes his permanent residence in Belgium, and C, a foreign corporation, in Belgium. In September 1966, C purchases all the stock of Y from X, in exchange for additional shares in C. In a series of corporate reorganizations carried out in 1966 and 1967, the foreign operations formerly conducted by Y and the foreign corporations previously owned by Y become foreign operations and corporations conducted and owned, respectively, by C. Direction of all such operations is carried on in Belgium; the head offices and senior managerial staff are moved to Belgium; and by December 1967, Y has no foreign holdings of its own. X is not a person within the United States in 1968.

Example 5. A U.S. citizen (X), having permanently resided in Italy since 1961, owns several parcels of undeveloped and commercial real estate in the United States with an aggregate fair market value in excess of $10,000,000 in January 1968. The commercial real estate is managed for X by an independent real estate organization, and profits are remitted to X periodically. X maintains certain bank accounts in the United States in connection with his real estate investments. His only other U.S. investments consist of marketable securities of large U.S. corporations. X makes one or two trips per year to the United States, primarily to visit relatives. X has no significant investments in foreign countries. X is not a person within the United States.

§ B322–3 Corporations or partnerships.

Section 322(a)(3) provides that a corporation or partnership organized under the laws of the United States (excluding a branch of such corporation or partnership, if the branch is a separate foreign national under § 302) is a person within the United States.

§ B322–4 Trusts.

Trusts (other than a trust deemed to be a corporation under § 307(b)) deemed to be persons within the United States, under § 322(a)(4), include inter vivos or testamentary trusts established by persons within the United States in which a person or persons within the United States have substantial beneficial interest.

An inter vivos trust governed by the laws of the United States to which any property is or has been contributed by a person who, at the time of making the contribution, is or was a person within the United States would be governed by § 322(a)(4), if: (a) Such contribution is or was made on or after January 1, 1968; or (b) the terms of the trust are such that the income therefrom is currently taxable to such person for U.S. Federal Income Tax purposes; or (c) a majority of the trustees thereof are or were, at any time after January 1, 1968, persons within the United States and OFDI has not been furnished with satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the trust.

A testamentary trust governed by the laws of the United States and created by a person who, at the time of his death, was a person within the United States, would likewise be governed by § 322(a)(4), if a majority of the trustees thereof are or were, at any time after January 1, 1968, persons within the United States and OFDI has not been furnished satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the trust.

§ B322–5 Estates.

A decedent's estate is deemed to be a person within the United States under 322(a)(5), if the deceased was a person within the United States at the time of his death, and: (a) A majority of the executors or administrators are persons within the United States, or substantial assets of the estate are being administered under the laws of the United States; and (b) OFDI has not been furnished satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the estate.

§ B322–6 Domestic banks.

Section 322(a)(6) makes clear that a domestic bank (including a domestic branch or office of a foreign bank), as defined in § 317(a), will be considered a person within the United States.

§ B322–7 Special cases.

Under § 322(b), OFDI may determine, in particular cases based on the facts and circumstances involved, that a person not described in § 322(a), or an activity (such as a branch) of a person not described in § 322(a), is nevertheless a person within the United States for purposes of the regulations.

Example 6. Corporation Y, a foreign corporation, has no managerial office or operations in the country of incorporation. Ninety-five percent of Y's share capital is held by persons within the United States and shares are traded on a national securities exchange in the United States. The principal office of Y is in the United States and all officers and directors are citizens and residents of the United States. Y owns more than 10 percent of the share capital (in proportions ranging from 15 percent to 100 percent) of more than 20 foreign corporations. Under the foregoing facts, Y could be deemed a person within the United States for purposes of the regulations.

B323—International Finance Subsidiaries

Section 323 defines the term "international finance subsidiary" ("IFS") to mean a corporation organized under the laws of the United States, all the stock of which (disregarding directors' qualifying shares) is owned directly or indirectly by a DI, and the principal business of which is to borrow funds from foreign nationals, other than AFNs of the DI, and to invest such funds in debt or equity securities of AFNs of the DI. The section further provides that a DI and its IFS are considered a single person for all purposes of the regulations.

Accordingly, direct investment transactions of, and foreign balances held by, an IFS are attributed to the DI, and transactions between the DI and the IFS are ignored for purposes of the regulations. Similarly, long-term foreign borrowings obtained by the IFS are considered borrowings by the DI, and only one certificate need be filed by the DI under § 1002 (a)(6) and (b) concerning each such borrowing. Therefore, if the DI guarantees due and punctual payment of the principal, premium (if any), and interest on debt obligations of the IFS, together with due and punctual mandatory sinking fund payments (if any), the DI should file the "Subpart J" certificate as a borrower, not a guarantor, and any payments made by DI under the guarantee (including delivery of capital stock of DI pursuant to exercise of conversion privileges) will be treated as repayments by a borrower and not by a guarantor.

In light of the foregoing, records maintained pursuant to §§ 203(c) and 601, and reports filed under § 602, by the DI should include all relevant items attributable to the IFS.

B324—Long-Term Foreign Borrowing

§ B324–1 Introduction.

Section 324 defines one of the key concepts of the regulations, "long-term foreign borrowing," by stipulating the conditions under which a borrowing is a "long-term foreign borrowing" and hence an offset against direct investment for the purposes of the Program. Related provisions of the regulations that deal with use of proceeds of such borrowing and repayment thereof are also discussed in this segment of the Bulletin.

§ 324–2 Summary.

Only proceeds of a borrowing that qualify as a long-term foreign borrowing under § 324 may be used as an offset to direct investment under the regulations.

Section 324(a) requires that the lender be a foreign national (Canadians are excluded by § 1106) and that the borrowing have an original maturity of at least 12 months. In addition, § 324(e) establishes four conditions, at least one of which must be satisfied with respect to a foreign borrowing made on or after June 10, 1968, in order for such borrowing to qualify as a long-term foreign borrowing for purposes of the regulations.

If a borrowing qualifies under § 324, the regulations permit the gross amount of funds or other property received from the borrowing to be treated as "proceeds of long-term foreign borrowing" until the underlying borrowing is repaid. For all purposes under the Regulations, proceeds of a long-term foreign borrowing denominated in a foreign currency are valued throughout the life of the loan (including refinancings under § 324(b)(1)) at the dollar equivalent prevailing when the borrowing was made, regardless of subsequent exchange rate fluctuations (note particularly §§ 203(d), 306(e), 312(a)(7), 313(d)(1), and 1001(b)). When first received by a DI from the lender, the proceeds are "available proceeds" and remain such until expended in making transfers of capital to AFNs or allocated to positive direct investment.

It is not necessary that funds expended in direct investment transactions be the actual proceeds of long-term foreign borrowing. If a DI acquires debt or stock of an AFN during a given year with U.S.-source funds, but makes a long-term foreign borrowing in an equal amount prior to the end of such year and maintains the proceeds thereof in the United States, § 306(e) permits the DI to offset positive direct investment by "allocating" available proceeds of a long-term foreign borrowing to such investment.

Deductions under §§ 306(e) and 313(d)(1) may be taken in any scheduled area, and the DI may, if certain conditions are satisfied, change the scheduled area in which such deductions are taken so long as the underlying long-term foreign borrowing remains outstanding (see § 203(d)(2) and (3)). For example, if a DI expended and deducted (under § 313(d)(1)) available proceeds of long-term foreign borrowing in Schedule A, those proceeds could subsequently be allocated to and deducted from positive direct investment in Schedule B (under § 203(d)(2)). Upon such allocation to Schedule B, however, DI must recognize a transfer of capital to Schedule A, where the previous deduction was taken. Section 203(d)(2) also permits further allocations of the proceeds while the borrowing is outstanding, with the same effects. Proceeds originally expended and subsequently allocated to a different scheduled area under § 203(d)(2) may remain expended in an AFN or may be expended in another AFN, but no deduction under § 313(d)(1) may be taken for such expenditure.

Repayment (in whole or in part) of the underlying long-term foreign borrowing from which the direct investment offset was derived is recognized as a transfer of capital (§ 312(a)(7)). When repayment occurs, the charge is made against the allowable in the last scheduled area in which a deduction was taken, whether under § 306(e), § 313(d)(1), § 203(d)(2), or § 203(d)(3). If deductions were last taken in more than one scheduled area, the charge is made on a proportional basis among the scheduled areas.

The regulations require a DI to keep separate books and records with respect to long-term foreign borrowings and the uses to which the proceeds of such borrowings have been put. Such records must distinguish between deductions taken by reason of the borrowing and the actual flow of funds from one investment to another. (See § 203(b).)

§ B324–3 Related sections.

The following sections of the regulations, discussed elsewhere in this Bulletin, are also pertinent to the concept of long-term foreign borrowing:

(i) *Section 1002.* Even though a transfer of capital is charged to a DI's allowable upon repayment of a long-term foreign borrowing if the proceeds of that borrowing had been expended or allocated, positive direct investment resulting from such repayment may be authorized by § 1002 subject to the provisions of § 1003 if the certification requirements of § 1002 have been complied with.

(ii) *Section 203(c).* Permits a DI to hold available proceeds of long-term foreign borrowing in the form of liquid foreign balances without limitation in amount.

(iii) *Section 203(d)(1).* Prohibits a positive net transfer of capital (subject to certain exemptions) to any scheduled area during any year if a DI holds available proceeds of long-term foreign borrowing in the form of foreign property at the end of such year.

§ B324–4 Basic definition of long-term foreign borrowing.

The term "long-term foreign borrowing" is defined in § 324(a) as any borrowing by a DI from a foreign national (other than an AFN) with an original maturity of at least 12 months or that is expressly renewable for a total term of at least 12 months from the original date and is not expected to be repaid, in whole or in part, within that period. In addition, a borrowing by a DI on or after June 10, 1968 must fulfill one of four conditions contained in § 324(e) in order to qualify as a long-term foreign borrowing. Also, borrowings from Canadian nationals are generally excluded from treatment as long-term foreign borrowing. (See § 1106.)

The term "borrowing," as used in § 324(a), refers not only to the typical loan of funds to or sale of debt obligations by a DI, but also to every transaction, however designated, resulting in acquisition of an equity interest in consideration for a fixed sum or sums for which payment is completely or partially deferred. For example, an installment purchase (including a long-term lease or charter that is treated, consistent with accounting principles generally accepted in the United States, as an installment purchase) would qualify as a long-term foreign borrowing under § 324(a).

The following examples are illustrative of transactions constituting long-term foreign borrowing:

Example 1. On June 1, 1968, DI purchased all the voting stock of a French corporation from an unaffiliated foreign national. The purchase price was $1,000,000, $250,000 of which was paid in cash at the closing, the balance being payable (together with interest) in three equal annual installments commencing 1 year from the date of closing. DI has made a transfer of capital of $1,000,000 and a long-term foreign borrowing of $750,000 on June 1, 1968. (Note that if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

Example 2. On June 1, 1969, DI acquires all the voting equity of a French corporation from foreign shareholders, in exchange for 20,000 shares of DI's common stock at the closing, 10,000 shares of such stock 3 years after the closing, and an indeterminate number of shares (based on future earnings of the French corporation) 5 years after the closing. DI did not make a long-term foreign borrowing with respect to the obligation to deliver common stock three years and 5 years hence. (The value of the transfer of capital during 1969 will depend on all the facts and circumstances of the acquisition. The issue of valuation may be submitted to OFDI for interpretation.)

Example 3. On June 1, 1968, DI purchased a parcel of commercial real estate in Belgium from an unaffiliated foreign national. The purchase price was $500,000, $200,000 of which was paid in cash at the closing, the balance being payable (together with interest) in five equal annual installments commencing 1 year from the closing date. The balance of the purchase price was secured by a mortgage on the property. DI has made a transfer of capital of $500,000 and a long-term foreign borrowing of $300,000 on June 1, 1968. (Note that if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

Example 4. On June 1, 1968, DI purchased equipment and machinery from an unaffiliated foreign national and immediately leased the property to an AFN for a 3-year term. The purchase price was $100,000, all of which was payable (together with interest) 1 year from the date of purchase. DI has made a transfer of capital of $100,000 and a long-term foreign borrowing of $100,000 on June 1, 1968. (Note that if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

Example 5. On March 1, 1968, DI entered into a 10-year equipment lease with an unaffiliated foreign national (X) and immediately leased the equipment to an AFN for a term of 5 years. The equipment lease with X was appropriately treated as an installment purchase by DI under accounting principles generally accepted in the United States. Assuming no rental payments are to be made to X under the lease for at least 1 year from the commencement thereof, an appropriate portion of the aggregate rentals should be treated as a long-term foreign borrowing by DI, the remainder being allocated to interest charges. (Note that if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

The term "borrowing" involves only issuance of debt obligations, not equity securities, by a DI. An international finance subsidiary of a DI (see § 323) is considered the same entity as the DI. If such subsidiary issues debentures convertible into stock of the DI, the debentures will be considered debt obligations of the DI; however, if the debentures have detachable warrants entitling the holder to purchase DI's stock, the issue will be considered to be part debt and part equity. (For discussion of the computation of proceeds of long-term foreign borrowing when debentures are issued with warrants attached, see Examples 7 and 17 below.)

Example 6. On March 1, 1968, an international finance subsidiary of a U.S. corporation (A) sold abroad $20,000,000 face amount of debentures at par. The debentures had a 12-year maturity, were convertible into common stock of A after 6 months from date of issue, and required no sinking fund payments. A made a long-term foreign borrowing of $20,000,000. (Note that if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

Example 7. On March 1, 1968, an international finance subsidiary of a U.S. corporation (A) sold abroad $20,000,000 face amount of debentures at par. The debentures have a 12-year term and have no required sinking fund payments. Each $1,000 debenture was sold with a warrant attached for five shares of common stock of A. The warrants are detachable after 6 months, and are exercisable after 12 months from the issue date. A made a long-term foreign borrowing of $20,000,000, less an amount reasonably allocable to the value of the warrants. (Note if the borrowing had been made on or after June 10, 1968, the borrowing would have had to meet one of the conditions in § 324(e), as well as the requirements of § 324(a).)

Example 8. On March 1, 1969, a U.S. corporation (A) sold abroad 500,000 shares of preferred stock for $50 per share. A did not make a long-term foreign borrowing. (But see § B801-3(ii)(a).)

The date of a borrowing refers to the date the proceeds are received by the DI. Opening of a line of credit, such as a revolving credit agreement or an overdraft facility, is not itself a borrowing; borrowing under a line of credit occurs on the date of call, in the amount of funds taken down.

Example 9. On July 1, 1969, DI entered into a 5-year agreement with a German bank under which the bank agreed to loan DI up to $10,000,000, with the loan or loans to be evidenced by 12-month notes. As of that date, DI had not made a long-term foreign borrowing. On September 1, 1969, DI made a takedown of $5,000,000, evidenced by ten 12-month notes for $500,000 each. Thus, on September 1, 1969, DI made a long-term foreign borrowing of $5,000,000.

The "original maturity" of a borrowing refers to the date the first principal payment is required (without regard to provisions for acceleration upon default or conversion privileges in convertible debt obligations). For example, if a borrowing of $500,000 on June 1, 1969 from a foreign bank is evidenced by two promissory notes of $250,000 each, payable on January 1, 1970 and June 1, 1970, respectively, no part of the borrowing constitutes a long-term foreign borrowing under § 324(a) because the first principal repayment is required within 12 months of the date of the borrowing.

In certain instances where more than one instrument of indebtedness is involved, a factual question will be presented whether more than one borrowing is involved. If two or more borrowings are involved, the fact that one is repayable within 12 months will not disqualify the others as long-term foreign borrowings.

A borrowing made prior to January 1, 1968, is considered to have had an original maturity of at least 12 months if no principal payments were, in fact, made within 12 months from the date of the borrowing. On the other hand, a borrowing made on or after January 1, 1968, will be treated as having an original maturity of at least 12 months only if there are express provisions for renewal, extension, or continuance of the debt for a total term of at least 12 months (as in Example 9 above) and the DI reasonably expects that no principal payment will be made within 12 months from the date of the borrowing.

Example 10. On July 1, 1967, DI borrowed $1,000,000 from a foreign bank, giving a 6-month note. The note contained no provision for renewal or extension, but was, in fact, renewed for four additional 6-month terms. DI has outstanding a long-term foreign borrowing of $1,000,000 in 1969.

Example 11. On July 1, 1968, DI borrowed $1,000,000 abroad, giving a 6-month note. There was no express provision for renewal, extension or continuance but the note was, in fact, renewed for two additional 6-month terms. The borrowing does not constitute a long-term foreign borrowing.

For purposes of determining whether a borrowing is from a foreign national, the lender will be considered to be the person extending the credit. With respect to issuance of debt obligations, only the first public purchasers are considered lenders. Accordingly, sales of debt obligations to underwriters or dealers, U.S. or foreign, in a public offering are irrelevant in determining whether the debt obligations are sold to foreign nationals. Similarly, if a foreign national does not act for its own account, but as agent or fiduciary for the account of another person, the nationality and residence of the person actually extending credit will determine whether the borrowing is from a foreign national.

Example 12. DI desires to borrow $1,000,000 from a Swiss bank. The bank states that it would not itself lend the funds, but that it can place the loan with a U.S. resident and national who has an account at the Swiss bank. The loan, if consummated, would not constitute a long-term foreign borrowing.

§ B324-5 Additional requirements under § 324(e).

In addition to the requirements of § 324(a), a borrowing made on or after June 10, 1968 must meet one of the following tests under § 324(e) in order to qualify as a long-term foreign borrowing:

The borrowing must be from a foreign bank; or

The borrowing must be from or be guaranteed by a foreign country or any agency thereof; or

The borrowing must have an original maturity of at least 3 years, and (as of the date of the borrowing) acquisition of the debt obligation must be subject to the U.S. Interest Equalization Tax; or

The lender agrees in writing that, for a period of 3 years from the date of the borrowing or until final maturity, whichever first occurs, it will not sell or otherwise transfer the debt obligation resulting from the borrowing (a) to a resident or national of the United States (other than a foreign bank as defined in § 317) or to a Canadian person (as defined in § 1101), or (b) to any person who the lender has reason to believe will sell or otherwise transfer the debt obligation to a U.S. resident or national or to a Canadian person.

In connection with the first alternative, note that a foreign branch of a U.S. bank is considered a foreign bank under § 317. However, in order for a borrowing to qualify under this category, it is not enough that the borrowing be made through an entity organized or operating as a "bank" under the laws of a foreign country. In addition to meeting that institutional test, the borrowing must meet a functional test. For instance, if a foreign bank acts as agent for a foreign principal and not as a commercial bank, and is not itself the obligee on the DI's debt obligation with respect to a borrowing, the borrowing cannot qualify as a long-term foreign borrowing under § 324(e)(1). (See Example 12 above.) Similarly, if a foreign bank acts as underwriter for a DI with respect to sale of debt obligations, the borrowing will not be from a foreign bank and must qualify as a long-term foreign borrowing under one of the other categories of paragraph (e).

Example 13. DI desires to place with Europeans $5,000,000 principal amount of long-term notes convertible into common stock. DI contracts with a French subsidiary of a U.S. investment bank, the subsidiary being organized as a French bank, to underwrite the placement with European nationals. The $5,000,000 borrowing is not from a foreign bank and, therefore, must qualify under a category other than § 324(a)(1) if it is to be a long-term foreign borrowing as that term is used in the regulations.

In connection with § 324(e)(2), an industrial or commercial enterprise of a foreign government operating essentially in the private business sector shall not be considered as part of the government of that country or as an agency thereof.

Section 324(e)(3) is intended to permit debentures of a DI's international finance subsidiary that are sold to foreign nationals to qualify as long-term foreign borrowings. Typically, such debentures are guaranteed as to payment of principal and interest by the parent DI, and may or may not be convertible into common stock of the parent. In order to satisfy the requirements of § 324(e)(3), the debentures must be subject to the U.S. Interest Equalization Tax (I.E.T.), if purchased by residents or nationals of the United States.

The requirement concerning applicability of the I.E.T. does not mean that the tax actually must be imposed on a

particular U.S. resident or national. The requirement is satisfied if the nature of the debt obligation is such that under normal circumstances the tax would be imposed upon acquisition by any U.S. resident or national. Accordingly, debt obligations issued by a less-developed country corporation (exempt from the I.E.T. under I.R.C. § 4916) will not satisfy the conditions of § 324(e). On the other hand, a debt obligation the acquisition of which is exempt from the tax under I.R.C. § 4918, because previously held by a U.S. person, is not disqualified under § 324(e).

The term "original maturity of at least 3 years," as used in § 324(e)(3), is analogous to the term "original maturity of at least 12 months" in § 324(a). (See Examples 10 and 11 above.) Thus, a requirement that there be a principal repayment within three years will make § 324(e)(3) inapplicable to the entire borrowing. Since a public issue of debentures is considered to be a single borrowing, the original maturity of a public issue refers to the date the first principal payment is required to be made with respect to any of the debentures issued. Therefore, if mandatory redemption of any debenture falls within three years of the issue date, the entire borrowing will fail to qualify as a long-term foreign borrowing. It is possible, however, for a DI to request specific authorization, pursuant to § 801, with respect to transactions that are subject to this rule. Such authorization will ordinarily be granted only upon the DI's undertaking that redemptions during the initial three-year period be offset by other foreign borrowing that meets the requirements of § 324 (a) and (e).

Example 14. DI proposes to make a borrowing of $25,000,000 through a debenture offering of its international finance subsidiary to persons other than United States or Canadian persons. The debentures will be guaranteed as to payment of principal and interest by the DI and will have a 12-year term. DI has received a ruling from the Internal Revenue Service that acquisition of the debentures by the U.S. residents or nationals will be subject to the Interest Equalization Tax. The underwriting agreement provides, however, that 12 months and 10 days after issue, a New York trustee must redeem a portion of the debentures in face amount of $2,000,000 utilizing mandatory sinking fund payments by DI for such purpose. The entire $25,000,000 fails to qualify as a long-term foreign borrowing, because the original maturity of the borrowing is less than 3 years.

An agreement such as described in § 324(e)(4) is not the typical agreement entered into between underwriters and a DI with respect to issuance of debentures to foreign nationals. Ordinarily, underwriters will agree not to offer or sell the debentures to persons who are nationals or residents of the United States or residents of Canada. Section 324(e)(4), by contrast, contemplates a more restrictive agreement, in which the obligee agrees not to sell or otherwise transfer the debt obligation to any United States or Canadian person or to any person whom the obligee has reason to believe will so sell or otherwise transfer the debt obligation.

§ B324–6 Proceeds of long-term foreign borrowing.

The term "proceeds of long-term foreign borrowing" is defined in § 324(c) to mean the gross amount or value received from a long-term foreign borrowing (before deducting discounts, commissions or fees) less repayment of principal of such borrowing. A borrowing must be reported to OFDI on the DI's first required periodic report following the borrowing (whether quarterly or annual) in order for funds received from the borrowing to qualify as proceeds of long-term foreign borrowing.[2] Therefore, if a DI contemplates using funds received from a borrowing as an offset to direct investment under §306(e) or § 313(d)(1) at any time in the current or succeeding years, the borrowing should be reported on Form FDI–102 or FDI–102F, whichever is first required thereafter. If a borrowing is not reported, the DI will not have available proceeds from such borrowing at the end of 1969 and will not be subject to the restriction on positive net transfer of capital under § 203(d)(1). (Note, however, that funds received from an unreported borrowing will, if held as liquid foreign balances, be subject to the repatriation requirements of § 203(c).)

Example 15. On March 1, 1969, DI's international finance subsidiary sells a public offering in Europe of 12-year, $20,000,000 face amount convertible debentures in a form that qualifies as a long-term foreign borrowing. The debentures are sold at an aggregate discount of $500,000 and DI pays $500,000 in underwriting fees. DI thus receives $19,000,000 net as a result of the borrowing. However, for purposes of § 324(c), the proceeds of the borrowing are nevertheless $20,000,000. DI reports this borrowing on Form FDI–102 for the second quarter of 1969. Accordingly, DI has $20,000,000 in available proceeds, including the $1,000,000 representing discount and fees. DI may allocate a full $20,000,000 to positive direct investment under § 306(e) even though only the $19,000,000 received is repatriated before the end of the year. DI may alternatively transfer $1,000,000 abroad and hold in liquid foreign balances a full $20,000,000 without regard to the limitations of § 203(c). Thereafter, if it expends such proceeds in making transfers of capital, the full $20,000,000 will be deductible under § 313(d)(1).

Example 16. DI purchases equipment from an unaffiliated foreign national and contributes it to the capital of an AFN. The purchase price for the equipment is $500,000, $100,000 of which is paid at the time of the purchase, the remainder being due (together with interest thereon) 1 year later, the extension of credit qualifying as a long-term foreign borrowing. In connection with the purchase, DI incurs expenses of $5,000. The proceeds of the borrowing are $400,000.

Example 17. DI's international finance subsidiary issues debentures in aggregate principal amount of $10,000,000, in a form that qualifies as a long-term foreign borrowing. Attached to each debenture is a warrant entitling the holder to purchase N number of shares of DI's common stock at P price. DI obtains the opinion of its independent financial counsel that the value attributable to the warrants (based on coupon rate of the debentures and the interest-cost saving to the issuer over the life of the issue represented thereby in relation to prevailing market rates for nonconvertible debt issues, or on some other basis acceptable to OFDI) is $1,000,000. DI has made a long-term foreign borrowing, the proceeds of which are $9,000,000. The $1,000,000 attributable to the warrants is not proceeds of long-term foreign borrowing.

§ B324–7 Available proceeds.

"Available proceeds" are defined in § 324(d) as proceeds of long-term foreign borrowing that have not been expended in a transfer of capital for which a deduction was made under § 313(d)(1), or allocated to positive direct investment and deducted therefrom under § 306(e), and are, therefore, still available for use as an offset to direct investment.

Available proceeds are computed somewhat differently for 1969 and subsequent years from the manner in which direct investment liquid foreign balances were computed for 1968. During 1968, § 324(c) of the regulations contained a provision whereby the return of proceeds of long-term foreign borrowing to the DI by an AFN, by reason of repayment or other liquidation of debt or equity interests in such AFN acquired with such proceeds, was treated as an increase in available proceeds of long-term foreign borrowing, and not as a transfer of capital under § 312(b). Transfers of capital or allocation using such "returned proceeds" could again result in a deduction from positive net transfer of capital. For example, a DI made a long-term foreign borrowing in 1965 and made a transfer of capital with the proceeds of such borrowing, in the form of a loan to an AFN. The AFN subsequently repaid the DI prior to December 31, 1968. The repayment would not result in a transfer of capital from the AFN to the DI under § 312(b), but would increase the amount of proceeds of long-term foreign borrowing in the DI's possession. If the DI subsequently expended such proceeds in a transfer of capital to another AFN, a deduction from net transfer of capital could again be taken under § 313(d)(1).

The rule stated above has been changed, effective January 1, 1969. Deductions under § 313(d)(1) may now be made only for expenditure of "available proceeds" and once expended such proceeds cease to be "available proceeds". Commencing in 1969, repayment of the loan by the AFN during 1969 would result in a negative transfer of capital to DI, but the proceeds will not be "available proceeds" and no further deductions under § 313(d)(1) may be taken. However, § 203(d)(2) has been added to the regulations, the provisions of which permit a DI to change the scheduled area in which positive direct investment is offset by proceeds. This alteration may be made whether or not proceeds previously

[2] An apparent anomaly is created by the fact that the term "proceeds of long-term foreign borrowing," as defined in § 324(c), requires that the borrowing be reported to OFDI before the funds received can be regarded as "proceeds" for purposes of the Regulations. However, in the interim between a borrowing and the time such borrowing must be reported under § 324, a DI may treat the funds received as proceeds; provided the requirements are thereafter satisfied.

expended are returned to the DI by the AFN. Any such transfer by the AFN to the DI will be treated like any other negative transfer of capital (with no effect whatever on the amount of outstanding proceeds or the manner in which they may be utilized as an offset to positive direct investment). Allocation of previously expended proceeds to a different scheduled area is accomplished by entering the allocation on the DI's records maintained pursuant to §§ 203 (b) and 601 and reporting such allocation on Form FDI-102F filed for the year in which the resulting deduction is made. As a consequence of the change, DI must recognize a positive transfer of capital to the scheduled area in which the § 313(d)(1) deduction was previously taken (since the amount of positive direct investment offset by proceeds may not exceed the total amount of proceeds). If the AFN actually returns the proceeds which the DI originally expended, the negative transfer of capital will offset the positive transfer which must be recognized as a consequence of the allocation, but the DI will be prohibited, as of the end of the year in which such allocation is made, and thereafter, from holding such proceeds in the form of foreign balances or any other foreign property (other than as investments in AFNs, for which no deduction may be taken).

Section 203(d)(3) is a companion provision to § 203(d)(2). Section 203(d)(3) permits reallocation of proceeds previously allocated to positive direct investment under § 306(e) (or to net transfer of capital during 1968 under § 313(d)(1) as in effect during 1968) with consequences similar to allocation of previously expended proceeds. For a more detailed discussion of reallocation under § 203(d)(3), see § B324-10.

A DI should compute available proceeds in two steps: First, under the rules in effect during 1968 with respect to transactions during 1965-68; and second, under the rules in effect during 1969 with respect to 1969 transactions. A DI's available proceeds as of December 31, 1968 were proceeds of an outstanding long-term foreign borrowing that had not been allocated at the end of 1968 or expended in making transfers of capital to AFNs during 1965-68, or, if so expended, had been returned to the DI as of December 31, 1968. A DI's available proceeds at any time during 1969 or thereafter are those proceeds of an outstanding long-term foreign borrowing that were available as of December 31, 1968, and have not been expended or allocated since that date, plus proceeds of long-term foreign borrowing made subsequent to that date that have not been expended or allocated. (See § B324-11 regarding reductions in proceeds and available proceeds resulting from repayment of long-term foreign borrowing.)

Example 18. During 1966, DI made a long-term foreign borrowing of $15,000,000, and used the entire amount that same year to acquire a debt obligation of a Schedule B AFN (B). During 1967, B repaid $5,000,000 principal amount of the $15,000,000 debt obligation, and during 1968, B repaid another $5,000,000 principal amount of such debt obligation. At the end of 1968, DI allocated $2,000,000 of the $10,000,000 returned (considered to be "available proceeds" under the 1968 regulations) to a positive net transfer of capital to Schedule C. At the end of 1968, DI had proceeds of long-term foreign borrowing of $15,000,000; $8,000,000 were available proceeds, $5,000,000 were expended in B, and $2,000,000 were allocated to Schedule C.

In March 1969, B repaid the final $5,000,000 principal amount of its debt obligation to DI. This repayment is recognized as a § 312(b) negative transfer of capital from B to DI and does not change the amount of available proceeds. After the March transaction, DI held $8,000,000 of available proceeds, $5,000,000 of returned proceeds and $2,000,000 of allocated proceeds. In June 1969, DI expended the cash received from B in March 1969 to acquire stock of a new Schedule A AFN. This constituted a transfer of capital under § 312(a). DI received no deduction with respect to this transfer of capital, since the funds expended were not available proceeds. At the end of 1969, DI allocates $4,000,000 of the available proceeds to positive direct investment in Schedule C. At the end of 1969, DI still has $15,000,000 of proceeds of long-term foreign borrowing, $4,000,000 of which are available proceeds, $5,000,000 of which are considered to be expended in B, and $6,000,000 are allocated to C.

§ B324-8 Expenditure of available proceeds and deduction from net transfer of capital.

If a DI expends available proceeds of long-term foreign borrowing in a transfer of capital to an AFN (other than a Canadian AFN), the amount of such proceeds so expended is deducted from net transfer of capital to the appropriate scheduled area (§ 313(d)(1)). The deduction is mandatory when available proceeds are so expended.

Example 19. In March 1969, a U.S. corporation acquires all the stock of an Argentinian company from an unaffiliated foreign national (X). The purchase price is $4,000,000, $1,000,000 of which is payable in cash at the closing. The balance is to be paid in three equal annual installments of $1,000,000 (together with accrued interest) commencing 1 year from the date of closing. Each future installment is represented by a promissory note of DI payable to X. The borrowing qualifies as a long-term foreign borrowing under § 324 (a) and (e)(4). Assuming no other transactions, DI's net transfer of capital to Schedule A (and worldwide) during 1969 will be $1,000,000 (i.e., a $4,000,000 transfer of capital under § 312(a)(1) resulting from the stock acquisition, from which is deducted the $3,000,000 available proceeds of long-term foreign borrowing expended in making that transfer of capital pursuant to § 313(d)(1)).

Example 20. DI has a Schedule C AFN (C). On June 1, 1969, DI purchases machinery from an unaffiliated foreign national (X). The purchase price is $1,000,000, all of which is to be paid on May 31, 1970. DI gives X its promissory note for $1,000,000 payable on May 31, 1970, and X makes an agreement with DI as described in § 324(e)(4), so that the borrowing qualifies as a long-term foreign borrowing. DI then transfers the machinery to C. Assuming no other transactions, DI's net transfer of capital to Schedule C during 1969 will be zero, because DI receives a deduction under § 313(d)(1) with respect to the available proceeds of long-term foreign borrowing expended in the transfer of capital to C.

Example 21. On March 1, 1969, DI purchases from an unaffiliated foreign national (X) all outstanding stock of an Australian corporation for $3,000,000, of which $1,000,000 is paid in cash at closing, the balance being payable in 1972. The $1,000,000 cash paid at closing was borrowed by DI from a foreign bank against a 3-year term note, so the proceeds qualified as a long-term foreign borrowing under § 324 (a) and (e)(1). X has made an agreement as described in § 324(e)(4), so the extension of credit qualifies as a long-term foreign borrowing. Assuming no other transactions during 1969, DI's net transfer of capital to Schedule B will be zero. DI's $3,000,000 transfer of capital (the acquisition of the Australian corporation) is reduced, pursuant to § 313(d)(1), by the $1,000,000 borrowed from the foreign bank and the $2,000,000 credit extended by X.

Example 22. On April 1, 1969, DI purchases from unaffiliated foreign nationals all outstanding stock of a closely held German corporation. In exchange therefor, DI delivers to the sellers $5,000,000 principal amount of 1-year debentures convertible into common stock of DI, that qualify as a long-term foreign borrowing under § 324(a). The foreign nationals make an agreement described in § 324(e)(4). DI has made a $5,000,000 transfer of capital to the German corporation on April 1, 1969, and receives a deduction under § 313(d)(1) in an equal amount. Assuming no other transactions during the year, DI's net transfer of capital to Schedule C during 1969 will be zero.

Example 23. DI borrows $5,000,000 in December 1968, that qualified as a long-term foreign borrowing under § 324 (a) and (e)(1). In January 1969, DI loaned the $5,000,000 to a Schedule A AFN (A) on A's 6-month note. Accordingly, DI made a $5,000,000 transfer of capital and received a deduction under § 313 (d)(1), so that its net transfer of capital to Schedule A at the end of the first quarter was zero. In July 1969, A repaid the $5,000,000, as a result of which there was a § 312(b) transfer of capital from A to DI. In August 1969, DI loaned the $5,000,000 to a Schedule B AFN (B), resulting in a § 312(a) transfer of capital to Schedule B. Assuming no other relevant transactions during the year, DI has made positive direct investment of $5,000,000 to Schedule B. Under § 203(d)(2), DI may allocate the proceeds to such positive direct investment in Schedule B, if DI complies with the reporting requirements of § 203(d)(2)(i) and (ii). If such allocation is made, DI must recognize a transfer of capital to Schedule A of $5,000,000 (thereby effectively cancelling the July § 312(b) transfer from A to DI). Note that a § 313(d)(1) deduction cannot be taken with respect to the 1969 loan to B, but the § 203(a)(2) reallocation has the same effect as a § 313(d)(1) deduction.

Example 24. In November 1968, DI's international finance subsidiary made a public issue of convertible debentures in principal amount of $25,000,000, which qualified as a long-term foreign borrowing under § 324 (a) and (e)(3). In February 1969, DI purchased machinery with $5,000,000 of available proceeds derived from the public issue and installed the machinery in its Australian branch (B). Assuming that the transfer of machinery to B results in a net increase of $5,000,000 in B's assets and there are no other relevant transactions during 1969, DI's net transfer of capital to Schedule B during 1969 is zero, because the $5,000,000 transfer of capital is offset by a deduction in an equal amount of available proceeds of long-term foreign borrowing expended in such transfer of capital, pursuant to § 313(d)(1).

Example 25. In December 1968, DI's international finance subsidiary made a public issue of convertible debentures in principal

amount of $20,000,000 which qualified as a long-term foreign borrowing under § 324 (a) and (e)(3). In February 1969, DI expended $10,000,000 of available proceeds of such borrowing to acquire the assets of a German corporation, which DI organized as a direct branch. Upon acquisition, net assets of the branch (disregarding DI's equity interest) were $10,000,000. During the remainder of 1969, DI made no further debt or equity investment in the branch. However, after acquisition by DI, the branch incurred a loss in 1969 of $500,000, so that its net assets at the end of 1969 were $9,500,000. DI has no other Schedule C AFNs. Although DI's net transfer of capital to the German branch during 1969 would normally be $9,500,000 (by operation of § 313(b)), the $10,000,000 expended in acquisition of the branch is offset by a $10,000,000 deduction under § 313(d)(1), because the acquisition was made with available proceeds. Therefore, after taking into account the loss of $500,000, DI will have a negative net transfer of capital to Schedule C during 1969 of $500,000.

Example 26. In January 1969, DI borrowed $5,000,000 from a foreign bank, which qualified as a long-term foreign borrowing under § 324 (a) and (e)(1). During the same month, DI loaned the $5,000,000 to a Canadian AFN. The proceeds so expended are still available proceeds. (See § 324(d).) No deduction with respect to their expenditure was received under § 313(d)(1) because § 1103 excludes Canada from Schedule B for purposes of § 313 (a) and (b).

§ B324–9 Allocation of available proceeds.

A DI may reduce positive direct investment during a year by "allocating" available proceeds of long-term foreign borrowing (made during the same or a prior year) to such positive direct investment. Allocation is accomplished when (a) an entry is made on the books and records maintained by DI pursuant to § 203(b); (b) the allocation and deduction are reported on Form FDI–102F for the year in which made; and (c) the allocated proceeds, as of the end of the year in which allocation is made, are repatriated to the United States and are not held in any form of foreign property.

Whereas deductions under § 313(d)(1) are confined to transfers of capital (for purposes of calculating the amount of net transfer of capital), allocations and deductions under § 306(e) may be applied to direct investment (comprised of both net transfer of capital and reinvested earnings).

Example 27. DI has five wholly owned incorporated AFNs in Schedule B. During 1969, DI is authorized to make positive direct investment of $1,000,000 in Schedule B. In 1969, the Schedule B AFNs have earnings of $1,400,000 and pay no dividends, DI's net transfer of capital to Schedule B is zero, and positive direct investment is, therefore, $1,400,000. In November 1969, DI makes a borrowing from a foreign bank of $900,000 which qualifies as a long-term foreign borrowing under § 324 (a) and (e)(1) and deposits the $900,000 in a demand deposit in a London bank. To reduce Schedule B positive direct investment to the authorized $1,000,000 for 1969:

(a) DI repatriates $400,000 to the United States by December 31, 1969 as required by § 306(e)(1)(iii), and invests the $400,000 in bonds of a U.S. corporation.

(b) Thereafter DI enters an allocation on its books and records, as required by §306 (e)(1)(i), and deducts $400,000 from positive direct investment on its FDI–102F for 1969, as required by § 306(e)(1)(ii).

Accordingly, DI has made positive direct investment of $1,000,000 in Schedule B for 1969. As to 1970 and subsequent years DI holds $500,000 in available proceeds ($900,000 less $400,000 allocated).

During 1970, DI lends its AFNs in Schedule B $900,000, composed of the $500,000 of available proceeds deposited in the London bank and $400,000 of allocated proceeds, liquidating its holding of U.S. corporate bonds. DI receives a deduction under § 313(d)(1) of $500,000 for the transfer of capital made with the available proceeds, but does not receive a deduction for the transfer of capital made with the $400,000 of previously allocated proceeds.

Example 28. DI has three Schedule C AFNs, X, Y, and Z, and a $200,000 Schedule C allowable. In November 1968, DI had secured a commitment for a line of credit from a foreign bank of up to $5,000,000 for a period of 5 years. During 1969, the following transactions take place:

(a) X has $175,000 in earnings and pays no dividends. X repays $100,000 of a loan from DI and thereby satisfies a debt obligation of X held by DI.

(b) Y has $25,000 of earnings and pays no dividends. DI performs services on behalf of Y worth $400,000, for which DI is not paid at the end of 1969.

(c) Z has $50,000 of earnings and pays no dividends. DI leases machinery having a value of $500,000 to Z for a period of 10 years.

DI thus has Schedule C reinvested earnings of $250,000 and a positive net transfer of capital of $800,000, resulting in positive direct investment of $1,050,000, only $200,000 of which is authorized. During December 1969, DI takes down $850,000 under its line of credit, repatriates the funds to the United States, and utilizes the funds to make a payment to a U.S. lender on a real estate loan. Thereafter, pursuant to § 306(e)(1), DI records an allocation of $850,000 in its § 203(b) books and reports the allocation on its Form FDI–102F for 1969. DI's positive direct investment in Schedule C after the deduction is $200,000.

Example 29. DI has one Schedule C AFN, a direct branch of the DI, and zero Schedule C allowable. During 1969, DI transfers used machinery of a value of $250,000 to its Schedule C branch, and the branch has $100,000 of earnings, all of which is retained, thereby increasing branch net assets by $350,000. In December of 1969, DI makes a long-term foreign borrowing from a foreign bank of $350,000, repatriates the proceeds thereof to the United States and deposits them in a New York bank. Thereafter, DI makes an entry in its § 203(b) books and reports an allocation in its Form FDI–102F for 1969. DI's positive direct investment in Schedule C is zero.

Example 30. In 1968, DI made a long-term foreign borrowing of $10,000,000 and expended or allocated $8,000,000 of the proceeds thereof to transfers of capital in Schedules A and C. In December 1968, DI also loaned $2,000,000 of such proceeds on 6-month terms to a Canadian AFN. In June 1969, the 6-month notes were renewed for another 6 months. During 1969, DI has positive direct investment of $3,000,000 in Schedule B and a $1,000,000 allowable in Schedule B. In December 1969, DI causes its Canadian AFN to repay the loan to the DI, places the funds on deposit in a New York bank, makes an entry in its § 203(b) books and reports an allocation and deduction of $2,000,000 in its Form FDI–102F for 1969. DI's positive direct investment in Schedule B is $1,000,000.

§ B324–10 Allocation of expended proceeds and reallocation of previously allocated proceeds.

Section 203(d)(2) permits a direct investor expending proceeds of long-term foreign borrowing, and making a corresponding § 313(d)(1) deduction during 1968 or in subsequent years, to make unlimited successive deductions, in the same or successive years, from positive direct investment in other scheduled areas.

Under § 203(d)(3), a direct investor allocating proceeds of long-term foreign borrowing to positive net transfer of capital during 1968 or to positive direct investment in succeeding years may thereafter reallocate such proceeds to positive direct investment in other scheduled areas.

Whenever a deduction against positive direct investment is made under § 203(d)(2) or (3), a transfer of capital in an amount equal to the deduction must be recognized in the scheduled area in which the last prior deduction was made.

Allocation of expended proceeds under § 203(d)(2) is accomplished in a manner similar to allocation of available proceeds under § 306(e). Both sections require the DI to make appropriate entries in the books and records maintained pursuant to § 203(b), and the allocation must be reported on the DI's next annual report (Form FDI–102F). Allocations under § 203(d)(2) are subject to the repatriation requirements of that section.

Reallocation under § 203(d)(2) and (3) of proceeds previously deducted under § 313(d)(1), § 203(d), or § 306(e) requires appropriate bookkeeping entries. The DI must reflect the reallocation on books and records required to be kept by § 203(b) and the corresponding deduction together with the transfer of capital to the appropriate scheduled area on the next annual report (Form FDI–102F). Reallocations made pursuant to § 203(d)(3) are subject to the proscriptions of § 306(e) with respect to the form in which the underlying proceeds may be held.

No allocation or reallocation under § 203(d)(2) or (3) may take place with respect to any part of a long-term foreign borrowing that has been repaid, since "proceeds" are extinguished by repayment.

Example 31. During 1968, DI made a long-term foreign borrowing of $5,000,000, and allocated the proceeds to positive net transfer of capital to Schedule A (under § 313(d)(1) of the 1968 regulations). At the end of 1969, DI has positive direct investment of $6,000,000 in Schedule C. OFDI will interpret § 203(d)(3) as permitting DI to reallocate the $5,000,000 previously allocated to Schedule A during 1968 to the Schedule C positive direct investment, thereby reducing it to $1,000,000, by recording the reallocation in the books and records required in § 203(b), by reporting the reallocation and deduction in the annual report (Form FDI–102F) for 1969, and by holding the $5,000,000 of allocated proceeds, as of the end of 1969, in a form permitted by § 306(e)(2). Upon such reallocation, DI must recognize a transfer of capital to Schedule A of $5,000,000.

Example 32. During 1968, DI made a long-term foreign borrowing of $2,000,000 and used the proceeds to extend a one-year loan to a Schedule B AFN (B). During 1969, B repays the loan, constituting a § 312(b) transfer of capital to DI, and DI invests the $2,000,000 in bonds of a U.S. corporation. During 1969, DI allocates (pursuant to § 203(d)(2)) the $2,000,000 to positive direct investment in Schedule C by making an entry in the books and records required by § 203(b), and by reporting the allocation and deduction on the annual report (Form FDI-102F) for 1969. DI must, as of yearend, continue to hold the $2,000,000 in the U.S. corporate bonds (or in some other form of U.S. property), unless the $2,000,000 is expended in making a further transfer of capital to an AFN. As a result of the allocation, positive direct investment in Schedule C is reduced by $2,000,000, but DI must recognize a § 312(a) transfer of capital of $2,000,000 to Schedule B.

Example 33. DI makes a long-term foreign borrowing of $3,000,000 in March 1969 and loans the proceeds to a Schedule B AFN (B), recognizing a § 312(a) transfer of capital to B and making a deduction from net transfer of capital to that scheduled area under § 313(d)(1). In October 1969, B repays the loan and DI then loans the $3,000,000 to a Schedule A AFN, resulting in a § 312(b) transfer of capital from B and a § 312(a) transfer of capital to A. On the annual report (Form FDI-102F), however, DI makes a § 203(d)(2) allocation of the $3,000,000 to positive direct investment in Schedule C, resulting in a deduction of $3,000,000 from positive direct investment in Schedule C and a § 312(a) transfer of capital in the same amount to Schedule B. DI is permitted to leave the $3,000,000 proceeds actually invested in Schedule A, notwithstanding the allocation to Schedule C.

Example 34. During 1967, DI made a long-term foreign borrowing of $5,000,000 and, in turn, lent the funds received to a Schedule A AFN for a 3-year term, repayment to be made in full at maturity. During 1969, DI desires to allocate such proceeds to positive direct investment in Schedule C. This is not permissible. The proceeds of the borrowing do not qualify for allocation under § 203(d)(2) since they were expended as of December 31, 1968.

§ B324-11 Repayment of long-term foreign borrowing.

Repayment of long-term foreign borrowing reduces the amount of proceeds held by the DI, to the extent of the repayment. In addition, a transfer of capital must be recognized by the DI (under § 312(a)(7)) upon repayment of the long-term foreign borrowing to the extent that the proceeds were expended in making transfers of capital to AFNs or were allocated to positive direct investment. The charge to allowables is made in the scheduled area in which the deduction from net transfer of capital or positive direct investment had been taken. If, as a result of allocation or reallocation, deductions were taken in successive scheduled areas, the charge to allowable occurs in the last scheduled area in which a deduction was taken. However, if the total deductions with respect to the amount of the borrowing repaid were last taken in two or more scheduled areas, the transfer of capital resulting from repayment will be charged proportionally based on the last deductions taken in each scheduled area.

Example 36. In 1968, DI made a long-term foreign borrowing of $1,000,000, and loaned the proceeds to a Schedule C AFN, receiving a deduction with respect to such transfer of capital under § 313(d)(1). During 1969, DI repays the long-term foreign borrowing. DI must recognize a $1,000,000 transfer of capital to Schedule C under § 312(a)(7).

Example 37. In 1968, DI made a long-term foreign borrowing of $1,000,000, and allocated the proceeds to a positive net transfer of capital in Schedule A, thereby receiving a deduction from Schedule A net transfer of capital under § 313(d)(1). In 1969, DI reallocated, under § 203(d)(3), the proceeds to positive direct investment in Schedule C, recognizing a transfer of capital to Schedule A and a deduction from positive direct investment in Schedule C, each in the amount of $1,000,000. If, in 1970, DI repays the long-term foreign borrowing, DI must recognize a transfer of capital under § 312(a)(7) to Schedule C, since the last deduction with respect to the proceeds was received in that scheduled area.

Example 38. In 1968, DI made a long-term foreign borrowing of $1,000,000. DI expended $600,000 of the proceeds in a transfer of capital to Schedule B, receiving a deduction under § 313(d)(1) from net transfer of capital in Schedule B, and allocated the remaining $400,000 to a positive net transfer of capital to Schedule C, receiving a similar deduction in Schedule C. During 1969, DI repays the long-term foreign borrowing and DI recognizes a $600,000 transfer of capital to Schedule B and a $400,000 transfer of capital to Schedule C, under § 312(a)(7).

Example 39. In 1968, DI made a long-term foreign borrowing of $1,000,000. DI expended $500,000 of the proceeds in a transfer of capital to Schedule A, allocated $200,000 to a positive net transfer of capital in Schedule B, and allocated the remaining $300,000 to a positive net transfer of capital in Schedule C. Appropriate deductions were also taken from net transfer of capital in each scheduled area, under § 313(d)(1). During 1969, DI allocated to Schedule C, under § 203(d)(2), $250,000 of the proceeds previously expended in Schedule A, thereby recognizing a transfer of capital to Schedule A and receiving a deduction from positive direct investment in Schedule C in the same amount. If, in 1970, DI repays the long-term foreign borrowing, DI must recognize transfers of capital, under § 312(a)(7), in the amount of $250,000 to Schedule A, $200,000 to Schedule B, and $550,000 to Schedule C.

Example 40. In February 1969, DI makes a long-term foreign borrowing of $1,000,000 and loans the proceeds to a Schedule C AFN (C), receiving a deduction with respect to the transfer of capital under § 313(d)(1). In March 1970, C repays the loan, resulting in a $1,000,000 transfer of capital under § 312(b). In June 1970, DI repays the long-term foreign borrowing. The repayment is recognized as a transfer of capital to Schedule C of $1,000,000 under § 312(a)(7), since the last deduction with respect to the proceeds was received in that scheduled area. Note that the § 312(b) transfer of capital in March 1970 will offset the June 1970 § 312(a)(7) transfer of capital for purposes of calculating the net transfer of capital to Schedule C during 1970.

Repayment of a long-term foreign borrowing does not result in a transfer of capital if the proceeds of such borrowing are available proceeds at the time of repayment. Generally, available proceeds are those proceeds that have not been expended or allocated and with respect to which a deduction under § 313(d)(1) or § 306(e) has not been received. Proceeds expended or allocated during the years 1965 through 1968 will be considered available proceeds if returned to the DI prior to December 31, 1968, and not thereafter expended or allocated.

Example 41. DI makes a $1,000,000 long-term foreign borrowing during 1969 and loans the proceeds to a domestic subsidiary for working capital purposes. Such proceeds are not allocated to positive direct investment at the end of 1969. If such proceeds are not expended in 1970, repayment of the long-term foreign borrowing in 1970 will not be a transfer of capital under § 312(a)(7).

Example 42. During 1968, DI made a $1,000,000 long-term foreign borrowing and loaned the proceeds, during May 1968, to a Schedule B AFN (B) on a 6-month note, receiving a deduction with respect to the transfer of capital under § 313(d)(1). In November 1968, B repaid the DI. Under the regulations in effect during 1968, the repayment did not constitute a § 312(b) transfer of capital from B to DI, but did constitute an increase in available proceeds of $1,000,000. In 1969, without having again expended the $1,000,000 in a transfer of capital or allocated such proceeds, DI repays the long-term foreign borrowing. DI has not made a transfer of capital under § 312(a)(7). If B's note had been for 9 months and repayment occurred in February 1969, DI would recognize a § 312(b) transfer of capital from B in 1969, the repayment would not have constituted an increase in available proceeds, and repayment of the long-term foreign borrowing in 1969 would be recognized as a $1,000,000 transfer of capital to Schedule B under § 312(a)(7).

Delivery of a DI's equity securities to holders of debt instruments issued by the DI (or its international finance subsidiary) in connection with a long-term foreign borrowing, pursuant to the exercise of conversion or similar rights, is deemed a repayment of the borrowing in the principal amount of indebtedness surrendered. The conversion will result in repayment of the borrowing (and reduction of proceeds) in the year the delivery of stock occurs. However, transfers of capital under § 312(a)(7) resulting from such repayment by conversion are not recognized (and therefore are not a charge against Subpart E allowables) until the year following the conversion. Thus, for example, if a DI's international finance subsidiary issues $20 million face amount of debentures convertible into stock of the parent and invests the proceeds in Schedule C AFNs of the parent, conversion by the foreign debenture holders of $1 million face amount into stock in 1969 (the stock being delivered in 1969) results in a $1 million repayment of the borrowing (i.e., a $1 million transfer of capital to Schedule C) in 1969 (see § 324(b)(2)). However, assuming such repayment in 1969 is generally authorized by Subpart J, no reduction in the DI's 1969 Subpart E allowables will be made in 1969; rather, by operation of § 1002(a)(3), the 1969 repayment will be charged against Subpart E allowables in 1970 (and in subsequent years if such "repayment charge" exceeds 1970 allowables).

Surrender of debentures upon exercise of attached warrants is treated similarly. However, since a portion of the funds received from sale of debentures with warrants attached is attributed to the warrants, the DI did not receive proceeds of long-term foreign borrowing to the full extent of the face amount of the

issue. Therefore, when a debenture is surrendered, a ratable portion of the principal amount will not result in repayment of a long-term foreign borrowing.

Example 43. During 1968, DI's international finance subsidiary issued $10,000,000 principal amount of debentures with warrants attached, entitling holders to purchase 10 shares of DI's common stock at $100 and to present the debenture, having a principal amount of $1,000, in payment for the stock. DI's independent financial counsel valued the warrants in an aggregate amount of $1,000,000. Therefore, DI realized $9,000,000 proceeds of long-term foreign borrowing from sale of the debentures with warrants attached. Also during 1968, DI's international finance subsidiary loaned the entire $9,000,000 to DI's Schedule B AFNs, resulting in a § 313(b)(1) deduction. In 1969, upon the presentation of a warrant and debenture, and delivery of common stock to the holder, there is a repayment of the debenture, a reduction of proceeds of long-term foreign borrowing (to the extent such proceeds were received from sale of the debenture), and a transfer of capital under § 312(a)(7). (The transfer of capital occurs because such proceeds were invested in Schedule B and a deduction under § 313(d)(1) had been received during 1968.) However, although the amount of repayment is $1,000, the proceeds of long-term foreign borrowing received from sale of the debenture were $900. Accordingly, the transfer of capital to Schedule B and the corresponding reduction of proceeds will be $900. Recognition of the transfer of capital, if authorized by Subpart J, will be postponed until 1970, when the charge to Subpart E allowables occurs (see § 1002(a)(3)).

Generally, whether a transfer of capital or a reduction of available proceeds results from repayment of a long-term foreign borrowing may be ascertained by a DI from the books and records kept pursuant to § 203(b). Accordingly, when a DI repays a long-term foreign borrowing, all proceeds of which have been expended or allocated, the DI must report a transfer of capital under § 312(a)(7). If a DI has not expended or allocated any part of a particular long-term foreign borrowing, repayment of the borrowing (in whole or in part) results in a reduction of available proceeds. However, if a portion of proceeds of a borrowing has been expended or allocated, while the remainder has not been expended or allocated and thus constitutes available proceeds, the effect of partial repayment cannot be ascertained from the DI's books and records. In such case, any repayment shall be treated first as a reduction of available proceeds (until the available proceeds are reduced to zero) and then as a transfer of capital under § 312(a)(7). On the other hand, if a long-term foreign borrowing is in the form of debentures convertible into stock of the DI and a portion of the proceeds has been expended or allocated and the remainder is held as available proceeds, OFDI will permit the DI to elect whether repayments resulting from conversions will be treated as reductions of available proceeds or as transfers of capital under § 312(a)(7).

Example 44. In March 1968, DI made a long-term foreign borrowing from a foreign bank. DI gave the bank 20 notes, each for $1,000,000. At the end of 1968, DI had expended or allocated $10,000,000 of the proceeds. By June 1969, DI had expended an additional $5,000,000. Accordingly, there remained $5,000,000 of available proceeds. On October 1, 1969, DI repaid $2,000,000. The repayment did not constitute a transfer of capital under § 312(a)(7); rather, available proceeds were reduced from $5,000,000 to $3,000,000.

Example 45. During 1968, DI's international finance subsidiary made a public issue of debentures convertible into common stock of DI. The issue qualified as a long-term foreign borrowing. The proceeds of such borrowing were $20,000,000. As of the end of June 1969, DI had expended $15,000,000 of these proceeds in transfers of capital to a Schedule B AFN and $5,000,000 remained as available proceeds. During July 1969, $2,000,000 principal amount of debentures was converted into common stock of the DI. DI may treat the conversions either as reductions of available proceeds or as transfers of capital to Schedule B.

§ B324–12 Refinancing.

For purposes of §§ 324, 312(a)(7), and 1002, refinancing of a long-term foreign borrowing, in whole or in part, (by virtue of the renewal, extension or continuance of the borrowing or by virtue of repayment of the borrowing with proceeds of a subsequent long-term foreign borrowing obtained from the same or another lender) is not deemed a repayment of the borrowing or the making of a new borrowing. Thus, for example, if a DI renews a 1-year note for any additional period of time, the renewal is not considered repayment of the original borrowing or making of a new borrowing. (The result would be the same if the original borrowing had been denominated in a foreign currency that under went revaluation or devaluation prior to the renewal.) If a DI has a long-term foreign borrowing of $100 and obtains a new long-term foreign borrowing of $500, using $100 of the proceeds to repay the original borrowing, that payment of $100 is not considered a "repayment" of the original borrowing; rather, a new borrowing of only $400 will be deemed to have been made.

Refinancing cannot retroactively qualify a borrowing (made on or after Jan. 1, 1968) as a long-term foreign borrowing (see § 324(b)(1)). Thus, if a 6-month note that contains no express provisions for extension or renewal is, in fact, renewed for another six months, the borrowing as so renewed does not constitute a long-term foreign borrowing.

§ B324–13 Recordkeeping.

Because funds or property that are proceeds of long-term foreign borrowing have special status under the regulations, it is necessary that special records be kept by DIs showing disposition of such proceeds at any given time. Therefore, § 203(b) requires DIs to identify separately each long-term foreign borrowing and to record each separate use of the proceeds. The term "use" refers not only to actual investments, but also to deductions taken under § 203(d), § 313(d)(1) or § 306(e). For example, proceeds loaned by a DI to an AFN in Schedule C will occasion a deduction from net transfer of capital to Schedule C under § 313(d)(1), and the proceeds will actually be invested in the Schedule C AFN. However, if the Schedule C AFN repays the loan and the DI does not thereafter allocate the returned proceeds under § 203(d)(2), the Schedule C deduction will remain in effect until repayment of the underlying long-term foreign borrowing. (Upon such repayment, a § 312(a)(7) transfer of capital to Schedule C would have to be reflected.) Similarly, proceeds allocated to and deducted from positive direct investment in any scheduled area pursuant to § 306(e) may actually be invested in bonds of a U.S. corporation, or expended in making a transfer of capital to an AFN. Accordingly, the DI must identify actual investment of proceeds, as well as record direct investment deductions taken with respect to such proceeds.

Example 46. During 1969, the international finance subsidiary of a U.S. corporation (DI) sells $25,000,000 face amount of debentures convertible into DI's common stock in a form that qualifies the issue as a long-term foreign borrowing. (a) DI sells the debentures at a discount of $1,250,000 and pays the underwriters commissions of $1,250,000, receiving $22,500,000 net from the sale. (b) DI immediately expends $10,000,000 of the proceeds received to acquire a French corporation (C), which then becomes a Schedule C affiliated foreign national. (c) DI deposits the remaining proceeds of the borrowing ($12,500,000) in a demand account with a London bank. (d) At the end of 1969, DI allocates $3,000,000 of these available proceeds to positive direct investment in Schedule B. (e) In 1970, DI loans $5,000,000 of the funds deposited in the London bank to C. (f) Subsequently, in 1970, $2,000,000 face amount of debentures are converted. (g) At the end of 1970, DI allocates $2,500,000 of available proceeds to positive direct investment in Schedule B.

The above transactions should be recorded on the books and records required by § 203(b) in the following manner:

With respect to transaction (a), DI enters proceeds of a long-term foreign borrowing in the amount of $25,000,000.

With respect to transaction (b), DI enters an expenditure of $10,000,000 in connection with the transfer of capital incident to acquisition of C (§ 312(a)), and a deduction from net transfer of capital with respect to Schedule C (§ 313(d)(1)). After these entries, DI's records will reflect $15,000,000 available proceeds and $10,000,000 expended proceeds (the latter being held in the form of C's stock).

With respect to transaction (c), DI enters the demand deposit of $12,500,000 available proceeds in the London bank; these proceeds are now held in the form of liquid foreign balances. (Note that available proceeds are exempted from the repatriation requirement of § 203(c).) DI does not transfer U.S. funds abroad, as might have been done, to augment liquid foreign balances up to the full $15,000,000 available proceeds (see § 324(c)). Accordingly, DI would reflect $2,500,000 (the amount of discount and commissions) of available proceeds as being held in the United States.

With respect to transaction (d), the $3,000,000 allocation to Schedule B, DI may use the foregoing $2,500,000 available proceeds deemed held in the United States. Accordingly, only $500,000 need be allocated out of available proceeds held as liquid foreign balances. This $500,000 must be withdrawn from the London bank and repatriated to the United States. (§ 306(e)); DI

does so, investing the $500,000 in bonds of a U.S. corporation. The allocation, the source of available proceeds used, and the repatriation transaction would be reflected in DI's books and records pursuant to § 203(b).

Accordingly, at the end of 1969, DI has recorded a long-term foreign borrowing, the proceeds of which are $25 million. Of such proceeds, $10 million have been expended, with a deduction received in Schedule C, and are held in the form of stock of C; $2.5 million relate to the discount and commission, are treated as being held in the United States and are allocated, with the deduction in Schedule B; $500,000 are held in the form of bonds of a U.S. corporation and are allocated, with the deduction in Schedule B; and $12 million are held on deposit in the London bank and are available proceeds.

With respect to transaction (e), DI enters an expenditure of $5,000,000 available proceeds to C. Available proceeds in the London bank are decreased by such amount, and DI now has another $5,000,000 deduction in Schedule C under § 313(d)(1), the expended proceeds being held in the form of a debt obligation of C.

With respect to transaction (f), DI is permitted to treat the repayment by conversion of the debentures either as a reduction of available proceeds or as a transfer of capital. DI elects to recognize a transfer of capital. Since total expended and allocated proceeds at the time of conversion are $18,000,000, with $15,000,000 expended in Schedule C and $3,000,000 allocated to Schedule B, ⅚ of $2,000,000 ($1,667,000), is a transfer of capital to Schedule C and ⅙ of $2,000,000 ($333,000) is a transfer of capital to Schedule B. Simultaneously, proceeds expended in C and allocated to B are reduced in an equal amount. Accordingly, DI treats the proceeds held in the form of debt obligation of C as reduced by $1,667,000, and DI treats allocated proceeds held in the form of corporate bonds as having been reduced by $333,000.

With respect to transaction (g), the allocation of $2,500,000 to Schedule B is entered by DI. The deposit in the London bank is shown as reduced by $2,500,000. Since DI must repatriate these allocated proceeds, the funds are deposited in a New York bank. Accordingly, DI would enter such deposit on its records also.

At the end of 1970, DI has $23 million proceeds of long-term foreign borrowing ($25 million less $2 million repayment). Of such proceeds, $4.5 million are still available and are held on deposit in the London bank; $2.5 million (comprising the discount and commission) are allocated to Schedule B and are treated as held in the United States; $167,000 are allocated to Schedule B and are held in the form of U.S. corporate bonds; $2.5 million are allocated to Schedule B and are held on deposit with a New York bank; and $10 million are expended in C and held in the form of equity securities of C; and $3,333,000 are expended in C and held in the form of debt obligations of C.

B502—Election of Allowables

Section 502 requires a DI to elect, for each year, (a) the § 503 "minimum" allowable of $1 million, (b) the § 504(a) "historical" allowable or (c) the § 504(b) "earnings" allowable.

The election is required to be made on Form FDI–102F (Annual Report) filed for the year with respect to which the election is made. Therefore, DIs will not be obliged to make a binding election for 1969 until the due date of the 1969 annual report (Apr. 30, 1970, unless hereafter modified). However, Form FDI–102F for 1968 called for a tentative indication of the allowable to be elected for 1969, and DIs required to file quarterly reports (Form FDI–102) during 1969 were instructed to indicate in such reports any change of this tentative decision.

Beginning in 1970, an "incremental earnings" allowable under § 506 will be available in addition to the allowable elected pursuant to § 502.

In the event of a merger between two or more DIs during a year, the resulting entity will be regarded as having been a single DI for the entire year in question, as well as for the base-period years. Accordingly, merger during a year of two DIs, each of which had tentatively elected to be governed by the § 503 minimum allowable for such year, will not result in combination or pro rata attribution for such year of two § 503 minimum allowables with respect to the surviving DI. Likewise, in the event of merger between DIs each of which had tentatively elected to be governed either by the same § 504 allowable, or between a DI tentatively electing § 503 and a DI tentatively electing § 504, or between a DI tentatively electing § 504(a) and a DI tentatively electing § 504(b), the surviving DI may choose to be governed by § 503, § 504(a) or § 504(b), but such election will extinguish any right or entitlement to the benefit, for the year of election, of the sections not elected.

Note that the special allowable provided in § 1302 of Subpart M for U.S.-flag carriers is applicable only if a § 504 allowable is elected under § 502.

B503—Worldwide Minimum Allowable

§ B503–1 Introduction.

Section 503 in effect for 1969 allows any DI electing (under § 502) to be governed by the provisions of § 503 to make positive direct investment not exceeding an aggregate of $1 million in all scheduled areas. The section is intended primarily for the benefit of DIs that have small or no historical or earnings allowables under § 504.

§ B503–2 Summary.

The § 503 minimum allowable of $1 million applies worldwide, as opposed to the schedular application of the "historical" or the "earnings" allowables provided in § 504. A significant qualification to § 503 is that "aggregate annual losses" of all AFNs (defined in § 503(b)), whether incorporated or unincorporated, must be excluded in computing positive direct investment.

Beginning in 1969, election of § 503 in any year operates to eliminate allowables otherwise available during such year under § 504 (including carryforwards from prior years) and to eliminate carryforwards into succeeding years.

A DI having positive direct investment of $200,000 or less during 1968 under former § 503 and not electing § 503 for 1969 may carry forward the amount of 1968 § 504 allowables, reduced by the positive direct investment actually made in each scheduled area during 1968.

§ B503–3 Calculation of direct investment under § 503.

(i) *Worldwide basis.* Section 503(a) provides that positive direct investment is authorized on a worldwide basis up to $1 million, in contrast to the "schedular" limitations imposed by § 504.

Example 1. DI has a wholly owned incorporated AFN (B) in the United Kingdom and a wholly owned incorporated AFN (A) in Argentina. During 1969, B has a loss of $500,000, and A has earnings of $1,500,000 all of which are reinvested. There are no other earnings, resulting in worldwide positive direct investment made by DI during 1969 of $1,000,000, that is authorized by § 503(a).

Example 2. DI has three AFNs: A, a corporation in Brazil; B, a corporation in Australia; and C, a branch in Germany. During 1969, DI makes a positive transfer of capital of $700,000 to A and a negative transfer of capital of $400,000 to B. C earns $500,000, none of which is remitted, so that its net assets increase by $500,000. A has losses of $300,000, and B earns $500,000 and pays no dividends. Positive direct investment in all scheduled areas for 1969 is $1,000,000 which is authorized by § 503(a), as shown by the following table (000 omitted):

	Amount by scheduled area			
	A	B	C	Total
Net transfer of capital	$700	($400)	$500	$800
Reinvested earnings	(300)	500	0	200
Positive direct investment	400	100	500	1,000

As illustrated by Examples 1 and 2 above, all of the positive and negative components of direct investment are taken into consideration without regard to the scheduled area of the particular transactions. In addition, dividends, remittances of branch profits and transfers of capital between AFNs in different scheduled areas (except between Canadian and non-Canadian AFNs) will "net out". Any number of such interschedular transactions may take place without affecting the amount of direct investment for purposes of the regulations.

Example 3. DI has two AFNs: B, a corporation in Schedule B, and C, a corporation in Schedule C. During 1969 DI transfers $1,000,000 to C, and B transfers $2,000,000 to C. Under § 505(a)(3) the transfer from B to C is treated as a transfer of capital from B to DI of $2,000,000 and a transfer of capital from DI to C of $2,000,000. DI has made positive direct investment of $1,000,000 in all scheduled areas under § 503 (000 omitted):

Net transfer of capital

To Schedule C	$3,000
To Schedule B	(2,000)

Positive direct investment

In Schedule C	$3,000
In Schedule B	(2,000)
Total	1,000

(ii) *Aggregate annual losses.* Section 503(b) provides that in calculating direct

investment, aggregate annual losses of incorporated and unincorporated AFNs shall be disregarded. This provision is a departure from the general rule, set forth in § 306, that direct investment is the sum of net transfer of capital and the DI's share of reinvested earnings. The purpose of the § 503(b) rule is to prevent DIs electing the § 503 minimum allowable from using aggregate annual losses as an offset against transfers of capital. Section 503(b) is thus analogous to § 504(e), which requires that total losses of Schedule C incorporated AFNs be eliminated in calculating Schedule C direct investment under § 504.

The term "aggregate annual losses" is derived from the "annual earnings" of the DI's incorporated and unincorporated AFNs as defined in § 504(b)(4) consolidated on a worldwide basis. If the computation of "annual earnings," as provided in § 504(b)(4), for all AFNs in all scheduled areas results in a negative amount, such negative amount constitutes "aggregate annual losses" and must be eliminated in calculating the amount of direct investment for § 503 purposes.

Example 4. DI has three AFNs: X and Y, both corporations, and Z a branch. During 1969, X has earnings of $500,000, and Y has earnings of $200,000. Z has a net loss of $800,000. DI's AFNs have aggregate annual losses for 1969 of $100,000.

Annual earnings under § 504(b)(4) and aggregate annual losses under § 503(b) are calculated for incorporated AFNs on the basis of total earnings (see § 306(c)), i.e., without taking into account dividends paid to the DI and interscheduler dividends and remittances.

Example 5. DI has two AFNs: A, a corporation, that has a branch, B, in a different scheduled area.

In 1969, A earns $1,000,000 and pays DI a dividend of $1,500,000. B has losses of $500,000.

There are no aggregate annual losses. There are negative "reinvested earnings" in A of $500,000 but aggregate annual earnings are $500,000 (positive).

If A had losses of $1,000,000 and paid no dividends, and B had earnings of $500,000 and remitted $200,000 to A, DI's AFNs would have had aggregate annual losses of $500,000. Note that A has negative reinvested earnings of $800,000, i.e., a loss of $1,000,000 reduced by the $200,000 remission of funds to A from B.

Calculation of direct investment by a DI with aggregate annual losses can be achieved most simply by adding the amount of aggregate annual losses to direct investment as computed under § 306.

The following examples illustrate the treatment of aggregate annual losses in computing positive direct investment under § 503:

Example 6. During 1969, DI makes a $750,000 positive transfer of capital to its wholly owned incorporated AFN (X). X earns $300,000 and pays no dividends. DI also has a branch (Y) that has losses of $500,000, resulting in a decrease in net branch assets of $500,000. DI also makes a negative transfer of capital of $50,000 to a second incorporated AFN (Z). There are no other relevant transactions during 1969.

DI's direct investment for 1969 under § 503 is computed as follows: The $750,000 positive transfer of capital to X is partially offset by the $50,000 negative transfer of capital from Z. X's earnings of $300,000 are offset by $300,000 of the $500,000 of Y's losses, but the remaining $200,000 of losses constitute "aggregate annual losses," which are disregarded under § 503(b). Therefore, DI's direct investment for 1969 is $700,000, which is authorized by § 503(a).

Alternatively, direct investment can first be computed under § 306 (000 omitted):

Net transfer of capital to X	$750
Net transfer of capital to Y	(500)
Net transfer of capital to Z	(50)
Reinvested earnings of X	300
Positive direct investment	500

Then, aggregate annual losses of $200 [thousand] are added to this figure, resulting in a total $700 [thousand] which is positive direct investment for purposes of applying § 503.

Example 7. DI has two wholly owned incorporated AFNs (X and Z). X has a wholly owned subsidiary (Y) in a different scheduled area, and Z has a branch (W) in a different scheduled area. The following takes place during 1969: X has earnings (excluding dividends received from Y) of $2,000,000 and pays a dividend to DI of $1,500,000 (before withholding taxes); Y has losses of $3,000,000 but pays a dividend to X of $250,000 (before withholding taxes); DI makes a positive transfer of capital of $2,500,000 to Z; and W earns $500,000, all of which is remitted to Z, and there is no change in W's net asset position. To compute direct investment under § 503, direct investment under § 306 is first computed (000 omitted):

Net transfer of capital to Z	$2,500
Net transfer of capital to W	0
Reinvested earnings of X [$2,000—$1,500—$250)]	750
Reinvested earnings of Y [$3,000—($250)]	(3,250)
Reinvested earnings of Z [0—(—$500)]	500
Direct investment under § 306	500
Next "aggregate annual losses" are computed (000 omitted):	
Earnings of X	$2,000
Losses of Y	(3,000)
Net earnings of W	500
Aggregate annual losses	(500)

Thus, positive direct investment under § 503 is $1 million the sum of direct investment under § 306 of $500 [thousand] and aggregate annual losses of $500 [thousand], as calculated above.

(iii) *Canadian AFNs.* As a result of §§ 1103 and 1104 of Subpart K, direct investment in Canadian AFNs is not included in calculating direct investment under § 503. Accordingly, dividend distributions, profit remissions, and transfers of capital between Canadian and non-Canadian AFNs will not net out. For example, if a Canadian AFN transfers funds or other property to a non-Canadian AFN, the DI will be deemed to have made such transfer if the conditions of § 505 are met. However, because of § 1103, the transfer deemed to have been made by the Canadian AFN to the DI (under § 505) will not offset the corresponding transfer deemed made by the DI to the non-Canadian AFN. Also, by virtue of § 504(b)(4), earnings of Canadian AFNs are excluded in calculating aggregate annual losses under § 503.

§ B503–4 Carryforward of unused portion.

Unused § 503 allowables may not be carried forward to succeeding years. In addition, § 503(c) provides that the election of § 503 eliminates all existing § 504 allowables as of the year of electing § 503, including historical and earnings allowables for such year, carryforwards from prior years and carryforwards into succeeding years.

Example 8. In 1969, DI has allowables under § 504 of $50,000 in Schedule C, $500,000 in Schedule B, and $200,000 in Schedule A. A portion of the allowables in Schedules A and B are carryforwards of § 504 allowables not used in 1968. In 1969, DI, in order to make positive direct investment in Schedule C in excess of its § 504 allowable of $50,000, elects § 503 and makes worldwide positive direct investment of $600,000. As a result of this election, the DI loses the § 504 schedular allowables carried forward from 1968, and the unused portion of the 1969 § 503 allowable may not be carried forward into subsequent years.

Section 504 as in effect during 1968 permitted a DI to carry forward any unused portion of the schedular allowables authorized by that section. Present § 504(f) preserves that carryforward for use in 1969 and succeeding years. However, to make clear that positive direct investment authorized by § 503 in 1968 must be taken into account in calculating the amount of such § 504 carryforward, § 503(d) provides that if a DI elects to be governed by § 504 in 1969, the § 504 allowables carried forward from 1968 must be reduced by the amount of positive direct investment actually made in 1968. The reduction is made first in the scheduled area where the positive direct investment was made under § 503 in 1968 and then in the remaining scheduled areas in the following order: C–B–A.

Example 9. In 1968, DI had allowable under § 504 of $50,000 in Schedule C, $50,000 in Schedule B, and $200,000 in Schedule A. During 1968, DI made positive direct investment of $100,000 in Schedule C and $50,000 in Schedule B under § 503 as then in effect. DI also made negative direct investment of $50,000 in Schedule A, which, under § 504(f), may be carried forward to succeeding years together with any other unused Schedule A allowable. While the investment in Schedule C was not authorized under § 504, DI's overall positive direct investment in 1968 was authorized under § 503, since positive direct investment in each scheduled area, when added together, was $200,000 or less (in this case, $150,000), and positive direct investment in any one scheduled area did not exceed $200,000. If DI does not elect the § 503 minimum allowable for 1969, DI will carry forward to 1969 § 504 allowables not used in 1968 of $200,000, after the reductions provided for in § 503(d), distributed in the scheduled areas as follows: Zero in Schedule C, zero in Schedule B, and $200,000 in Schedule A. The carryforward of $200,000 is in addition to any earnings allowables or historical allowables which DI may have for 1969 under § 504. The above calculations are set forth in tabular form as follows (000 omitted):

	Amount by scheduled area		
	C	B	A
1968 § 504 allowables	$50	$50	$200
Direct investment under § 503 in 1968	100	50	(50)
Reductions to 1968 § 504 allowables under § 503(d)	50	50	0
§ 504 carryforwards to 1969	0	0	200

If DI elects to make positive direct investment in 1969 under § 503, DI will lose the foregoing $200 [thousand] carryforward in Schedule A for 1969 and succeeding years, by reason of § 503(c).

If positive direct investment under § 503 in 1968 exceeded the § 504 historical allowable in two scheduled areas, § 503(d) operates to eliminate the § 504 carryforward for those areas. Carryforward in the remaining area will then be reduced by the aggregate amount of such excess.

Example 10. In 1968, DI had allowables under § 504 of $100,000 in Schedule C, $200,000 in Schedule B and $50,000 in Schedule A. During 1968, DI's positive direct investment was $130,000 in Schedule C, zero in Schedule B, and $70,000 in Schedule A. While DI exceeded the applicable allowables on a schedular basis under § 504, the positive direct investment made during 1968 was, nevertheless, within the "minimum allowable" under § 503, since neither positive direct investment in any one scheduled area nor the total of positive direct investment in each scheduled area exceeded $200,000. If DI elects to be governed by one of the § 504 allowables for 1969, there will be no carryforward of § 504 allowables in Schedules C and A since positive direct investment in those scheduled areas was in excess of such allowables. Furthermore, carryforward of the unused Schedule B allowable from 1968 must be reduced by the amount of positive direct investment made during 1968 in Schedules C and A in excess of the § 504 schedular allowables, i.e., $30,000 in Schedule C and $20,000 in Schedule A. Accordingly, DI's carryforward of § 504 allowables into 1969 will be zero for Schedules C and A, and $150,000 in Schedule B (the unused 1968 allowable of $200,000, reduced by 1968 positive direct investment in excess of § 504 allowables of $30,000 in Schedule C and $20,000 in Schedule A), computed as follows (000 omitted):

Item	Amount by scheduled areas		
	C	B	A
1968 § 504 allowable	$100	$200	$50
Direct investment under § 503 in 1968	130	0	70
Reductions in 1968 § 504 allowable under § 503(d)	100	50	50
§ 504 carryforward to 1969	0	150	0

§ B503–5 Related provisions.

(i) *Available proceeds.* Section 203(d)(1) exempts DIs electing § 503 from the restrictions otherwise applicable to positive net transfers of capital while holding available proceeds of long-term foreign borrowing in the form of foreign property.

(ii) *Associated groups and persons owning interests in DIs.* Section 905(b)(2) limits the use of § 503 by members of an associated group with respect to a group AFN, and § 906(b)(3)(ii) limits the use of § 503 to persons making an election under § 906(b)(1).

(iii) *Quarterly reports.* A DI may be exempt from filing quarterly reports on Form FDI–102 if, among other requirements, the DI has not made direct investment (whether positive or negative) in any year, beginning with the year 1968, in excess of $1 million. For this purpose, direct investment in Canada must be included and no deduction will be made for proceeds of long-term foreign borrowing expended in transfers of capital to AFNs, even though deducted under § 313(d)(1) for purposes of determining compliance under § 201(a), or allocated to positive direct investment, even though deducted under § 306(e) for purposes of determining compliance under § 201(a). (See General Instruction B, including examples, of Instructions for Completing the 1969 Quarterly Report on Form FDI–102, Revised October 1969.)

B504—Schedular and Carryforward Allowables

§ B504–1 Introduction.

Section 504 provides alternative allowables applicable to direct investment in each of the three geographical "schedules" (or "scheduled areas") established for purposes of the Program (see §§ 201 and 319): An historical allowable (§ 504(a) and (c)) and an earnings allowable (§ 504(b)). A DI may elect to be governed by either of these § 504 allowables as an alternative to the $1 million minimum allowable of § 503.

Unlimited "downstream" utilization of § 504 (a) or (b) allowables is permitted (i.e., from Schedule C to Schedules B and A, and from Schedule B to Schedule A). Provision is also made for "upstream" adjustment of allowables under certain circumstances. Carryforward of unused allowables into succeeding years is also permitted, so long as the DI continues electing to be governed by § 504. (See § 503(b).)

§ B504–2 Summary.

A DI electing to be governed by § 504(a) for a given year may make positive direct investment in Schedules A and B based on a percentage of average annual direct investment in those areas during 1965–66, viz., 110 percent in Schedule A and 65 percent in Schedule B. For Schedule C, the allowable is the lesser of (a) 35 percent of the DI's average annual direct investment in 1965–66 in Schedule C, or (b) the DI's share of the current year's earnings of incorporated AFNs in Schedule C multiplied by the ratio of reinvested earnings to total earnings of such AFNs during 1964–66.

Section 504(c)(1) and (2) provides that the § 504(a) historical allowable in Schedule C may be increased if such allowable is less than 30 percent of DI's annual earnings in that scheduled area during the preceding year. The amount of authorized increase will be equal to the full amount of the difference between such 30-percent earnings figure and the "basic" historical allowable for Schedule C determined under § 504(a)(3), if the sum of the § 504(a) historical allowables in Schedules A and B are sufficiently large. The historical allowable in Schedule A and, if necessary, in Schedule B must be charged with such authorized increase. An "upstream" adjustment for the Schedule B allowable is also authorized by § 504(c)(3) in the same circumstances, to the extent there remains (after increasing the Schedule C historical allowable) any of the Schedule A historical allowable against which such increase can be charged.

A DI electing the § 504(b) earnings allowable is permitted to make positive direct investment in each scheduled area not exceeding 30 percent of "annual earnings" (defined in § 504(b)(4)) for the immediate preceding year in the respective scheduled area.

All or any part of the allowables computed pursuant to § 504 (a) and (c) or § 504(b) may be used "downstream", i.e., the Schedule C allowable may be used in Schedule B or A instead of Schedule C and the Schedule B allowable may be used in Schedule A instead of Schedule B. A DI may carry forward into succeeding years any portion of a schedular allowable not used during the year. Negative direct investment for a year in any scheduled area may also be carried forward and may also be used in other areas "downstream" in the same or subsequent years. However, in any year for which a DI elects to be governed by the § 503 minimum allowable, all accrued carryforward of § 504 allowables will be permanently lost.

In calculating direct investment in Schedule C for purposes of measuring use of the § 504 allowable elected by a DI, losses of incorporated AFNs in the scheduled area must be excluded. Such losses may, however, be carried forward to subsequent years as an offset to additional reinvestment of earnings of incorporated AFNs in Schedule C.

Carryforwards authorized in 1968 under § 504 as in effect for that year may be used in the same or downstream scheduled areas in 1969 and succeeding years, with the exception that losses of Schedule C AFNs during 1968 may be carried forward only as an offset to reinvested earnings in Schedule C (§ 504(f)).

§ B504–3 Calculation of historical allowables under § 504(a).

(i) *Schedule A and B.* Section 504(a)(1) and (2) authorizes annual positive direct investment in Schedule A in an amount equal to 110 percent of a DI's average annual direct investment in that scheduled area during 1965 and 1966, and in Schedule B in an amount equal to 65 percent of a DI's average annual direct investment in that scheduled area during 1965 and 1966. The following examples illustrate calculation of historical allowables for Schedule A (under § 504(a)(1)) and for Schedule B (under § 504(a)(2)):

Example 1. DI made positive direct investment in Schedule A in 1965 of $3,000,000 and in 1966 of $1,000,000. Average annual direct investment in Schedule A for 1965–66 is $2,000,000 ($3,000,000 plus $1,000,000 divided by 2.) The amount of annual positive direct investment authorized under § 504(a)(1) is $2,200,000 (110 percent of $2,000,000). If Schedule B rather than Schedule A were involved, § 504(a)(2) would authorize $1,300,000 of annual positive direct investment (65 percent of $2,000,000).

Example 2. DI made positive direct investment in Schedule A during 1965 of $1,000,000 and negative direct investment in 1966 of $500,000. Average annual direct investment was, therefore, $250,000. DI made positive direct investment of $1,000,000 in Schedule

B during 1965 and negative direct investment of $2,000,000 in 1966. Thus, annual average investment was a negative amount (i.e., minus $500,000), treated as zero for purposes of calculating the historical allowable under § 504(a) (1), (2), or (3)(i). Accordingly, DI's historical allowable for Schedule A is $275,000; for Schedule B, it is zero. (These are DI's "basic" historical allowables, and the Schedule B allowable is subject to upward adjustment by "borrowing" from the Schedule A allowable if the conditions specified in § 504(c)(3) are satisfied. See § B504–4 (iii).)

(ii) *Schedule C.* Section 504(a)(3) authorizes annual positive direct investment in Schedule C during a year in an amount equal to the *lesser* of:

35 percent of a DI's average annual direct investment in Schedule C during 1965 and 1966; or

The DI's share of current total annual earnings of incorporated Schedule C AFNs multiplied by the "reinvestment ratio."

The "reinvestment ratio" is a fraction, the numerator of which is DI's share of reinvested earnings of all incorporated AFNs in Schedule C during 1964–66 (calculated according to § 306(b)), and the denominator of which is DI's share of total earnings of such AFNs during those years (calculated according to § 306(c)). The reinvestment ratio will be zero if the AFNs had no earnings during the base years, or if such earnings as they did have were not reinvested during the base years. While the numerator may exceed the denominator, the reinvestment ratio may not be greater than 1 (i.e., reinvested earnings during 1964–66 may be recognized for purposes of § 504(a)(3)(ii) in an amount no greater than 100 percent of total earnings for those years).

Example 3. During 1964 through 1966, DI had three wholly owned incorporated AFNs in Schedule C, that, in turn, had subsidiaries and branches located in other scheduled areas. Total earnings and reinvested earnings of DI's Schedule C AFNs were as shown below (000 omitted):

Year	Total earnings, as defined in § 306(c)	*plus*	Dividends and profits received (net of withholding taxes)	*less*	Dividends paid to DI (before withholding taxes)	*equals*	Reinvested earnings as defined in § 306(b)
1964	$500		$200		$200		$500
1965	600		100		400		300
1966	300		300		200		400
Total	1,400		600		800		1,200

Accordingly, the reinvestment ratio is 1,200,000/1,400,000, or 0.86. During 1965 and 1966, DI's average annual direct investment in Schedule C was $3,000,000. In 1969, DI's share of total earnings of the Schedule C AFNs is $1,500,000. If DI elects to be governed by § 504(a), positive direct investment of $1,050,000 will be authorized in Schedule C under § 504(a)(3); i.e., 35 percent of 1965–66 average annual direct investment ($1,050,000) is less than total earnings for 1969 times the reinvestment ratio ($1,500,000 × 0.86 = $1,290,000).

In any of the following circumstances, a DI will have a zero allowable in Schedule C under § 504(a)(3):

Zero or negative average annual direct investment during 1965–66;

Zero or negative reinvested earnings for 1964–66;

Zero or negative total earnings for 1964–66;

Zero or negative total earnings for the current year; or

No incorporated AFNs in Schedule C.

However, some relief in the above situations may be available in Schedule C under the carryforward provisions of §§ 504(d)(3), 504(e), and 504(f)(3), the § 504(b) earnings allowable or the upstream adjustment to the § 504(a) historical allowable provided for in § 504(c).

§ B504–4 Calculation of § 504(b) earnings allowables and § 504(c) adjustment to § 504(a) historical allowables.

The § 504(b) earnings allowable is intended to benefit DIs with small or no historical allowables under § 504(a), and the § 504(c) "upstream adjustment" to § 504(a) historical allowables is intended principally to aid DIs with small or no historical allowables in Schedule C. Either the earnings allowable or the upstream adjustment may be advantageous when 30 percent of earnings for the year immediately preceding the year of electing either the § 504 historical or earnings allowable exceeds a DI's historical allowables.

Accordingly, a DI with no Schedule C historical allowable may, nevertheless, be authorized to make positive direct investment in that scheduled area based on Schedule C earnings during the preceding year. Election of the earnings allowable under § 504(b), however, requires its use in all scheduled areas. Where historical allowables in Schedules A and B are substantial, it may not be to a DI's advantage to elect § 504(b) because the historical allowables in Schedules A and B could not then be utilized. Under these circumstances, the DI may benefit from the "upstream adjustment" to historical allowables provided by § 504(c), whereby the historical allowables can be shifted "upstream" to Schedule C from Schedules A and B.

(i) *Section 504(b): 30 percent earnings allowables.* A DI may elect, under § 502(a)(3), to be governed by the allowable provided in § 504(b), authorizing positive direct investment in each scheduled area equal to 30 percent of the DI's share of AFN earnings in such area during the immediately preceding year.

The earnings allowable is computed on the basis of a DI's annual earnings in a scheduled area, defined in § 504(b)(4) as the DI's share of "total earnings or total losses" of all incorporated AFNs in such scheduled area (determined as provided in § 306(c)) plus the DI's share of "net earnings or losses" of all unincorporated AFNs during the year in such scheduled area. Earnings or losses of Canadian affiliates are excluded from this computation.

Example 4. DI's 1968 share of AFN annual earnings are $1,000,000 in Schedule C and $1,500,000 in Schedule A. DI's Schedule B AFNs incurred aggregate losses during 1968 of $200,000. Schedule B "annual earnings" in 1968 are, therefore, a negative $200,000. If DI elects the 30 percent earnings allowable for 1969 under § 502(a)(3), allowables under § 504(b) will be $300,000 in Schedule C (30 percent of $1,000,000), zero in Schedule B (since DI had aggregate losses in Schedule B in 1968), and $450,000 in Schedule A (30 percent of $1,500,000).

Example 5. DI's sole AFN, a Schedule C branch (C), had earnings of $2,000,000 in 1968, that resulted in a net increase of $2,000,000 in C's net assets and, therefore, a positive net transfer of capital of $2,000,000 to C (under § 313(b)) and, assuming no other relevant transactions, a positive net transfer of capital of $2,000,000 to Schedule C (under § 313(c)). DI had no historical allowables in Schedule C under § 504(a)(3). Therefore, DI's positive net transfer of capital in 1968 was not authorized under § 504(a)(3), as in effect for that year (such section only permitted reinvestment of current earnings of incorporated AFNs in Schedule C). (The only positive net transfer of capital to Schedule C that DI could make in 1968 under § 504 would have been pursuant to the "excess dividend" provision of § 504(c)(1)(ii), as in effect for that year.) During 1969, however, a positive net transfer of capital to C would be authorized in the amount of $600,000 (30 percent of $2,000,000), under the 30 percent earnings allowable of § 504(b). (Alternatively, if DI elects the historical allowables under § 502(a)(2), a positive net transfer of capital to C would be authorized if there are Schedule A or B historical allowables available to "upstream" under § 504(c).)

(ii) *Section 504(c): "Upstream" use of allowables.* A DI electing under § 502(a)(2) to be governed by the schedular § 504(a) historical allowables obtains the benefit of an "upstream" adjustment of such allowables as required by § 504(c). Section 504(c)(1) and (2) automatically increases the Schedule C allowable if 30 percent of DI's annual earnings in Schedule C in the preceding year exceed the § 504(a) historical allowable in that scheduled area for the current year and if there are historical allowables in Schedules A and/or B. Section 504(c)(3) will operate in a corresponding manner to increase the Schedule B allowable, if any Schedule A historical allowable remains after the § 504(c)(1) adjustment.

The upstream adjustment is the lesser of (a) the excess of 30 percent of the preceding year's annual earnings in the upstream scheduled area over the historical allowable for that area, or (b) the aggregate amount of the historical allowables in the downstream schedules.

Although the "upstream" adjustment is automatic, § 504(d)(2) and (3) permits a DI to utilize allowables for positive direct investment in a "downstream" schedule.

Unused allowables carried forward from 1968 pursuant to § 504(f), or carried forward from 1969 or later years pursuant to § 504(d), are not available for adjustment upstream; only a current year's historical allowable calculated under § 504(a) may be used for this

purpose. On the other hand, the additional allowables in Schedules B and C resulting from an upstream adjustment may themselves be carried forward into succeeding years.

Example 6. In 1969, DI has § 504(a) historical allowables in each of the scheduled areas as shown on line (1) of the table below. DI also has a carryforward of unused allowables from 1968 in Schedule A of $1,000,000 (line (2) below). In 1968 DI's share of annual earnings of AFNs in each scheduled area was as shown on line (3) below. If DI elects, pursuant to § 502(a)(2), to be governed by § 504(a) for 1969, DI's historical allowables under § 504(a) are adjusted pursuant to § 504(c), thereby increasing the Schedule C allowable by $2,000,000. Of this amount, $1,500,000 is moved upstream from Schedule A and $500,000 is upstreamed from Schedule B, with corresponding reductions in the historical allowables for those schedules, as shown below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	$1,000	$2,500	$1,500	$5,000
(2) § 504(f) carryforward allowable from 1968	0	0	1,000	1,000
(3) 1968 annual earnings	10,000	4,000	2,000	16,000
(4) 30 percent of line (3)	3,000	1,200	600	4,800
(5) 1969 § 504(a) historical allowables after § 504(c) "upstream" adjustments	3,000	2,000	0	5,000

Presumably, DI will elect to use the adjusted historical allowables rather than the 30 percent earnings allowable under § 504(b), since (1) total historical allowables ($5,000,000) available under § 504(a) exceed total earnings allowables ($4,800,000) available under § 504(b); (2) the Schedule C allowable is as great and the Schedule B allowable greater under § 504(a) than under § 504(b); and (3) under § 504(d), DI may use any portion of the Schedule C adjusted historical allowable downstream in Schedule B or A, and any portion of the Schedule B allowable in Schedule A. While no part of the $1,000,000 carryforward in Schedule A from 1968 can be adjusted upstream, DI may use that as an additional allowable in Schedule A.

Since DI has an unadjusted historical allowable in Schedule C of $1,000,000, the amount moved to Schedule C from Schedules A and B is $2,000,000, i.e., the difference between 30 percent of 1968 earnings in Schedule C and the historical allowable in Schedule C. Note, however, that if the aggregate historical allowables for Schedules A and B had been less than $2,000,000, the Schedule C allowable could have been increased only by such lesser amount of aggregate historical allowables for Schedudes A and B. The total adjusted historical allowable of $3,000,000 in Schedule C can be used in Schedules C, B, or A in 1969 or in succeeding years in the same manner as is generally permitted for § 504 allowables in Schedule C.

Example 7. In 1969, DI has § 504(a) historical allowables in each scheduled area as shown in line (1), and DI's share of annual earnings in 1968 is as shown in line (2) of the table below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	$500	$2,000	$4,000	$6,500
(2) 1968 annual earnings	10,000	8,000	10,000	28,000
(3) 30 percent of line (2)	3,000	2,400	3,000	8,400
(4) 1969 § 504(a) historical allowables after § 504(c) upstream adjustments	3,000	2,400	1,100	6,500

Presumably, DI will elect to be governed by the 30 percent earnings allowable provided in § 504(b), since total allowables available to DI under the 30 percent earnings allowable ($8,400,000) exceed total historical allowables ($6,500,000 under § 504(a) and (c) and since the § 504(b) allowables in each scheduled area are as great or greater than in each schedule under § 504(b). The 30 percent earnings allowables are divided among the scheduled areas to reflect DI's share of 1968 annual earnings in each schedule. Whichever category of allowable is elected, DI may use such allowables "downstream" under § 504(d). For example, all allowables could be used in Schedule A.

Example 8. DI has no historical allowables under § 504(a). In 1968, DI had earnings in each scheduled area as shown in line (2) of the table below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	0	0	0	0
(2) 1968 annual earnings	$10,000	$6,000	$1,000	$17,000
(3) 30 percent of line (2)	3,000	1,800	300	5,100
(4) 1969 § 504(a) historical allowable after § 504(c) upstream adjustments	0	0	0	0

Presumably, DI will elect under § 502(a)(3) to compute its 1969 allowables based on the 30 percent earnings allowable under § 504(b). Section 504(a) and (c) would not be elected, since DI has no historical allowables. During 1969, however, DI may make positive direct investment in Schedule B or Schedule A in excess of the amounts indicated in line (3) above, by virtue of the "downstream" provisions of § 504(d). In other words, DI may carry down all or part of the Schedule B earnings allowable to Schedule A under § 504(d)(2), and all or part of the Schedule C earnings allowable to Schedule B or A under § 504(d)(3).

§ B504–5 Transfer or carryforward of schedular allowables.

Section 504(d) provides that the unused portion, if any, of the historical or earnings allowables provided in § 504 may be utilized in the same scheduled area in succeeding years to authorize positive direct investment in addition to that otherwise permitted, or may be used in other scheduled areas "downstream" in the same or succeeding years.

Schedule C allowables, to the extent unused in that area during the year, may be used in Schedules A and B in the same year or in Schedules C, B, and A in succeeding years. An unused allowable in Schedule B may be used in Schedule A in the current year or in Schedules B and A in succeeding years. An unused allowable in Schedule A may be used only in Schedule A in succeeding years.

The effect of the downstream and carryforward provisions is that, in addition to the amounts authorized by the basic historical or earnings allowable elected, a DI may make positive direct investment in each scheduled area up to the amount of any allowables that were available but unused in such area in prior years and that were available but unused in upstream areas in the same and prior years.

Both the historical allowable of § 504(a) and (c) and the earnings allowable of § 504(b) can be used downstream or carried forward. The amount that may be carried forward is the excess of authorized positive direct investment over direct investment actually made during a given year, whether positive or negative. If no positive direct investment is authorized but negative direct investment is made, then the amount of such negative direct investment may be used downstream or carried forward.

(i) *Schedule A carryforward.* The following examples illustrate § 504(d)(1), governing the carryforward of unused Schedule A allowables:

Example 9. DI elects the historical allowable for 1969. Under § 504(a)(1) the Schedule A allowable is $500,000, but DI makes positive direct investment of only $200,000. Under § 504(d)(1), DI may carry forward the $300,000 difference as an additional Schedule A allowable for use in succeeding years. If the historical allowable is elected again in 1970, DI may make positive direct investment of $800,000, consisting of the $500,000 authorized by § 504(a)(1) and the $300,000 authorized by § 504(d)(1).

Example 10. DI elects the historical allowable for 1969. Under § 504(a)(1), DI has a zero allowable in Schedule A. In 1969, DI's sole incorporated AFN in Schedule A has earnings of $500,000, pays DI a dividend of $500,000, and transfers $500,000 to DI. For 1969, DI has negative direct investment of $500,000 in Schedule A. Under § 504(d)(1), this may be used to offset a corresponding amount of positive direct investment in Schedule A in succeeding years.

In 1970, DI elects the 30 percent earnings allowable under § 504(b). Authorized positive direct investment in Schedule A in 1970 will be $650,000: $150,000 (30 percent of 1969 total earnings) plus $500,000 carryforward under § 504(d)(1).

If DI's historical allowable had been $100,000 in Schedule A, the carryforward allowable would have been $600,000 (the sum of the historical allowable of $100,000 and negative direct investment of $500,000).

If a DI had unused allowables in Schedule A in 1968, former § 504(b)(1) in effect for 1968 authorized their carryforward into 1969 and succeeding years. Present § 504(f)(1) specifically preserves these carryforwards.

(ii) *Schedule B downstream or carryforward.* Unused historical or earnings allowables in Schedule B may be carried forward in the same manner as those in Schedule A, as provided by § 504(d)(2).

The unused Schedule B allowables may also be used downstream in Schedule A in the same or succeeding years. Under former § 504(b)(2), unused 1968 Schedule B allowables authorized additional positive direct investment in Schedules B and/or A in 1969 and succeeding years. Present § 504(f)(2) specifically preserves these carryforwards.

Example 11. DI's Schedule B historical allowable is $1,000,000. Positive direct investment of $500,000 is made during 1968 in that schedule.

In 1969, DI elects the historical allowable and may make positive direct investment in Schedule B of $1,500,000, consisting of the $1,000,000 historical allowable under § 504(a)(2) plus the $500,000 carryforward from 1968 under § 504(f)(2). All or any part of this $1,500,000 not used in Schedule B during 1969 may be used in Schedule A in 1969 or in Schedule B and/or A in succeeding years, under § 504(d)(2).

(iii) *Schedule C downstream or carryforward.* Unused allowables in Schedule C may be used downstream or carried forward, pursuant to § 504(d)(3).

Section 504(f)(3) preserves the Schedule C carryforwards authorized under former § 504 in effect for 1968 and increases the scope of their use. During 1968, § 504(c)(1) authorized carryforward of Schedule C allowables unused as a result of "excess dividends", and § 504(c)(2) in effect for 1968 authorized carryforward unused as a result of negative net transfer of capital. Under present § 504(f)(3)(i), these 1968 carryforward allowables can be used by the DI to make positive direct investment in Schedules C, B, and/or A in 1969 and succeeding years in addition to that otherwise authorized.

"Total losses" of incorporated AFNs in Schedule C during 1968 may be carried forward to 1969 and succeeding years only as an authorization for additional reinvested earnings in Schedule C. See § 504(f)(3)(ii).

§ B504–6 Total losses of incorporated AFNs in Schedule C.

Section 504(e) provides that total losses (as defined in § 306(c)) of incorporated AFNs in Schedule C must not be taken into account in calculating positive direct investment in that scheduled area under § 504. However, this requirement does not affect the computation of allowables under § 504(a)(3) or § 504(b); it is applicable only in calculating the amount of direct investment made during a year and the extent to which the given allowable for such year has been used up. The principal purpose of § 504(e) is to prevent total losses of incorporated AFNs in Schedule C from being utilized in the current year or succeeding years to authorize transfers of capital to AFNs that result in positive direct investment in any scheduled area. Such losses may, however, be carried forward for use to authorize additional reinvested earnings of incorporated AFNs in Schedule C in subsequent years.

By operation of this section, total losses of incorporated Schedule C AFNs are, in effect assigned a value of zero for purposes of computing direct investment in Schedule C under § 306. (Accordingly, the formula suggested in § B306–6(iii) for determining reinvested earnings pursuant to § 306(b) would, if total earnings are zero or a negative amount, be:

$$RE = O - [(DP + dp) - (dr + pr)].$$

Example 12. DI has both incorporated and unincorporated AFNs in Schedule C. In 1969 DI elects the earnings allowable under § 504(b). The § 504(b) earnings allowable for 1969 in Schedule C is $500,000.

The incorporated AFNs have losses of $200,000 and pay no dividends. The unincorporated AFNs have earning of $600,000 and a net increase in assets of $600,000. At this point, DI has made positive direct investment of $600,000 because the $200,000 total losses are disregarded under § 504(e). In order to be in compliance for 1969, DI will have to reduce this positive direct investment by $100,000 through a negative transfer of capital or an offset using proceeds of long-term foreign borrowing. However, DI can carry the $200,000 loss forward into 1970 to authorize additional reinvested earnings of incorporated AFNs in Schedule C.

If the AFNs had been in Schedule A or B, positive direct investment would have been $400,000 ($600,000 net transfer of capital, plus total losses (negative reinvested earnings) of $200,000).

Example 13. DI has only incorporated AFNs in Schedule C, that earn $500,000 in 1969 and pay dividends of $700,000 to the DI. Thus, total earnings are $500,000, while reinvested earnings are negative in the amount of $200,000. If there are no other relevant transactions during the year, DI will have made negative direct investment of $200,000. This can be used to authorize positive direct investment (positive transfers of capital or reinvested earnings) of up to $200,000 in Schedule C in subsequent years, or in Schedules A and B in the same and subsequent years (see § 504(d)(3)). (This example illustrates the difference between losses of incorporated AFNs in Schedule C and negative reinvested earnings of such AFNs in terms of permissible use as a carryforward into subsequent years.)

Example 14. DI has a wholly owned incorporated AFN (C) in Schedule C with a branch (A) in Schedule A. DI elects the § 504(b) earnings allowable for 1969, pursuant to which the Schedule C allowable is $700,000. A earns $1,000,000.

On December 30, 1969, it appears that C will have losses of $200,000. Nevertheless, A may remit no more than $700,000 to C. By operation of § 306(b), profits received by an incorporated AFN from a branch in another scheduled area are considered to be reinvested earnings of the parent. Therefore, if A remits $700,000 to C, net reinvested earnings (and DI's positive direct investment) would be only $500,000. However, in computing positive direct investment in Schedule C under § 306, C's losses must be excluded; in effect, they are treated as earnings of zero. Therefore, positive direct investment in Schedule C would be the full $700,000 permitted under the § 504(b) earnings allowable for 1969.

If the incorporated AFN had been in Schedule B, however, its branch could have remitted $900,000, since the restrictions imposed with regard to losses in calculating positive direct investment apply only to Schedule C.

§ B504–7 Related provisions.

Section 504 allowables will be reduced pursuant to § 1003 in the amount of repayment of borrowing authorized by § 1002. (See also § 312(a)(6) and (7)).

Section 203(d)(1) requires a DI to expend or allocate available proceeds of long-term foreign borrowing, other than available proceeds that have been repatriated to the United States, before the DI is permitted to make any net transfer of capital under § 504 that results in positive direct investment.

Section 312(c)(1) provides, in effect, that a DI acquiring an equity interest in an AFN from another DI must assume the 1965–66 direct investment and the 1964–66 earnings experience of the divesting DI with respect to the AFN acquired. In addition, the acquiring DI is charged with direct investment made with respect to the AFN by the divesting DI during the year of acquisition.

See the discussion in § B1003–1(ii) concerning the order in which allowables are reduced by repayment charges incurred incident to repayment of long-term foreign borrowings.

B505—Transfers of Capital Between Affiliated Foreign Nationals

§ B505–1 Introduction.

Section 505 is primarily concerned with the treatment of transactions between AFNs of a DI in calculating the DI's annual net transfer of capital to a given scheduled area under § 313. It should be emphasized that § 505 affects only the calculation of transfers of capital and net transfers of capital under §§ 312 and 313; it has no bearing on the calculation of a DI's share in reinvested earnings of incorporated AFNs under § 306.

§ B505–2 Summary.

As a general rule, a transfer of capital from an AFN in one scheduled area to an AFN in another scheduled area will result under § 505 in (a) a decrease in the DI's net transfer of capital to the scheduled area of the AFN making the transfer and (b) an equivalent increase in the net transfer of capital to the scheduled area of the AFN to which the transfer was made.

Transfers between AFNs are so treated only if at least one of the AFNs is an "affiliate" of the DI. (As defined in § 903(a), an "affiliate" is an entity in which the aggregate of direct interests held by the DI and any of its other affiliates exceeds 50 percent.) Transfers between AFNs will effectively "net out" under § 505, if both AFNs are located in the same scheduled area, or if the net transfer of capital is computed worldwide (such as for purposes of the § 503 minimum allowable).

Section 505 provides special rules with respect to treatment of unincorporated AFNs. A transfer to or from an unincorporated AFN is attributed to the immediate parent of such AFN (§ 505(a)(1)); and a DI is deemed to have no share in the change in assets of an unincorporated AFN, for purposes of § 313(b), unless the immediate parent of such AFN is either the DI or an incorporated AFN that is an affiliate of the DI (§ 505(a)(4)).

Section 505 excludes from its operation charters of vessels (§ 505(a)(3)) and certain short-term trade credits between AFNs (§ 505(b)). In this connection, the term "time charter" as used in § 505(a)(3) is intended to apply to any

vessel charter for a period of time however denominated, including "bareboat" and "voyage" charters.

§ B505–3 Transfers by or to unincorporated AFNs attributed to immediate parent.

Section 505(a)(1) provides that, for purposes of § 505, a transfer of funds or other property by an unincorporated AFN to the DI or to another AFN is treated as a transfer by the immediate parent of such unincorporated AFN (provided that the transferee is not the immediate parent, and that the immediate parent is the DI or an incorporated AFN). Conversely, a transfer to an unincorporated AFN by the DI or by another AFN is treated as a transfer to the immediate parent of the unincorporated AFN (provided that the transferor is not the immediate parent, and that the immediate parent is the DI or an incorporated AFN). Section 505(c) defines the "immediate parent" of an unincorporated AFN owned directly by a DI as the DI itself, while the "immediate parent" of an unincorporated AFN owned indirectly by the DI is the intervening AFN that directly owns the unincorporated AFN.

Example 1. DI has a wholly owned incorporated AFN (A) in Schedule A that has a branch (B) in Schedule B. DI also has an incorporated AFN (C) in Schedule C. In 1969 B lends $100,000 directly to C. The $100,000 is deemed transferred by A (i.e., the immediate parent of B) to C.

If C loaned $100,000 directly to B, the $100,000 would be deemed transferred by C to A (i.e., the immediate parent of B). Likewise, if the $100,000 loan to B were made by a branch of C located in Schedule A, the $100,000 would be deemed transferred by C (i.e., the immediate parent of the branch in Schedule A) to A (i.e., the immediate parent of B).

Example 2. DI has a wholly owned subsidiary (A) in Schedule A that has a branch (B) in Schedule B. In 1969 DI lends $100,000 to B. The $100,000 is deemed transferred by DI to A, the immediate parent of B.

Section 505(a)(1) does not apply if both the transferor and the transferee are unincorporated AFNs and if both have the same immediate parent. Thus, a transfer from a Schedule A branch of a DI to a Schedule B branch of the same DI is not governed by § 505(a)(1); any net changes in net assets of the branches resulting from this transfer will be taken into account under § 313(b).

§ B505–4 Treatment of transfers deemed made under § 505(a)(1).

Section 505(a)(2) provides that any transfer of funds or other property deemed by § 505(a)(1) to be a transfer between the DI and an incorporated AFN shall be treated as a transfer of capital under § 312 if (a) the transaction would have constituted a transfer of capital under § 312 had the parties actually been the DI and the incorporated AFN or (b) the transfer is between AFNs of the DI and either the actual transferor AFN or actual transferee AFN is an "affiliate" of the DI as defined in § 903(a).

Under § 903(a) an "affiliate" of a person within the United States is any other person (other than an individual) in which the aggregate of direct interests (defined in § 901) owned by such person and any of its affiliates exceeds 50 percent.

Example 3. DI has a branch (A) in Schedule A and a 60-percent owned subsidiary (C) in Schedule C. In 1969 C lends $500,000 to A. The loan from C to A is deemed made by C to DI, the immediate parent of A, under § 505(a)(1)(ii). If the loan had actually been made by C to DI, it would have constituted a transfer of capital from C to DI under § 312(b)(1). Therefore, under § 505(a)(2), C has made a transfer of capital of $500,000 to DI.

If no other transactions take place during 1969, DI will have made a $500,000 negative net transfer of capital to Schedule C, under § 313(a), and a $500,000 positive net transfer of capital to Schedule A, under § 313(b), the latter being the net increase in A's assets as a result of the loan from C. (If A and C had been located in the same scheduled area, DI's net transfer of capital under § 313(c) during 1969 to such scheduled area would have been zero.)

Example 4. DI has a branch (B) in Schedule B and a wholly owned subsidiary (A) in Schedule A. During 1969 B lends A $100,000. Under § 505(a)(1), DI is deemed to have made the loan to A (a transfer of capital under § 312(a)(1)). Therefore, § 505(a)(2) applies, and DI has made a positive net transfer of capital to Schedule A of $100,000 (under § 313(a) and a negative net transfer of capital to Schedule B (under § 313(b)) of $100,000, the latter being the decrease in B's assets after making the loan to A. (If both AFNs had been in one scheduled area, DI's net transfer of capital under § 313(c) would have been zero.)

Example 5. DI has a wholly owned subsidiary (A) in Schedule A that has a branch (B) in Schedule B. In 1969 DI lends $100,000 directly to B. The transfer results in a $100,000 transfer of capital from DI to A by virtue of §§ 505(a)(1) and (2). To the extent that the transfer results in a net increase in the net assets of the branch, DI will have made a positive net transfer of capital to Schedule B under § 313(b). However, to the extent that DI's share in the increase in B's assets is not attributable to earnings, A is deemed to have made a transfer of capital to DI, according to § 505(a)(6). Therefore, for 1969, DI will have made a net transfer of capital to Schedule A of zero ($100,000 deemed transferred from DI to A, under §§ 505(a)(1) and (2), less $100,000 deemed transferred from A to DI, under § 505(a)(6)) and a net transfer of capital to Schedule B of $100,000.

§ B505–5 Transfers between incorporated AFNs.

Under § 505(a)(3), a transfer of funds or other property from one incorporated AFN to another incorporated AFN (including a transfer deemed under § 505(a)(1) to have been made between incorporated AFNs) is treated as a transfer of capital by the transferor AFN to the DI (equal to the full amount or value of the funds or other property transferred) and as a further transfer of capital in an equivalent amount from the DI to the transferee AFN. The rule applies only if either the transferor or the transferee AFN is an "affiliate" of the DI, as defined in § 903(a), and if the transfer would have constituted a transfer of capital under § 312 if made by the DI. If the transferor and transferee are in the same scheduled area, the transaction will "net out" (i.e., result in a net transfer of capital of zero) under § 313(a).

Example 6. During 1969 a wholly owned Schedule C subsidiary of DI (C) makes a $200,000 a 3-year loan to A, a wholly owned Schedule A subsidiary of DI. Under § 505(a)(3), the transaction is treated as a $200,000 transfer of capital from C to DI and a $200,000 transfer of capital from DI to A. Accordingly, the transaction reduces by $200,000 the net transfer of capital made by DI to Schedule C during 1969 and increases by an equivalent amount the net transfer of capital made by DI to Schedule A during the same year. The result would be the same even if neither of the AFNs were wholly owned by DI so long as DI owned more than a 50-percent interest in one of them. Thus, for example, the same result would be reached if DI owned 51 percent of A and only 10 percent of C, or vice versa, the theory being that DI can prevent the transaction if it owns more than a 50-percent interest in either of the AFNs.

Example 7. During 1969 a wholly owned Schedule A subsidiary (A) of DI leases machinery to B, a wholly owned Schedule B subsidiary of DI. The machinery has a value of $1,000,000 when leased and the lease expires in 1972. The transaction is treated under § 505(a)(3) as a $1,000,000 transfer of capital from A to DI and a $1,000,000 transfer of capital from DI to B (see § 312(a)(8)).

Current rental payments under the lease will not involve transfers of capital; rather, they will reduce the earnings of B and increase the earnings of A. When the machinery is returned to A at the end of the lease term, there will be a transfer of capital from B to DI (equal to the residual value of the machinery) and an equivalent transfer of capital from DI to A.

Example 8. During 1969 a wholly owned Schedule C subsidiary (C) of DI borrows $1,000,000 from a foreign bank. Repayment of the loan is guaranteed by B, a wholly owned Schedule B subsidiary of DI. In 1971 B is called upon to pay $500,000 under its guarantee and makes such payment. The transfer is treated under § 505(a)(3) as a $500,000 transfer of capital from B to DI and a $500,000 transfer of capital from DI to C. Any resulting positive direct investment in Schedule C would be generally authorized under Subpart J of the regulations if DI had filed an appropriate certificate under § 1002(b) within 10 days after the guarantee was made.

Example 9. DI has a wholly owned subsidiary (A) in Schedule A, that has a branch (B) in Schedule B. DI also has a wholly owned subsidiary (C) in Schedule C, that has a branch (X) in Schedule A. During 1969 X lends $100,000 directly to B. Under § 505(a)(1) and (3), the transaction results in a $100,000 transfer of capital from C to DI and a $100,000 transfer of capital from DI to A. The transfer of funds from X is treated as a transfer from the immediate parent (i.e., C) under § 505(a)(1)(i). The transfer of funds to B is treated as a transfer to its immediate parent (i.e., A) under § 505(a)(1)(ii). Since the transfer is deemed to be from C to A, § 505(a)(3) provides that it is treated as a § 312(b) transfer of capital from C to DI, and then as a § 312(a) transfer of capital from DI to A.

Under § 313(b), DI has made a positive net transfer of capital to Schedule B of $100,000 (the amount of net increase in B's assets) and a negative net transfer of capital to Schedule A (the amount of net decrease in X's assets). Under § 505(a)(5), DI is deemed to have made a § 312(a) transfer of capital to C (the amount of net decrease in X's assets not attributable to losses); and under § 505(a)(6), A is deemed to have made a § 312(b) transfer of capital to DI of $100,000 (the amount of net increase in B's assets not attributable to earnings).

Assuming no other transactions during 1969, DI will report a negative net transfer of capital of $100,000 to Schedule A; a positive

net transfer of capital of $100,000 to Schedule B and a zero net transfer of capital to Schedule C.

§ B505–6 Purchase and sale of interests in other AFNs.

Section 505(a)(3) also covers the purchase and sale by incorporated AFNs of interests in other AFNs.

The following general rules are applicable to such transactions:

(i) *Purchase of AFN.* If an incorporated AFN acquires from an unaffiliated foreign national an interest in a foreign national that becomes an AFN of the parent DI as a result of the acquisition, the full purchase price is treated as a transfer of capital by the acquiring AFN to the DI and as a further transfer of capital by the DI to the acquired AFN. However, if the acquisition is made after December 31, 1967, and the acquired AFN has subsidiaries and/or branches in other scheduled areas that become separate AFNs of the DI as a result of the acquisition, the transfer of capital by the DI should be allocated among the different scheduled areas involved in a manner fairly reflecting the respective values of the direct and indirect interests acquired. As a general rule, an allocation based on the respective book values of the entities involved is acceptable. The result is the same whether the acquiring AFN pays cash or gives a debt obligation in exchange for the interests acquired. If, however, the consideration for the acquisition is stock of the acquiring AFN, no transfer of capital to or from the DI will result.

(ii) *Sale of AFN.* If an incorporated AFN sells an interest in another AFN to an unaffiliated foreign national, there will be a transfer of capital by such other AFN to the DI in an amount equal to the purchase price and a further transfer of capital by the DI to the selling AFN in an amount equal to the cost or other basis to the selling AFN of the interest sold. Any capital gain or loss realized by the selling AFN from the sale will be included in determining the earnings of the AFN for the period involved. An allocation of the transfer of capital to the DI among different scheduled areas will be required (generally, based on relative book value of the components divested) if the interest sold was acquired after December 31, 1967, and the AFN in which the interest is sold has subsidiaries and/or branches in different scheduled areas that are separate AFNs of the DI. The result is the same whether the selling AFN receives cash or a debt obligation of the purchaser in exchange for the sale. If, however, consideration for the sale is stock in a foreign national that becomes an AFN as a result of the transaction, no transfer of capital to or from the DI will result.

Example 10. During 1969 a wholly owned Schedule B subsidiary (B) of DI purchases from an unaffiliated foreign national, for $1,000,000 in cash, all of the stock of a Schedule C corporation (C). Under § 505(a)(3), the transaction is treated as a $1,000,000 transfer of capital from B to DI and a $1,000,000 transfer of capital from DI to C. Accordingly, the transaction reduces by $1,000,000 the net transfer of capital made by DI to Schedule B during 1969 and increases by an equivalent amount the net transfer of capital made by DI to Schedule C during the same year.

If B had paid only $500,000 in cash and gave a 5-year note to the seller for the $500,000 balance of the purchase price, the result would be the same. No transfers of capital will be involved when B subsequently makes payments on the note.

The result would also be the same even if DI owned only 51 percent of the Schedule B AFN. Note, however, that if DI owned an interest of 50 percent or less in the Schedule B AFN, the transaction would not involve any transfer of capital to or from DI, regardless of the amount of the interest in the Schedule C corporation acquired by the Schedule B subsidiary, since the DI is presumed in this situation to lack control over the transaction. Note also that if the acquiring and the acquired corporation were in the same scheduled area, the transaction would effectively "net out."

Example 11. DI has a wholly owned Schedule B subsidiary (B) that has a wholly owned Schedule C subsidiary (C). During 1969, B sells all stock of C, that had been purchased for $500,000, to an unaffiliated foreign national for $1,000,000 in cash. Under § 505(a)(3), the transaction is treated as a $1,000,000 transfer of capital from C to DI and a $500,000 transfer of capital from DI to B. The $500,000 profit (measured by historical cost) realized by B will be taken into account in calculating that subsidiary's 1969 earnings.

If B had received $500,000 in cash and a five-year note of the purchaser for the $500,000 balance of the purchase price, the result would be the same. No transfers of capital will be involved when B subsequently receives payments on the note.

The result would be the same even if DI owned only 51 percent of the Schedule B AFN. Note, however, that if DI owned an interest of 50 percent or less in the Schedule B AFN, the transaction would not involve any transfer of capital to and from DI, since the DI is presumed in this situation to lack control over the transaction.

§ B505–7 Transactions between AFNs not involving transfers of capital.

Transfers between AFNs will not involve transfers of capital to or from the DI unless the transfer, if actually made by the DI, would be a transfer of capital under § 312. Consequently, the transactions described in § 312(c) will not result in transfers of capital when carried out by AFNs.

(i) *Stock for stock transactions and reorganizations.* As a general rule, a transfer of capital to or from a DI will not be involved under § 505(a)(3) if (a) an AFN of a DI transfers an interest in a lower-tier AFN and receives in exchange stock of a foreign corporation that becomes an AFN of the DI as a result of the transaction or if (b) there is a recapitalization, reorganization, merger or consolidation involving one or more AFNs. Although a foreign enterprise may cease to be an AFN of a DI as a result of the transaction, the transaction does not affect the amount of direct investment made by the DI during the base period years in the scheduled area of such foreign enterprise.

Example 12. B, a wholly owned Schedule B subsidiary of DI, transfers to an unaffiliated foreign national all of the stock of a wholly owned Brazilian subsidiary in exchange for all of the stock of a French corporation. The transaction does not result in any transfer of capital to or from DI. However, as a result of the transaction DI becomes a DI in the French corporation and ceases to be a DI in the Brazilian corporation. (The result would be the same if the other party to the transaction were also an AFN of DI.)

Example 13. A wholly owned German subsidiary of DI is reincorporated in the United Kingdom (or, alternatively, merged into a wholly owned U.K. subsidiary of the DI). Neither transaction results in any transfer of capital to or from the DI. However, the business of the newly created U.K. subsidiary (or the U.K. subsidiary after the merger) that is conducted in Germany will be a branch of the U.K. subsidiary and may, therefore be a separate unincorporated Schedule C AFN of DI by operation of § 304.

(ii) *Transfers of certain intangibles.* A transfer of property from one AFN to another AFN of the same DI before or after January 1, 1968, in exchange for a debt or equity interest in the transferee AFN does not involve a transfer of capital to or from the DI (regardless of the form of the transfer or the consideration exchanged therefor) if the property transferred consists of patents, copyrights, trademarks, trade names, trade secrets, technology, proprietary processes, proprietary information, or similar intangibles or any rights or interests therein or applications or contracts relating thereto (see § 312(c)(11)). No deduction for amortization or any like charge with respect to such an intangible transferred after January 1, 1968, shall be made against earnings in calculating the earnings of the transferee AFN.

(iii) *Vessel charters.* Any charter of a vessel for a period of time made or deemed made by an incorporated AFN to another incorporated AFN of the DI is excluded from treatment as a transfer of capital under § 505(a)(3). This exclusion applies to voyage and bareboat charters a well as to time charters, notwithstanding a statement to the contrary contained in the FEDERAL REGISTER notice of August 8, 1969 (34 F.R. 12884) accompanying promulgation of amended § 505(a)(3).

Example 14. During 1969 a wholly owned Panamanian subsidiary (A) of DI, charters one of its ships to C, a wholly owned German subsidiary of the DI, for a period of 6 months. There is no transfer of capital to or from DI under § 505(a)(3).

(iv) *Short-term trade credits between AFNs.* Section 505(b) provides, in effect, that the extension or satisfaction of a short-term trade credit between non-Canadian AFNs (see § 1103(c)) of a DI will not result in a transfer of capital to or from the DI, or in any net change in the net assets of an unincorporated AFN extending or receiving such credit for purposes of § 313(b). Section 505(b) applies to trade credits that are extended in the ordinary course of business pursuant to arm's-length terms and are in fact paid within 12 months after they are extended.

Example 15. On September 1, 1969, a wholly owned French subsidiary (C) of DI sells equipment to A, a Brazilian subsidiary of DI in the ordinary course of business pursuant to arm's-length terms. The $1,000,000

purchase price is payable in full by March 1, 1970. There is no transfer of capital to or from DI. (The result would be the same if the sale of services, rather than the sale of goods, were involved.) If, however, no part of the purchase price is paid by September 1, 1970, there would be a $1,000,000 transfer of capital from C to DI and from DI to A, deemed to have occurred on September 1, 1970, or on such sooner date as it became apparent that A would not be able to make payment prior to September 1, 1970. (The result would be the same if the sale of services, rather than the sale of goods, were involved.)

§ B505–8 Transactions between AFNs and their branches in different scheduled areas.

The net transfer of capital by a DI to unincorporated AFNs in any scheduled area during any period will generally equal the DI's share in the aggregate net increase or decrease, during the year, in such AFNs' aggregate net assets (see § 313(b)). This calculation is based on changes in the net assets of all unincorporated AFNs located in such scheduled area, including those in which DI has an indirect interest, e.g., a branch of an AFN that is headquartered in another scheduled area. However, § 505(a)(4) provides that a DI is chargeable with a net transfer of capital only to unincorporated AFNs the immediate parent of which is either the DI or another AFN that is an "affiliate" of the DI as defined in § 903(a).

While a DI's share of the change in net assets of a § 903(a) affiliate incorporated AFN's branch is automatically included in the DI's net transfer of capital to the scheduled area where the branch is located, certain changes in branch assets also result in a corresponding transfer of capital from or to the parent AFN. Section 505(a) (5) and (6) provides that a corresponding transfer of capital from or to the parent occurs when the net increase or decrease in branch assets cannot be attributed to earnings or losses of the branch.

Example 16. DI has a wholly owned AFN in France (Schedule C), that has a branch in Brazil (Schedule A). DI has no other AFNs. During 1969 the branch has earnings of $50,000 but its net assets increase by $100,000 because of a transfer of $50,000 from the AFN to the branch. This results, under § 313(b), in a $100,000 positive net transfer of capital to Schedule A (DI's share of the net increase in branch assets) and, under § 505(a)(6), in a $50,000 negative net transfer of capital to Schedule C (the amount by which DI's share in the net increase in branch assets ($100,000) exceeded DI's share in the branch's earnings ($50,000)).

If DI owned only 60 percent of the French AFN, the result would be a $60,000 positive net transfer of capital to Schedule A (60 percent of $100,000) and a $30,000 negative net transfer of capital to Schedule C (60 percent of $50,000). If DI owned 50 percent or less of the French AFN, no net transfer of capital would be involved.

The following are variations of the facts given above:

(a) *Positive earnings-decrease in assets.* If the branch had 1969 earnings of $50,000 but its net assets decreased by $150,000 because of a remittance of $200,000 to the parent AFN, this would result, under § 313 (b), in a $150,000 negative net transfer of capital to Schedule A (DI's share of the $150,000 net decrease in branch assets) and, under § 505(a)(5), in a $150,000 positive net transfer of capital to Schedule C (DI's share of the $150,000 net decrease in branch assets not attributable to losses). Moreover, the full amount of branch earnings ($50,000) would be treated as having been distributed to the Schedule C parent and would be deducted from dividends paid by the parent to DI (see § B306–6(iii)). If DI owned only 70 percent of the French AFN, the result would be a $105,000 negative net transfer of capital to Schedule A (70 percent of $150,000) and a $105,000 positive net transfer of capital to Schedule C (70 percent of $150,000). Moreover, $35,000 of the earnings of the branch (DI's 70 percent share of the $50,000 branch earnings) would be treated as having been distributed to the Schedule C parent and should be deducted from dividends paid by the parent to DI. If DI owned 50 percent or less of the French AFN, no net transfer of capital would be involved; however, an appropriate percentage of the earnings of the branch would still be treated as having been distributed to the Schedule C parent and would be deducted from dividends paid by the parent to DI.

(b) *Zero earnings-decrease in assets.* If the branch had 1969 earnings of zero and net assets decreased by $100,000 because of a remittance of $100,000 to the parent AFN, this would result, under § 313(b), in a $100,000 negative net transfer of capital to Schedule A (DI's share of the $100,000 net decrease in branch assets) and, under § 505(a)(5), in a $100,000 positive net transfer of capital to Schedule C (DI's share of the $100,000 net decrease in branch assets not attributable to losses).

(c) *Loss-no change in assets.* If the branch incurred a loss of $100,000 during 1969, but there was no change in net assets because of a transfer of $100,000 from the parent AFN, this would result, under § 505(a)(6), in a $100,000 negative net transfer of capital to Schedule C (DI's share of the $100,000 loss).

(d) *Loss-increase in assets.* If the branch incurred a loss of $100,000 during 1969 but had a $50,000 increase in net assets because of a transfer of $150,000 from the parent AFN, this would result, under § 313(b), in a $50,000 positive net transfer of capital to Schedule A (DI's share of the $50,000 net increase in branch assets) and, under § 505(a)(6), in a $100,000 negative net transfer of capital to Schedule C (DI's share of the $50,000 net increase in net assets plus DI's share of the $100,000 loss).

(e) *Decrease in assets smaller than loss.* If the branch incurred a loss of $100,000 during 1969 while net assets decreased by only $25,000 because of a transfer of $75,000 from the parent AFN, this would result, under § 313(b), in a $25,000 negative net transfer of capital to Schedule A (DI's share of the $25,000 net decrease in branch assets) and, under § 505(a)(6), in a $75,000 negative net transfer of capital to Schedule C (the amount by which DI's share of the loss ($100,000) exceeds DI's share of the net decrease in branch assets ($25,000)).

(f) *Decrease in assets greater than loss.* If the branch incurred a loss of $100,000 during 1969 while net assets decreased by $250,000 because of a remittance of $150,000 to the parent AFN, this would result, under § 313(b), in a $250,000 negative net transfer of capital to Schedule A (DI's share of the $250,000 net decrease in branch assets) and, under § 505(a)(5), in a $150,000 positive net transfer of capital to Schedule C (DI's share of the $250,000 net decrease in branch assets not attributable to the $100,000 loss).

B506—Incremental Earnings Allowable

§ B506–1 Introduction.

In addition to allowables available pursuant to §§ 503 and 504, commencing in 1970 a DI will also be eligible for an "incremental earnings allowable" pursuant to § 506.

Generally, this additional allowable may benefit only DIs that have AFNs with an unusually high growth rate of earnings. The provision was originally intended to facilitate certification of borrowings under Subpart J for DIs experiencing difficulty in forecasting (on the basis of future AFN earnings) that debt repayments could be made within the applicable limits of § 503 or § 504. However, the § 506 allowable is not limited to this particular situation and is available for positive direct investment in any scheduled area, whatever the purpose.

§ B506–2 Summary.

The incremental earnings allowable, if any, available to a DI will be the amount by which 40 percent of incremental earnings (defined in § 506(a)(3)) for the current year exceed the greatest amount of positive direct investment authorized in all scheduled areas pursuant to § 503, § 504(a), or § 504(b) without regard to allowables carried forward from prior years. For purposes of this calculation, it is immaterial whether the DI has elected to be governed by § 503 or by § 504 for the current year.

The additional positive direct investment authorized by § 506 may be made in any or all scheduled areas.

In computing positive direct investment in Schedule C under § 506, losses of the DI's incorporated AFNs in Schedule C must be excluded. (See § 506(d).)

Unused § 506 allowables may be carried forward to succeeding years.

§ B506–3 Calculation of incremental earnings allowables.

The following steps are required to calculate the incremental earnings allowable:

Compute current "aggregate annual earnings" ("annual earnings," as defined in § 504(b)(4)) of all incorporated and unincorporated AFNs for all scheduled areas combined, excluding Canada;

Compute "base period aggregate annual earnings;" i.e., 50 percent of the sum of aggregate annual earnings for the years 1966 and 1967 (but not less than zero); and

Determine the current year's "incremental earnings," if any, by subtracting base period aggregate annual earnings from aggregate annual earnings for the year involved.

The incremental earnings allowable is the amount by which 40 percent of the DI's incremental earnings exceeds the greatest amount of positive direct investment authorized in all scheduled areas for the current year (excluding any carryforward of allowables from prior years, and without regard to any reduction under § 1003, or to the § 502 election actually made).

The following examples illustrate calculation of the § 506 allowables:

Example 1. DI has an AFN (A) in Pakistan. In 1966 A had losses of $100,000 and in 1967 earnings of $500,000. DI's base period aggregate annual earnings under § 506(a)(2) is $200,000 ($500,000−$100,000 divided by 2).

Assume that DI's historical and earnings allowables under § 504 (a) and (b) are each less than $1,000,000. In 1970 A has earnings of $3,400,000.

DI's incremental earnings allowable under § 506 in 1970 is $280,000, calculated as follows (000 omitted):

1970 aggregate annual earnings	$3,400
Deduct: Base period aggregate annual earnings	−200
Incremental earnings	3,200
40 percent of incremental earnings	1,280
Deduct: Largest of available allowables (i.e., § 503)	−1,000
Incremental earnings allowable	280

Example 2. DI has six AFNs: Two incorporated in Schedule A, two incorporated in Schedule B and two branches in Schedule C. In 1966 the AFNs had aggregate annual losses of $200,000 and in 1967 aggregate annual earnings of $100,000. DI's base period aggregate annual earnings are, therefore, zero.

Assume that DI's historical allowables in Schedules A and B are, respectively, $300,000 and $400,000. The Schedule C historical allowable is zero, because the AFNs are not incorporated (see § 504(a)(3)). Accordingly, DI's § 504(a) allowables for all scheduled areas are $700,000.

In 1969 the AFNs had annual earnings of $1,500,000 in Schedule A, $1,200,000 in Schedule B, and $1,000,000 in Schedule C. Therefore, DI's 30 percent earnings allowable for 1970 is $450,000 in Schedule A, $360,000 in Schedule B and $300,000 in Schedule C; a total of $1,110,000 worldwide. In 1970 the AFNs have aggregate annual earnings of $4,000,000.

DI's incremental earnings allowable for 1970 is $490,000, computed as follows (000 omitted):

1970 aggregate annual earnings	$4,000
Deduct: Base period aggregate annual earnings	0
Incremental earnings	4,000
40% of incremental earnings	1,600
Deduct: Largest of available allowables (i.e., § 504(b))	−1,110
Incremental earnings allowable	490

§ B506–4 Application of the § 506 allowable.

Unlike the allowables provided in § 504 (a) and (b), which are schedular, the incremental earnings allowable applies on a modified worldwide basis. In other words, the additional direct investment authorized by § 506 can be made entirely in one scheduled area, or can be divided among two or more scheduled areas. Any unused § 506 allowable may be carried forward to subsequent years for use in any one or more scheduled areas, without regard to the election made under § 502.

Use (as contrasted with amount) of the § 506 allowable may vary, depending upon whether the DI elects to be governed by § 503 or by § 504 for the year in question. The election establishes whether direct investment is to be computed worldwide or by schedules, and whether total losses of Schedule C incorporated AFNs (see § 504(e)) must be excluded. These factors, in turn, influence the manner in which the incremental earnings allowable can be utilized.

Example 3. In 1970 DI elects to be governed by § 504(a), and has historical allowables of $500,000, $600,000, and $400,000 in Schedules A, B, and C, respectively. DI also has an incremental earnings allowable of $100,000.

DI makes positive direct investment of $750,000 in Schedule A, $400,000 in Schedule B and $450,000 in Schedule C, all of which is authorized. In Schedule A, $500,000 is authorized by § 504(a), $200,000 of the Schedule B historical allowable is carried "downstream" pursuant to § 504(d), and $50,000 of the § 506 allowable is used. In Schedule C, $400,000 is authorized by § 504 and the remaining $50,000 is authorized by § 506.

Example 4. DI has incorporated AFNs in Schedules A and C, with a § 504(a) historical allowable in Schedule A of $700,000 and a carryforward allowable of $450,000 in Schedule C pursuant to § 504(d). In 1970 DI has an incremental earnings allowable of $200,000.

During 1970 DI makes positive direct investment (consisting of reinvested earnings) in Schedule A of $700,000. In Schedule C, DI makes a positive net transfer of capital of $700,000. DI's Schedule C AFNs have total losses of $200,000.

If DI should elect to be governed by § 503 in 1970, the foregoing amount of positive direct investment would be authorized. Positive direct investment under § 503 would be $1,200,000 ($700,000+$700,000−$200,000). Of this amount, $1,000,000 would be authorized by § 503, and $200,000 by § 506.

Under § 504, however, DI would be out of compliance (i.e., in violation of § 201). Positive direct investment would be $1,400,000 ($700,000 in Schedule A and, because § 504 (e) requires total losses of incorporated AFNs in Schedule C to be excluded, $700,000 in Schedule C). Of the $700,000 positive direct investment in Schedule C, $450,000 would be authorized by § 504 and $200,000 would be authorized by § 506, but DI would have no allowable to cover the remaining $50,000. Under the foregoing circumstances, and assuming no other transactions, DI presumably would elect, on Form FDI–102F for 1970, to be governed by § 503.

§ B506–5 Carryforward of the § 506 allowable.

Unused § 506 allowables may be carried forward to subsequent years for use in any scheduled area. Section 506(c) provides that, to the extent any positive direct investment in any year is authorized by § 503 or § 504, it shall be deemed to have been made first pursuant to those sections.

Example 5. DI elects to be governed by § 503 in 1970 and has an incremental earnings allowable of $200,000. During 1970, DI makes positive direct investment worldwide of $1,100,000. DI has a § 506 carryforward of $100,000.

Example 6. In 1970 DI has historical allowables of $700,000 in Schedule A and $700,000 in Schedule C. DI also has a carryforward allowable of $100,000 in Schedule A pursuant to § 504(d)(1) and an incremental earnings allowable under § 506 of $100,000. During 1970, DI makes positive direct investment of $800,000 in Schedule A and $700,000 in Schedule C. The § 504(d)(1) carryforward allowable will be deemed to have been utilized to offset the $100,000 positive direct investment that exceeds DI's $700,000 historical allowable in Schedule A, and DI will be permitted to use the $100,000 incremental earnings allowable in any scheduled area in subsequent years.

§ B506–6 Miscellaneous.

Repayment charges incurred under § 1003 in connection with repayment of certain borrowings will, starting in 1970, reduce the § 506 incremental earnings allowable to the extent that such repayments exceed the DI's worldwide § 503 allowable, or exceed the DI's total § 504 allowables. (See § 1003.)

B801—Applications for Specific Authorizations or Exemptions or for Interpretive Opinions

§ B801–1 Introduction.

Section 201 prohibits DIs from making positive direct investment in AFNs in excess of amounts generally authorized by the regulations, or as may be specifically authorized by OFDI. Section 801 provides that DIs may file applications for (a) specific authorizations to effect positive direct investment otherwise prohibited, (b) specific exemptions from complying with particular requirements of the regulations, and (c) interpretive opinions concerning particular factual situations, including those involving the possibility that a DI may have to apply for a specific authorization or exemption.

§ B801–2 Procedures.

Applications for specific authorizations or exemptions and requests for interpretive opinions must be submitted in writing and must comply with instructions contained in the Revised Instructions for Submitting Applications for Specific Authorizations or Exemptions or for Interpretive Opinions (the "Instructions"), issued by OFDI on June 6, 1969, and amended and supplemented from time to time (see appendices hereto).

If a DI is uncertain whether it may or may not require a specific authorization or exemption concerning a particular transaction, a combined request for an interpretive opinion or, in the alternative, a specific authorization or exemption may be submitted.

§ B801–3 Particular authorizations or exemptions.

Note that the Instructions set forth particular requirements concerning applications for specific authorizations or exemptions regarding (a) export credit extended by a DI to its AFNs (see Part I.C. as revised Oct. 24, 1969, and attached as Appendix E hereto), (b) reinvested earnings of AFNs (see Part I.D.), (c) foreign equity financing of direct investment (see Part I.E.), (d) the requirement to repatriate to the United States allocated proceeds of long-term foreign borrowing (see Part I.F.), and (e) triangular or parallel financing arrangements (see the Sept. 24, 1969, supplement to the instructions, Appendix B hereto). The following comments supplement the information contained in the instructions (as revised) regarding particular specific authorizations or exemptions.

(i) *Export credit extended by a DI to AFNs.* DIs may apply for specific authorization to increase the amount of export credit extended to AFNs as of the end of the current year over the amount of export credit that had been extended by the DI to AFNs as of the end of the immediately preceding year. For these purposes, the term "export credit" generally includes arrangements for financing exports of goods by the DI to AFNs, such as advances to, notes from and open accounts with AFNs, which result in transfers of capital by the DI to AFNs. It is immaterial whether the goods exported by the DI were produced by the DI or by other suppliers, or whether the goods exported are to be sold by the AFN to foreign customers or used by the AFN itself.

Specific authorization relief is generally granted only if total exports by the DI to AFNs increase during the current year, or can be expected to increase, over the immediately preceding year, and only to the extent that goods are sold to AFNs on credit terms generally consistent with the DI's export financing experience with respect to AFNs during the years 1965 through 1968. Relief is normally granted on a worldwide basis.

Each request for export credit relief will be considered on its own merits and on the facts presented. The decision of OFDI will be influenced by reasonable alternatives available to the applicant and the manner in which the DI's general allowables provided by Subpart E have been used. DIs having a general allowable that is adequate to finance a normal rate of export credit expansion, or DIs merely seeking to extend longer credit terms to AFNs, may not qualify for specific authorization relief.

(ii) *Foreign equity financing of direct investment.* Application may be for specific authorization to defer, in whole or in part, charges to Subpart E allowables resulting from transfers of capital arising from equity financing of direct investment, such as in connection with equity financings of the types described below.

(a) Specific authorization may be sought to allow deferral of charges to Subpart E allowables that would otherwise result from the use of convertible preferred shares issued by an international finance subsidiary (see § 323), or the use of proceeds of sale of such shares, for direct investment purposes. To obtain such relief, the DI must demonstrate that the Interest Equalization Tax would be applicable if the shares were sold to residents or nationals of the United States, and that an exemption from withholding of U.S. income taxes will apply to the dividend payments to foreign nationals.

Ordinarily, the conversion right will involve common stock of the DI. When conversion takes place, the DI's Subpart E allowables will be charged in the year following conversion with an amount equal to the value of each preferred share converted. Such value will be stated in the specific authorization and will generally be determined as of the closing date for the issuance of the preferred shares.

In general, the terms and features of the convertible preferred shares should be designed to encouraged retention of such shares by foreign holders.

(b) Specific authorization may also be sought to defer for a limited period the charge to Subpart E allowables that would otherwise result from exchange of a DI's common stock in limited dollar amounts for the stock or assets of a foreign business entity held by a foreign family group or a limited number of foreign nationals. Express restrictions on sale, transfer or other disposition of DI's common stock by the recipients for a period of at least three years must be demonstrated. Accordingly, an agreement with the foreign recipients evidencing such restrictions must be executed, whether or not an "investment letter" is given by the recipients for Securities Act purposes. The DI's Subpart E allowables will be charged, in the year the restrictions expire or as otherwise provided in the specific authorization, with an amount equal to the value of DI's shares as originally established in the specific authorization.

In addition, DI must submit clear evidence of ability to report quarterly as to retention of the shares abroad. The burden of proof will rest on DI to show that shares have not been sold, transferred or otherwise disposed of during the "lock-up" period.

(c) Also, applications may be submitted for specific authorization to defer a portion of the charge to Subpart E allowables resulting from foreign equity financing transactions involving exchanges of DI's stock for stock or assets of foreign entities in transactions that may not qualify under category (b) above, because of large dollar amounts of equity securities and/or large receiving groups, or because assurance cannot be given that the U.S. securities will be retained abroad for the requisite period of time.

In cases qualifying for this relief, 30 percent of the value of the DI's equity securities exchanged, as stated in the specific authorization, will be charged as a transfer of capital in the year in which the direct investment transaction is effected. In each of the five succeeding years, 10 percent of the original value of the shares exchanged will be charged as a transfer of capital. Therefore, in addition to permitting "installment" charges against Subpart E allowables, this form of relief will completely exempt 20 percent of the transfer of capital involved.

(iii) *Offshore finance subsidiaries.* An "offshore finance subsidiary" is a corporation organized under the laws of a foreign country, all the share capital of which (except for directors' qualifying shares) is directly or indirectly owned by a DI and the principal business of which is to borrow funds from foreign nationals, other than AFNs of the DI, and to invest such funds in debt or equity securities of the DI or AFNs of the DI. Although a corporation organized under the laws of a foreign country does not technically come within the definition of an international finance subsidiary (see § 323(a)), OFDI will generally issue a specific authorization permitting the DI and its offshore finance subsidiary to be treated as a single person within the United States for some purposes of the regulations, subject to appropriate conditions. In particular, as a result of such specific authorization, the proceeds of long-term borrowings of an offshore finance subsidiary from unaffiliated foreign nationals may, subject to appropriate conditions, be treated as if they are "proceeds of long-term foreign borrowing," as defined in § 324(c), and "available proceeds," as defined in § 324(d): *Provided*, That the borrowings by the offshore finance subsidiary would have qualified as "long-term foreign borrowing," under §§ 324(a), 324(e), and 1106, if made by the DI or an international finance subsidiary. (See § 323(a).)

B900—Subpart I (§§ 901–907)

§ B900–1 Introduction.

Subpart I of the regulations (§§ 901–907) deals with direct investment by persons within the United States who are related, affiliated or associated with other persons within the United States. These relationships are described as affiliated groups (§ 903), family groups (§ 904), associated groups (§ 905), and ownership of direct investors (§ 906). Section 907 provides rules for reporting direct investment transactions involving such groups. Sections 901 and 902 define the terms "direct interests" and "indirect interests," which are significant in determining:

Existence of a DI-AFN relationship under §§ 304 and 305;

A DI's share in reinvested earnings of an incorporated AFN under § 306(b);

Whether an AFN is an "affiliate" of a DI, so that transfers made by or to the AFN should be attributed to the DI under § 505;

Existence of an affiliated or associated group under §§ 903 and 905; and

Availability and consequences of an election under § 906(b)(1).

Members of an affiliated group or a family group are treated as a single entity for reporting and compliance purposes under the regulations. An affiliated group consists of a U.S. person and all of such person's U.S. affiliates (see § 903). A family group consists of all family members residing in the same household (see § 904). An affiliated or family group files a consolidated Form FDI–101 (Base period Report), FDI–102 (Cumulative Quarterly Report), and FDI–102F (Annual Report); members of the group do not file reports individually (see § 907(d)).

Two or more U.S. persons acting in concert to own or acquire an aggregate 10 percent or greater interest in a foreign national constitute an associated group. Each member of an associated group is treated as a separate DI in the AFN acquired (the "group AFN"), and is

required to report individually unless certain requirements pertaining to consolidated reporting are met (see §§ 905(b)(3) and 907(c)(2)).

Direct investment transactions of a DI normally will not be attributed to any other person merely because such other person owns an interest in the DI. However, an option under § 906(b)(1) is available to direct owners of a DI, whereby each such owner may elect to be put in the position of the DI as to direct investment, allowables and foreign balances, in accordance with such owner's proportionate interest in the DI.

§ B901–1 Definition of direct interest.

A direct interest in a corporation, partnership, joint venture, trust or other entity is defined in § 901 as an interest that is not owned through an intervening person or chain of persons.

(i) *Direct interest in a corporation.* The amount of a direct interest in a corporation is determined by the percentage held of total combined voting power (represented by all outstanding voting securities of the corporation). Voting power means the power to vote presently in an election of directors of the corporation or, if the corporation does not have directors, in the election or appointment of persons performing management control functions. Treasury shares and shares reserved for issuance upon the exercise of options, warrants, conversion or other similar rights, and shares owned by a wholly owned subsidiary, are not deemed outstanding for purposes of determining the magnitude of a direct interest.

Example 1. As of January 1, 1969, a corporation (X) has 100,000 outstanding shares of capital stock, 60,000 of which are class "A" common, 20,000 are class "B" common, and 20,000 are preferred. In the election of directors, each class A carries three votes and each class B share carries one vote. Holders of preferred stock are entitled to vote on major matters such as mergers, consolidations, etc., or amendments to the certificate of incorporation affecting the preferred stock; they are not entitled to vote in the election of directors unless four quarterly dividend payments are in arrears. Y, an individual, owns 8,000 shares of class A common stock, 6,000 shares of class B common stock and 500 shares of preferred stock. No dividends on the preferred stock are in arrears as of January 1, 1969. Y's direct interest in X as of January 1, 1969, is 15 percent, since Y owns 15 percent of the total combined voting power of X (30,000 of a total 200,000 votes).

Beneficial ownership of voting stock is ordinarily the test of interest in a corporation for determining whether one is a DI, but ownership of such stock is not necessarily determinative of a DI's share in earnings of an incorporated AFN for purposes of § 306 because a corporation may have two classes of stock outstanding that share equally in earnings but do not have equal voting rights. Examples in this Bulletin involving incorporated AFNs are based on the assumption that the DI's voting interest and interest in earnings of the AFN are coextensive.

(ii) *Direct interest in unincorporated business activities.* The amount of a direct interest in an unincorporated enterprise, such as a partnership or joint venture, is usually determined by the percentage share of profits to which one is entitled. If one is entitled to a fixed amount rather than a percentage of profits, or the amount is for any reason variable, the direct interest normally should be calculated by reference to the portion of profits actually distributed or distributable at the close of the most recently ended annual accounting period of the organization, assuming there was no change in the interest since that time. If neither of the foregoing rules appropriately reflects the direct interest in an unincorporated entity, the amount of direct interest should be calculated by whatever method will produce a reasonable result.

Example 2. On January 1, 1969, P, a partnership, has three partners (A, B, and C). Under the partnership agreement, A is entitled to the first $100,000 of distributed profits, and if there are additional profits, he is entitled to receive 5 percent of all such additional profits. B is entitled to 50 percent of profits after the first $100,000 up to $500,000 of total profits and to 35 percent of all profits over $500,000. C is entitled to 45 percent of profits after the first $100,000 up to $500,000 and 60 percent of all profits over $500,000. Between January 1 and December 31, 1969, P distributed $1,000,000 to the partners. A received $145,000, B received $375,000, and C received $480,000. As of January 1, 1970, A's interest in the partnership is 14.5 percent, B's interest is 37.5 percent, and C's interest is 48 percent.

The result would be the same if no distribution were made but the profits were retained and added to the capital accounts of the partners in the same proportion.

Example 3. P and Q, two U.S. corporations, enter into a joint venture agreement for the purpose of constructing and owning an apartment house in Rome. The land on which the building is to be constructed is owned by R, an Italian national, who leases it to P and Q for a rental equal to 20 percent of the annual net rental received by P and Q from the tenants of the building. P and Q are to share equally the remaining 80 percent of net rentals received. The apartment house is an AFN of P and Q, and each has a 50 percent direct interest in the AFN.

If R were a person within the United States, the result would be the same. In addition, the real estate would be an AFN of R in which R has a 100 percent direct interest. If, however, R were not only a person within the United States but a party to the joint venture agreement, P, Q, and R would be members of an associated group (see § 905). The land and building would be an AFN of P, of Q, and of R, in which P and Q each have a 40 percent interest and in which R has a 20 percent interest.

If Z, an Italian corporation, becomes a member of the construction joint venture and will share equally with P and Q net rentals of the apartment house after R has received his share, the apartment house would be an AFN of P and of Q, and P and Q each would have a 33⅓ percent direct interest in that AFN.

§ B902–1 Definition of indirect interest.

An indirect interest in a corporation, partnership, joint venture, trust or other entity is an interest owned through an intervening person or chain of persons. The amount of an indirect interest is calculated by multiplying together the direct interests of each person in the chain.

Example 4. DI owns 50 percent of outstanding voting stock of P, a U.S. corporation. P owns 70 percent of outstanding voting stock of C, a French corporation, while C owns 50 percent of outstanding voting stock of B, a United Kingdom corporation. DI has a 50 percent direct interest in P, a 35 percent indirect interest in C (50 percent × 70 percent), and a 17.5 percent indirect interest in B (35 percent of C's 50 percent interest).

Example 5. DI has a 17.5 percent interest in B, a United Kingdom corporation. B has a manufacturing branch in Brazil (A) and is entitled to 80 percent of the profits of C, a partnership organized under the laws of Germany. DI has a 17.5 percent indirect interest in a (17.5 percent × 100 percent) and a 14 percent indirect interest in C (17.5 percent × 80 percent).

§ B903–1 Definition of affiliate.

As defined in § 903(a), an "affiliate" of a person within the United States is any other person in which the aggregate of direct interests (defined in § 901) owned by the former person and its affiliates exceeds 50 percent. An "affiliate" may be a U.S. person or a foreign national.

Example 6. X is a U.S. corporation. X has a 51 percent direct interest in corporation Y. Y is an affiliate of X. X has a 30 percent direct interest in corporation Z, and Y has a 25 percent direct interest in Z. Z is an affiliate of X, since X and Y (affiliate of X) together have more than 50 percent direct interest in Z. The location of Y and Z is immaterial. Y has a 50 percent direct interest in corporation A. A is not an affiliate of X.

Example 7. An individual resident and citizen of the United States (P) directly owns 51 percent of outstanding voting stock of corporation A, 10 percent of voting stock of corporation C, and all voting stock of corporation Y. Corporation A directly owns 30 percent of outstanding voting stock of corporation B, and corporation B directly owns 45 percent of outstanding voting stock of corporation C. Corporation Y directly owns 60 percent of outstanding voting stock of corporation Z, and corporation Z directly directly owns 40 percent of outstanding voting stock of corporation B. All corporations are affiliates of P.

(i) *Consequences of being an affiliate.* A U.S. person and all U.S. affiliates constitute an "affiliated group" (see § 903(b)). When a U.S. person has an AFN that is an "affiliate" under § 903(a), transactions between the affiliate AFN and any other AFN of the U.S. person are subject to § 505.

(ii) *Definition of affiliated group.* As defined in § 903(b), an "affiliated group" is a person within the United States and all such person's "affiliates" who are persons within the United States.

Example 8. P is an individual resident and citizen of the United States. P has a 60 percent direct interest in X, a U.S. corporation. X has a 60 percent interest in C, a French corporation. X and C are affiliates of P. P and X are an affiliated group. C is not a member of the affiliated group, because C is not a person within the United States.

(iii) *Treatment of members of an affiliated group as a single person.* Except for purposes of an election under § 906(b)(1), all members of an affiliated group are treated as a single person (see § 903(c)). Consequently, the foreign balances, direct investment transactions and allowables of each member are attributed to the group. The group files a single

report for each period for which a report is required, aggregating reportable items of all members of the group (see § 907 (d)). In addition, the group, as a whole, makes one election of allowables under § 502.

Example 9. Since 1963 X, a U.S. corporation, has owned 51 percent of outstanding stock of another U.S. corporation Y. X and Y are members of an affiliated group, under § 903(b). Since 1963 X has had a wholly owned subsidiary (B) in Schedule B and Y has had a 10-percent-owned subsidiary (A) in Schedule A. B is X's sole AFN and A is Y's sole AFN. During 1965–66 X made positive direct investment of $1,000,000 in Schedule B and lent $300,000 to A. Y made positive direct investment in Schedule A of $1,300,000. X and Y, as an affiliated group, filed a single Form FDI–101 showing the following § 504(a) historical allowables (000 omitted):

Schedule A:	
Positive direct investment for 1965–66 ($1,300 plus $300)	$1,600
§ 504(a) allowable ($1,600 × 50% × 110%	880
Schedule B:	
Positive direct investment for 1965–66	1,000
§ 504(a) allowable ($1,000,000 × 50% × 65%	325

In 1969, X and Y elect the historical allowable of § 504 (a) and (c). X and Y make positive direct investment in Schedules A and B in an amount aggregating the amounts authorized pursuant to the foregoing calculations. Unused allowables will be available for carryforward or carryover under § 504 by the affiliated group.

Positive direct investment made during the year by X and Y will be reported on a single Form FDI–102 and Form FDI–102F.

Example 10. A, B, C, and D constitute an affiliated group. During 1965 and 1966, average end-of-month liquid foreign balances subject to § 203(c) held by each member of the group were as follows: A—$100,000; B—$50,000; C—$25,000; and D—none. The Form FDI–101 filed by the group should show an average end-of-month liquid foreign balance of $175,000 (the sum of the monthly 1965–66 averages of each member of the group).

An affiliated group may itself be a member of an "associated group", as defined in § 905, if any member of the affiliated group acts in concert with another U.S. person (not a member of the same affiliated group) in acquiring or owning an interest in a foreign national.

Example 11. X is a member of an affiliated group. X enters into an agreement with an unrelated U.S. corporation, Y, pursuant to which X and Y each acquire 5 percent of the outstanding voting stock of C, a Netherlands corporation, from an unrelated foreign national. C thereby becomes an AFN both of the affiliated group and of Y.

§ B904–1 Definition of family group.

A "family group" is defined in § 904 as an individual within the United States, his spouse (unless legally separated), and all relatives of such individual or his spouse residing with such individual. As with an affiliated group, all members of a family group are deemed a single person within the United States and file one report under § 602 aggregating all foreign balances, direct investment transactions and other reportable items attributable to each member of the group. Members of a family group cannot elect to report separately (see § 907–1(iv)).

Example 12. H, a U.S. citizen and resident, lives in New York City with his wife (W) and two teenage daughters (P and Q). H and W also have two sons (R and S). R is 20 years of age, unmarried, attends undergraduate college in California, and is supported by H and W; S is 28 years of age, married, with a child of his own, is self supporting, and maintains his own home. W's grandfather (G) resides with H and W. H, R, and S each own 5 percent of outstanding voting stock of a French corporation (C). W who is wealthy in her own right, is a joint owner with her grandfather, G, of a substantial parcel of commercial real property (K) in the United Kingdom. H, W, P, Q, R, and G are members of a family group and X and K are AFNs of the group. S is not a member of the family group. The family group should file a single report under § 602 for each reporting period, aggregating the direct investment transactions during the relevant period between each member of the group and X and K.

A family group may itself be a member of an affiliated group as defined in § 903, or of an associated group as defined in § 905.

Example 13. Same facts as in Example 12, except that H owns 100 percent of outstanding voting stock of a U.S. corporation (U), and H and W each own 30 percent of outstanding voting stock of another U.S. corporation (V). The family group (i.e., H, W, P, Q, R, and G), together with U and V, constitute an affiliated group and are subject to the rules governing reporting and other obligations of affiliated groups.

Example 14. Same facts as in Example 12. In 1969, H, a son (S), and T, are an unrelated U.S. person, enter into an agreement pursuant to which each purchases 4 percent of outstanding voting stock of a Japanese corporation (J) from an unrelated foreign national for $100,000 in cash, or a total of $300,000. The family group together with S and T, are an associated group under § 905(a). J becomes an AFN of the family group as well as of S and of T, and each has made a $100,000 transfer of capital to J (Schedule B).

Example 15. A U.S. citizen and resident (X) owns all outstanding voting stock of a French corporation (C). In 1967, X establishes an inter vivos trust under New York law and contributes all stock of C to the trust. The trust beneficiaries are X's three minor children, all of whom reside with X. X and a domestic bank are cotrustees of the trust and X expressly retains the right to revoke or amend the trust without consent of the trust beneficiaries. No associated group is involved in this situation. However, X and his children are members of a family group, and the family group and the trust are members of an affiliated group. C is an AFN of the affiliated group.

§ B905–1 Definition of associated group.

An "associated group" is defined in § 905(a) as two or more persons within the United States, including individuals, legal entities, affiliated groups or family groups, if: (a) Such persons act in concert, pursuant to an express or implied agreement or understanding, to own or acquire interests in the same corporation or partnership organized under the laws of a foreign country or in the same business venture conducted within a foreign country; (b) the interests in the foreign enterprise owned or acquired are not owned or acquired through a corporation, partnership (other than a joint venture) or trust within the United States, whether or not such corporation, partnership, or trust is organized or created for the purpose of owning or acquiring the interests; and (c) the aggregate interests in the foreign enterprise owned or acquired would, if owned or acquired by one U.S. person, cause such person to be a DI.

The basic consequences of being designated an associated group are: (a) Each member of an associated group is deemed a DI in the foreign enterprise owned or acquired (referred to as the group AFN) even though no single member of the group may own a 10 percent or greater interest in the group AFN; (b) the amount of positive direct investment that each member of the associated group is authorized by § 503 to make in the group AFN is limited (see § B905–1 (iv)); and (c) reporting requirements imposed by § 602 must be complied with by each member of the group unless the election set forth in § 907(c)(2) is properly made.

A person owning a direct or indirect interest in a U.S. corporation or partnership is not a member of an associated group merely because the U.S. corporation or partnership directly owns an interest in a foreign enterprise.

Example 16. In 1968, three U.S. citizens and residents (A, B, and X) enter into an agreement pursuant to which they form and capitalize a Delaware corporation (D) and D purchases all outstanding voting stock of a French corporation (C) from an unrelated foreign national (N), for $300,000 in cash. A, B, and X each acquire 33⅓ percent of the voting stock of D. A, B, and X are not members of an associated group although, as a result of the purchase, C will become an AFN of each of A, B, X, and D. Unless an election under § 906(b)(1) is made with respect to D, the transfer of capital to C (Schedule C), resulting from purchase of C's stock, as well as all subsequent direct investment transactions between D and C, will be charged to and reported by D alone (see § B907–1(iii)).

Example 17. Same facts as in Example 16, except that A, B, and X do not organize D, but enter into an agreement pursuant to which each of them directly acquires 8 percent of outstanding voting stock of C from N for $100,000 in cash, or a total of $300,000. A, B, and X are members of an associated group and each will be charged with a $100,000 transfer of capital to C (Schedule C). Moreover, unless A, B, and X exercise the election provided in § 907(c)(2) to report as a group, A, B, and X will each file separate Forms FDI–102 and FDI–102F.

Example 18. In 1969, three U.S. corporations (A, B, and C) enter into a joint venture agreement for the purpose of developing and exploiting an oil concession in Iran. The agreement is made in New York and provides that it is to be governed by New York law. Under the pertinent concession agreement, the Iranian government is entitled to 50 percent of all oil produced, while A, B, and C are to share the remaining 50 percent. A, B, and C are members of an associated group; the joint venture in Iran is an AFN of each.

(i) *Acting in concert pursuant to an agreement or understanding.* An associated group exists only if two or more persons within the United States act in

concert pursuant to an agreement or understanding. The agreement may be oral or written, and an agreement may be implied from the surrounding facts and circumstances even when no express agreement is involved. The most common examples of an express agreement are a joint venture or stockholders' agreements with respect to the stock and management of the foreign enterprise involved. The mere signature, adherence to or acceptance of the articles of incorporation or bylaws of a foreign corporation will not, of themselves, be considered an express or implied agreement or understanding to act in concert within the meaning of § 905(a). The result may be different, however, if the articles or bylaws contain provisions ordinarily contained in a stockholders' agreement. Similarly, the purchase of stock of a foreign corporation by U.S. underwriters and dealers or U.S. investors in connection with a bona fide public offering, and the execution and performance of customary agreements in connection with such offering, will not, of themselves, be considered such an agreement or understanding.

Example 19. In 1969, two U.S. corporations (A and B) each acquire 30 percent of outstanding voting stock of a foreign corporation (F). Simultaneously, A and B enter into a written stockholders' agreement concerning the stock so acquired and the participation of A and B in the management of F. A and B are an associated group.

Example 20. F is a publicly owned foreign corporation. Seventy-five percent of F's outstanding voting stock is owned by foreign nationals, the remaining 25 percent being owned by U.S. citizens and residents no one of whom owns more than 2 percent. In this situation, in the absence of any facts indicating that the U.S. shareholders acted, or are acting, in concert with respect to the purchase of F's stock or the voting of such stock, or with respect to the management of F, the U.S. shareholders are not an associated group.

Example 21. In 1967, a U.S. citizen and resident (A) became interested in purchasing majority control of a foreign corporation (F). A contacted 20 other U.S. citizens and residents with a view toward inducing them to purchase stock of F as an investment. Such persons were unknown to each other, but were informed by A that he was organizing a group of U.S. investors to purchase control of F. A informed such other persons that F was being mismanaged and that with proper management F would be a very profitable venture. Thereafter, A purchased 20 percent of outstanding voting stock of F and 10 other U.S. citizens and residents contacted by A each purchased 2 percent of F's voting stock. No express written agreement was entered into among A and the other U.S. shareholders with respect to such purchase or with respect to any other matter concerning F, but each of the U.S. shareholders voted for A's nominees for directors. A and the other U.S. shareholders are an associated group.

(ii) *Aggregate 10 percent interest.* An associated group exists only if the aggregate of direct and indirect interest in the foreign enterprise acquired or owned by the U.S. persons acting in concert amounts to at least 10 percent.

Example 22. In December 1967, three U.S. citizens and residents (A, B, and C) entered into an agreement pursuant to which each purchased 3 percent of the outstanding voting stock of a foreign corporation (F). A, B, and C are not an associated group, since the aggregate of their interests in F is only 9 percent. In June 1968, in furtherance of the 1967 agreement, A, B, and C each purchased an additional 2 percent of outstanding voting stock of F. Accordingly, A, B, and C became members of an associated group in June 1968. Whether an associated group would have resulted if only one of them had purchased an additional 2 percent of the outstanding voting stock of F, and, if so, as of what date they became members of such group, would depend on all the facts and circumstances surrounding the purchase.

(iii) *Members of associated group as separate DIs.* Unlike members of an affiliated or family group, members of an associated group are not treated as a single person under the Regulations. The principal effect of the associated group rule is to establish a DI-AFN relationship. Each member of an associated group is considered a separate DI in the foreign national (referred to as the "group AFN") owned by the group, with the following consequences:

Allowables must be individually elected under § 502 and calculated separately by each member of the group.

For compliance purposes (§ 201), each member of an associated group must compute direct investment during 1968 and subsequent years without reference to direct investment transactions of other members of the group. Long-term foreign borrowing by one member of an associated group may not be offset against the net transfer of capital or positive direct investment of other members of the group. However, if two or more members of an associated group elect to be governed by the minimum allowable of § 503, aggregate positive direct investment in the group AFN by those particular members may not exceed $1,000,000.

Foreign balances held by a member of an associated group are calculated without reference to foreign balances held by other members. Under § 905(b)(1), a U.S. person who is a DI by virtue of the associated group rules, but does not own a 10 percent or greater interest in a foreign national, is not subject to the restrictions on liquid foreign balances of § 203(c) and is not required to report such balances (see § 907(c)(1)).

Separate reports are required from members of an associated group, unless they elect to report as a group under § 907(c)(2). However, even if the members elect to report as a group, compliance is still measured individually. Members of an associated group may be exempt from reporting on Forms FDI-101 (Base Period Report) and FDI-102 (Cumulative Quarterly Report), pursuant to the instructions to such forms, but only if the associated group as a whole would be exempt if an election under § 907(c)(2) had been made.

Example 23. In 1965, three U.S. corporations (A, B, and C) enter into an agreement pursuant to which each purchases 5 percent of the outstanding voting stock of a United Kingdom corporation (K) from an unaffiliated foreign national for $500,000 in cash, or a total of $1,500,000. The following also occurs during 1965 and 1966: A lends $200,000 to K, $50,000 of which is repaid in 1966; B sells $500,000 in merchandise to K on open account, the open account indebtedness of K to B being $300,000 at the end of 1966; C contributes $200,000 of equipment to the capital of K; during 1965 and 1966, K earns an aggregate of $3,000,000 and pays dividends of $2,000,000, of which A, B, and C each receive $100,000. A, B, and C had no other AFNs during 1965 or 1966, individually or collectively. A, B, and C are an associated group and K is a group AFN of the associated group. Assuming an election to report as a group is not made under § 907(c)(2), A, B, and C will each submit a separate Form FDI-101 showing the following § 504(a)(2) historical allowables in Schedule B (000 omitted):

Corporation A:		
Purchase of stock of K		$500
Loan to K		200
Repayment by K		(50)
Share in reinvested earnings of K (5% of $3,000 earnings minus $100 dividends)		50
Total positive direct investment		700
Allowable (65% of 50% of $700)	$227.50	
Corporation B:		
Purchase of stock of K		500
Open account indebtedness		300
Share in reinvested earnings of K		50
Total positive direct investment		850
Allowable (65% of 50% of $850)	$276.25	
Corporation C:		
Purchase of stock of K		500
Contribution to capital		200
Share in reinvested earnings of K		50
Total positive direct investment		750
Allowable (65% of 50% of $750)	$243.75	

If A, B, and C had not acted in concert in acquiring the stock of K, none of them would have an historical allowable in Schedule B since a DI-AFN relationship would not have existed. Also, if A, B, and C elected to report as a group under § 907(c)(2), they would file a single Form FDI-101 showing aggregate positive direct investment of $2,300,000 in Schedule B during 1965 and 1966 and an aggregate Schedule B allowable of $747,500. However, since compliance by each member of an associated group is measured separately, the FDI-102F would have to indicate in a supplemental statement the portion of aggregate positive direct investment and the portion of the aggregate allowable allocable to each member of the group (see § B907-1(iv)).

Example 24. A, B, and C are members of an associated group, each owning 5 percent of one group AFN. A, B, and C have no other AFNs. By virtue of § 905(b)(1), A, B, and C are not required to limit their liquid foreign balances because none has the 10 percent interest necessary to be an individual DI. In 1968, A, B, and C each made positive direct investment under § 504 of $300,000, or a total of $900,000. During 1969, A, B, and C are exempt from filing quarterly reports on Form FDI-102, provided their total direct investment (negative or positive) does not exceed $1,000,000 from January 1, 1969, through the end of any reporting period. (See General Instruction B to Form FDI-102.)

(iv) *Associated group investment under § 503.* Section 905(b)(2) provides that no positive direct investment is authorized under § 503 to any member of an associated group during a year is aggregate positive direct investment by all members of the group during the year in all group AFNs exceeds $1 million. Thus, each member of an associated group electing to be governed by § 503 must meet two separate tests: First, aggregate positive direct investment by such member in all AFNs (including, but

not limited to, group AFNs of the associated group) may not exceed $1 million; and second, aggregate positive direct investment in group AFNs by such member and all other members of the associated group electing to be governed by § 503 may not exceed $1 million. In computing aggregate positive direct investment under § 905(b)(2), aggregate annual losses of group AFNs must be excluded in accordance with § 503(b). Positive direct investment in group AFNs by members of the associated group electing to be governed by § 504 and positive direct investment pursuant to the incremental earnings allowable of § 506 are not included in computing direct investment for purposes of § 905(b)(2).

Example 25. Three U.S. corporations (A, B, and C) are members of an associated group. A Brazilian corporation (F) is a group AFN of the associated group. A, B, and C each own a 33⅓ percent interest in F. A, B, and C have no other AFNs during 1969 and have no § 504 allowables. Accordingly, they each elect to be governed by the § 503 allowable for 1969. During 1969 A, B, and C each lend $500,000 to F on a long-term basis; F incurs a loss of $500,000 and pays no dividends to A, B, or C. As a result, A, B, and C have each made positive direct investment of $500,000 in Schedule A during 1969. F's loss is not available as an offset in calculating positive direct investment under § 503(b). Since aggregate positive direct investment ($1,500,000) exceeds $1,000,000, A, B, and C are out of compliance for 1969.

Example 26. X, Y, and Z are members of an associated group, each owning a 33⅓ percent interest in a group AFN (B) in Schedule B. During 1969, X and Y elect to be governed by § 503. Z elects to be governed by § 504(a), pursuant to which he has a historical allowable of $400,000 in Schedule B. X transfers $600,000 to B; Y transfers $400,000 and Z transfers $500,000. B has losses of $300,000. All such direct investment is authorized. X and Y together have made $1,000,000 of positive direct investment in B, an amount authorized by § 503 and § 905(b)(2). Z has made positive direct investment of $400,000 ($500,000 less Z's share of B's losses ($100,000)), an amount authorized by § 504. (Z's investment is not included in applying § 905(b)(2) to direct investment made by X and Y.)

Example 27. X and Y are members of an associated group with respect to a group AFN (G). X has a wholly owned AFN (A) and Y has a wholly owned AFN (B). X and Y each elect to be governed by § 503 for 1969. X makes positive direct investment of $300,000 and G and $600,000 in A. Y makes positive direct investment of $700,000 in G and $300,000 in B.

All such positive direct investment is authorized. The investment made by X in A and G ($900,000) is authorized by § 503. The investment made by Y in B and G ($1,000,000) is authorized by § 503. The investment made by X and Y in G ($1,000,000) is within the limitation of § 905(b)(2).

(v) *Related AFNs.* Although U.S. persons acting in concert must ordinarily own or acquire an interest in the same foreign enterprise before an associated group can exist, there may be instances where ownership or acquisition of interests in different foreign enterprises by U.S. persons acting in concert will be sufficient to constitute such persons an associated group. This will be true where the businesses conducted by the different foreign enterprises involved are so related as to justify treating them as a single economic unit for purposes of the regulations.

Example 28. A Danish citizen and resident (D) owns all the stock of two Danish corporations (E and F). E is engaged in the manufacture of widgets, while F markets the widgets produced by E. The management of E and F is substantially identical. Two U.S. citizens and residents (A and B) enter into an agreement with D pursuant to which A purchases all the stock of E from D, while B purchases all the stock of F from D. A and B have an understanding that the businesses of E and F will be operated in the same integrated manner as they have in the past and that the net profits of E and F will ultimately be split equally between them. A and B are an associated group, and E and F are group AFNs of the associated group.

Example 29. Three U.S. citizens and residents (A, B, and C) enter into an agreement to establish a chain of six drive-in restaurants in continental Europe. Each restaurant is to be established as a separate foreign corporation, and A, B, and C will each own 100 percent of two such corporations. A, B, and C are an associated group, and all of the restaurant corporations are group AFNs of the associated group.

(vi) *Effect of § 505.* Under § 505, certain transfers between AFNs are treated as transfers by the transferor AFN to the DI and as further transfers by the DI to the transferee AFN. This rule applies only if either of the AFNs involved is an "affiliate" of the DI (defined in § 903(a)). AN AFN is not considered an "affiliate" of the DI unless the DI (itself or together with other affiliates) owns more than 50 percent of the AFN. If, however, in the case of a group AFN of an associated group (a) no one member of the group (either itself or together with other affiliates of such member) owns more than 50 percent of the AFN, but (b) the members of the group as a whole (either themselves or together with their affiliates) own more than 50 percent of the AFN, then (c) the group AFN will be treated as an affiliate of each member of the group for purposes of § 505.

Example 30. A, B, C, and D are members of an associated group and F, a French corporation, is a group AFN of the associated group. A, B, C, and D each own 25 percent of the outstanding stock of F. F owns all outstanding stock of J, a Japanese corporation. F lends $100,000 to J on a long-term basis. F and J are considered to be affiliates individually of A, B, C, and D for purposes of § 505. Accordingly, under § 505(a)(3), F is deemed to have made a transfer of capital to A, B, C, and D in the amount of $25,000 each and A, B, C, and D are each deemed to have made a transfer of capital to J in the amount of $25,000.

If A were to own 70 percent of F's stock and B, C, and D each held 10 percent, F and J would be considered affiliates of A, but not of B, C, or D, for purposes of § 505. Accordingly, the $100,000 loan from F to J would be treated under § 505(a)(3) as a $100,000 transfer of capital from F to A, and as a further $100,000 transfer of capital from A to J.

(vii) *Reporting.* Unless an election to report as a group is made under § 907(c)(2), members of an associated group should file separate Forms FDI–101, FDI–102, and FDI–102F reflecting such member's individual direct investment transactions (see § 905(b)(3)). If members of a group file separately, the FDI–102F filed by each member of an associated group should indicate on a supplemental statement the names of all other members of the associated group and the names of group AFNs. If positive direct investment in group AFNs is made under § 503, each member of the group electing to be governed by § 503 should submit a supplemental statement indicating his positive direct investment and the positive direct investment of the other members of the group in group AFNs.

§ B906–1 Ownership of DIs.

A U.S. person may be a DI by reason of either a direct or an indirect interest in an AFN (see § 305). For example, if A and B (U.S. corporations) each own 50 percent of C (a U.S. corporation), and C has a wholly owned AFN (X), all three corporations are DIs with respect to X. C has a 100 percent direct interest, and A and B each have a 50 percent indirect interest in X (see §§ 901 and 902). However, unless A and B elect under § 906(b)(1) to be treated separately under the regulations, C's direct investment transactions will ordinarily not be deemed to have been made by A or B (see § 906(a)). In other words, direct investment transactions between C and X will normally be charged to and reported by C alone (the owner of the direct interest in the AFN).

Example 31. A, B, C, and D each own 25 percent of E. During 1965–66 E made positive direct investment in Schedule A of $2,000,000, and A made positive direct investment of $800,000 in Schedule A. In addition, E maintained average end-of-month liquid foreign balances of $100,000, A maintained $50,000, and D maintained $80,000.

Absent an election under § 906(b)(1), E must file a Form FDI–101 (Base Period Report) showing $2,000,000 of positive direct investment in Schedule A during 1965–66 and a Schedule A historical allowable of $1,100,000 ($2,000,000×50%×110%). E's Form FDI–101 should also reflect base-period average end-of-month liquid foreign balances of $100,000. A would file a Form FDI–101 showing positive direct investment of $800,000 in Schedule A during 1965–66, an historical allowable of $440,000 ($800,000×50%×110%) and average end-of-month liquid foreign balances of $50,000. D would file a Form FDI–101 showing only end-of-month liquid foreign balances of $80,000. B and C would not file a Form FDI–101. B, C, and D would have no Schedule A historical allowables under § 504.

If A were to own 70 percent of E and B, C, and D were each to own 10 percent, A and E would be an affiliated group. Absent an election under § 906(b)(1), A and E would file a consolidated Form FDI–101 showing $2,800,000 of positive direct investment in Schedule A, an historical allowable of $1,540,000 and liquid foreign balances of $150,000; D would file a Form FDI–101 showing only its balances; and B and C would not be required to file a Form FDI–101. B, C, and D would have no Schedule A historical allowables.

§ B906–2 Person deemed acting for or on behalf of a DI.

Under § 906(a)(2), a person within the United States owning an interest in a DI (whether or not such U.S. person is also a DI) may be deemed to be acting for or on behalf of the DI, if such person

transfers funds or other property to an AFN of the DI. Application of the provisions of § 906(a)(2) to particular transactions will depend on analysis of all surrounding facts and circumstances.

§ B906–3 Election under § 906(b)(1).

Under § 906(b)(1), persons within the United States owning direct interests in a DI may, under certain circumstances, elect not to be governed by the rule set forth in § 906(a)(1). The principal effect of this provision is that, whereas direct investment transactions of and foreign balances held by a DI are not ordinarily attributable to or reportable by the stockholders or other owners of the DI, an election under § 906(b)(1) will reverse the ordinary rule and cause such direct investment transactions and foreign balances to be charged pro rata to the stockholders or other owners consenting to the election. An election once made may not be changed without the permission of OFDI.

(i) *Conditions for making election.* An election under § 906(b)(1) can be made with respect to a DI only if electing U.S. persons own, in the aggregate, a majority interest in such DI and there are not more than 10 persons (including foreign nationals) owning direct interests in the DI. If more than 10 persons own direct interests in the DI, OFDI may nevertheless permit an election if it is demonstrated, upon written application, that the election will not cause substantial administrative difficulties.

(ii) *Procedure for making election.* An election under § 906(b)(1) is made by filing a written notice thereof with the Program Reports Branch of OFDI. All persons within the United States owning direct interests in a DI must be afforded a reasonable opportunity to join in any election made with respect to such DI. Notice of such election (counterparts of which may be filed in lieu of a single instrument) must be executed by or on behalf of all persons consenting to the election and, if all U.S. persons owning direct interest in the DI do not join in the election, the notice must recite that such persons were in fact afforded a reasonable opportunity to do so.

(iii) *Effect of election.* A DI with respect to which an election is made under § 906(b)(1) is referred to as a "principal DI," while a person consenting to the election is referred to as a "consenting owner." An election under § 906(b)(1) with respect to any principal DI has the following consequences:

Each consenting owner is himself deemed a DI in every AFN of the principal DI, notwithstanding that he may not directly or indirectly own a 10 percent or greater interest in any such AFN (see § 906(b)(3)(i)). Thus, if a U.S. citizen (A) owns 5 percent of outstanding stock of a U.S. corporation (C), and C owns 100 percent of the stock of two foreign corporations (F and G), A will be a DI in both F and G if A consents to a § 906(b)(1) election, even though A's indirect interest in F and in G is merely 5 percent (and A would not otherwise be a DI under § 305). A would also be subject to the liquid foreign balance provisions of § 203(c) if he consented to an election with respect to C.

The entire amount of direct investment made and foreign balances held by the principal DI, the principal DI's share in earnings and losses of its AFNs for purposes of determining annual earnings, and total earnings and reinvested earnings under § 504 (a)(3)(ii) and (b)(4) are attributed to each of the consenting owners according to their share of the direct interests in the principal DI held by all consenting owners (see § 906(b)(3)(i)). Thus, if A, B, C, and D each own 25 percent of the principal DI and all consent to an election, they will each be deemed to have made 25 percent of the principal DI's direct investment transactions. If only three consent to the election, their proportionate share would be 33⅓ percent (25 percent/75 percent) of the principal DI's direct investment transactions.

Allowables of the principal DI are also attributed pro rata to the consenting owners. Compliance is then measured individually on the basis of the prorated allowable as well as other applicable allowables of each consenting owner. Each consenting owner may make an independent election under § 502 so that one consenting owner might elect § 504(a), another § 504(b), and another § 503. The § 503 minimum allowable is not distributed pro rata. Instead, the § 503 limit of $1,000,000 is applied to aggregate positive direct investment made (and deemed made under § 906(b)(3)(i)) in AFNs of the principal DI by all consenting owners electing to be governed by § 503 (see § 906(b)(3)(ii)).

Each consenting owner files reports under § 602 showing its pro rata share of all reportable items of the principal DI, as well as its own direct investment activity. An exemption from filing reports is available to consenting owners only if the principal DI would have been exempt absent the election.

Operation and effect of the foregoing principles are demonstrated in the following examples:

Example 32. A, B, C, and D each own 25 percent of E. All are U.S. corporations. E made positive direct investment in Schedule B during 1965–66 of $2,000,000 and held average end-of-month liquid foreign balances of $80,000. A, B, C, and D consent to an election under § 906(b)(1) with respect to E. A, B, C, and D will each file a Form FDI–101 showing positive direct investment of $500,000 ($2,000,000 × 25%) in Schedule B during 1965–66, an historical allowable in Schedule B of $162,500 ($2,000,000 × 50% × 65% × 25%) and average end-of-month liquid foreign balances of $20,000 ($80,000 × 25%). A, B, C, and D will also include direct investment made and balances held by them individually during 1965–66. E will not file a Form FDI–101.

If one owner (D) does not consent to the § 906(b)(1) election, A, B, and C will each report 33⅓ percent of E's direct investment and liquid foreign balances, i.e., the direct interest of each consenting owner divided by the aggregate of direct interests of all such consenting owners.

Example 33. During 1969 A, B, and C each own 33⅓ percent of D and consent to an election under § 906(b)(1). D has an historical allowable in Schedule A of $1,200,000 and in Schedule B of zero. During 1968 D's share of annual earnings of Schedule A AFNs was $2,000,000 and of Schedule B AFNs, $1,500,000. As a result, D has a § 504(b) earnings allowable in Schedule A of $600,000 and in Schedule B of $450,000. Should A elect to be governed by § 504(a) for 1969, A would acquire, as a result of § 906(b)(3)(i), a $400,000 historical allowable in Schedule A and zero in Schedule B. If B and C chose to be governed by the § 504(b) allowable, each would acquire an earnings allowable of $200,000 in Schedule A and $150,000 in Schedule B.

Example 34. A, B, C, and D each own 25 percent of E. E has an historical allowable in Schedule A of $800,000. During 1969, E repays a 1967 long-term foreign borrowing (authorized borrowing under § 1002) and incurs a repayment charge under § 1003 of $2,000,000 in Schedule A. E has no AFNs in Schedules B or C. A, B, C, and D make a § 906(b)(1) election. For 1969, A elects to be governed by § 504(a) with an historical allowable in Schedule C of $500,000, in Schedule B of $600,000, and zero in Schedule A (other than what is available as A's pro rata share of E's historical allowable). A's pro rata share of the repayment charge ($500,000) reduces A's Schedule A allowable ($200,000, derived from E by virtue of the § 906(b)(1) election) to zero, and the excess ($300,000) reduces A's allowables in Schedule C from $500,000 to $200,000 (see § 1003). The Schedule B allowable is not affected.

Consenting owners may utilize allowables passed on to them by virtue of a § 906(b)(1) election either to make individual positive direct investments in AFNs of the principal DI or in their own AFNs. However, positive direct investment by the principal DI will be charged to consenting owners on the same pro rata basis as allowables are "passed on". Thus, if the principal DI makes positive direct investment in any year that exceeds the applicable allowable "passed on" to the consenting owners, such owners might be in violation of § 201.

(iv) *Election by affiliated groups.* Members of an affiliated group are deemed to be a single person under the regulations, except for purposes of making an election under § 906(b)(1) in which case they are treated as separate persons. However, the purpose of this rule is to make the § 906(b)(1) election available to members of an affiliated group, and not to break up the affiliated group.

Example 35. A, B, and C are U.S. corporations. A owns 51 percent of C and B owns 49 percent. A and C are an affiliated group. Nevertheless, A may elect under § 906(b)(1). If both A and B elect under § 906(b), A will assume 51 percent of C's direct investment position, and B will be accorded 49 percent. However, A and C are still an affiliated group and therefore will be treated as one person with respect to 51 percent of C's direct investment transactions.

Example 36. A, B, C, and D are all U.S. corporations. A owns 80 percent of D, and B and C each own 10 percent of D. B owns 100 percent of C. A and D are an affiliated group, and B and C are another affiliated group. If A, B, and C make a § 906(b)(1) election with respect to D, the A-D affiliated group will report as to 80 percent of D's direct investment and the B-C affiliated group will report as to 20 percent of D's direct investment.

(v) *Limitation on use of § 503 by consenting owners.* If direct owners electing under § 906(b)(1) also elect to be governed by the § 503 minimum allowable, the $1 million allowable is not divided

proportionally among the consenting owners, as it would be with respect to §§ 504 and 506 allowables. Instead, § 906(b)(3)(ii) provides that the aggregate direct investment made, and deemed made, by all consenting and nonconsenting owners in AFNs of the principal DI may not exceed $1 million. Thus, if A and B each own 50 percent of C and elect under § 906(b)(1), A may make $700,000 of positive direct investment in AFNs of C, while B may make $300,000.

Each consenting owner electing to be governed by § 503 must meet two separate tests: First, aggregate positive direct investment made by such member in all AFNs (including, but not limited to, AFNs of the principal DI) may not exceed $1 million; second, aggregate positive direct investment in AFNs of the principal DI by such owner and all other consenting and nonconsenting owners electing to be governed by § 503 may not exceed $1 million. (This parallels the requirements of § 905(b)(2) applicable to individual members of associated groups.) In computing aggregate positive direct investment under § 906(b)(3)(ii), aggregate annual losses must be excluded in accordance with § 503(b). By the same token, positive direct investment in AFNs of the principal DI by consenting owners electing to be governed by § 504, and all positive direct investment made under the § 506 incremental earnings allowable, are not included in computing direct investment for purposes of § 906(b)(3)(ii).

Example 37. A, B, C, and D, U.S. citizens and residents, each own a 25 percent interest in E, a U.S. corporation, and consent to an election with respect to E under § 906(b)(1). E owns all outstanding stock of foreign corporations F, G, and H. A, B, C, and D elect to be governed by § 503 for 1969. During 1969, E makes a $100,000 long-term loan to F, contributes $200,000 to capital of G, and sells $250,000 of merchandise to H on credit. F, G, and H earn an aggregate of $50,000 but pay no dividends to E. Also during 1969, A makes a long-term loan of $100,000 each to F and G, while C makes a long-term loan of $250,000 to H. E's total positive direct investment is, therefore, $600,000, of which $150,000 (25%) is allocable each to A, B, C, and D because of the election. In addition, A has made positive direct investment of $200,000 and C has made positive direct investment of $250,000. The total positive direct investment made and deemed made in all AFNs of E by A, B, C, and D is, therefore, $350,000 for A, ($150,000 plus $200,000), $150,000 for B, $400,000 for C ($150,000 plus $250,000), and $150,000 for D. To the extent that the total ($1,050,000) exceeds $1,000,000, A, B, C and D are all in noncompliance.

Example 38. X owns 60 percent of D, and Y owns 40 percent. X and Y elect under § 906(b)(1) with respect to D. During 1970, D has a § 506 allowable of $100,000. As a result of the election under § 906(b)(1), $60,000 of D's § 506 allowable is acquired by X and $40,000 by Y. X and Y each elect to be governed by the § 503 minimum allowable.

During 1970 D makes worldwide positive direct investment of $600,000. X lends $400,000 to D's AFNs and acquires an AFN of its own for $300,000. Y leases machinery valued at $40,000 to D's AFNs and acquires an AFN for $760,000. The foregoing direct investment is authorized by §§ 503 and 506 as shown below (000 omitted):

Authorized Direct Investment			
Pro rata share of D's § 506 allowable		§ 503 allowable	Total
X [60%]	$60	$1,000	$1,060
Y [40%]	$40	$1,000	$1,040

Actual Direct Investment			
In AFNs of D			
Pro rata share of D's direct investment		Own direct investment	In own AFNs	Total
X [60%]	$360	$400	$300	$1,060
Y [40%]	$240	$40	$760	$1,040
	$1,040			

Direct Investment for Purposes of Compliance with § 906(b)(3)(ii):	
Aggregate direct investment of X and Y in AFNs of D	$1,040
Less: Amount authorized by § 506	−100
Balance: Direct investment under § 503	940

The foregoing tables demonstrate that individual direct investment by X and Y was within the amounts respectively authorized under §§ 503 and 506, and that their collective direct investment (actual and imputed) in AFNs of D was within the limitation imposed by § 906(b)(3)(ii).

Example 39. A, B, and C each own 33⅓ percent of D. A and B elect under § 906(b)(1). C does not consent to the election. A, B, and C each elect to be governed by § 503 for 1969. During 1969 D makes positive direct investment of $900,000. C lends $150,000 to D's AFNs. The direct investment deemed made by A and B violates the limitation of § 906(b)(3)(ii), because aggregate direct investment made and deemed made by them and the nonconsenting owner (C) in the principal DI's AFNs exceeds $1,000,000.

Example 40. A, B, C, and D, each owning 25 percent of E, consent to an election under § 906(b)(1) with respect to E. In addition, they all elect to be governed by § 503 for 1969. In 1969 E makes a $500,000 repayment under § 1002. By operation of § 1003, each consenting owner's § 503 allowable is reduced by $125,000 (25 percent of the total repayment charge) so that each may make only $875,000 of positive direct investment in all AFNs (including, but not limited to, AFNs of E). In addition, the aggregate direct investment made by A, B, C and D in AFNs of E during 1969 may not exceed $500,000 (§ 906(b)(3)(ii)).

§ B907–1 Reporting.

Section 907 sets forth a number of rules concerning the responsibility of DIs to file base period, quarterly and annual reports under § 602.

The general rule is that all DIs must file reports unless exempt from reporting as provided by the instructions to the applicable reports or by § 907(b)(3) or § 907(c)(2). It is important to note that persons consenting to an election under § 906(b)(1), and members of an associated group, are not exempt from reporting on Forms FDI–101, FDI–102, and FDI–102F under the provisions of the instructions to such forms, unless the "principal DI" or the associated group as a whole would be exempt.

(i) *Consenting owners.* Section 907(b)(1) provides that if a U.S. person consents to an election under § 906(b)(1) with respect to any principal DI, reports filed by such person should include such person's pro rata share (calculated as provided in § 906(b)(3)(i)) of the amount of foreign balances, direct investment and other items that the principal DI would have included in its reports had the election not been made.

Example 41. A U.S. corporation (D) owns 25 percent of U.S. corporation (E) and 40 percent of U.S. corporation (F). Elections are made under § 906(b)(1) with respect to both E and F with D and all other U.S. stockholders of E and F consenting to such elections. During 1969 E makes positive direct investment of $1,000,000 in Schedule A and $2,000,000 in Schedule B, while F makes positive direct investment of $500,000 in Schedule A and $300,000 in Schedule B. D also has a number of directly owned foreign subsidiaries in Schedules A and B, and D itself makes positive direct investment of $1,000,000 in Schedule A and $800,000 in Schedule B during 1969. The Form FDI–102F filed by D for 1969 should show positive direct investment of $1,450,000 in Schedule A ($1,000,000 plus 25 percent of $1,000,000 plus 40 percent of $500,000) and $1,420,000 in Schedule B ($800,000 plus 25 percent of $2,000,000 plus 40 percent of $300,000).

(ii) *Nonconsenting owners and owners of indirect interests.* Section 907(b)(2) provides that reports filed by a U.S. person should not include any direct investment or other items attributable to (a) DIs is which the U.S. person owns merely an indirect interest, or (b) DIs in which the U.S. person owns a direct interest but has not consented to an election under § 906(b)(1).

Example 42. A U.S. citizen and resident (D) owns 25 percent of a U.S. corporation (E), which in turn owns 50 percent of another U.S. corporation (F). D also owns 50 percent of U.S. corporation (G) and 40 percent of U.S. corporation (H). No elections are made under § 906(b)(1) with respect to corporation E, F, or G. An election is made under § 906(b)(1) with respect to corporation H, but D does not consent to the election after being given a reasonable opportunity to do so. During 1969 E, F, G, and H, with various AFNs throughout the world, make positive direct investment of $1,000,000, $500,000, $800,000 and $600,000, respectively. Also during 1969, D himself makes positive direct investment of $200,000 by cash purchase of foreign commerical real estate from an unaffiliated foreign national. The Form FDI–102F filed by D for 1969 should include his own positive direct investment of $200,000, but should not include any of the positive direct investment made by E, F, G, or H.

If D had made no positive direct investment of his own during 1969, D would not be required to file reports on Forms FDI–102 and FDI–102F for 1969.

(iii) *Associated groups.* Section 907(c)(1) provides that reports filed by a member of one or more associated groups should include all direct investment made by such person in group AFNs of the relevant associated groups. Although the general rule is that each member of an associated group files a separate report under § 602 showing his own direct investment transactions, § 907(c)(2) permits a majority in interest of an associated group to elect, subject to the approval of OFDI, to have the group file

a single report showing direct investment transactions of all members of the group in all group AFNs during the relevant period. The election is made by filing a notice of election with the Program Reports Branch of OFDI, the notice being executed by or on behalf of a majority in interest of the group. Notwithstanding an election under § 907(c)(2), each member of an electing associated group having independent direct investment transactions with respect to AFNs other than group AFNs must file separate reports reflecting such transactions.

Example 43. (a) A U.S. citizen and resident (A) is a member of two different associated groups (G1 and G2). The group AFN of G1 is a French corporation (F) and the group AFN of G2 is an Australian corporation (K). A owns 5 percent of outstanding voting stock of F and 8 percent of outstanding voting stock of K. A also owns all outstanding stock of a Panamanian corporation (P). The following occurs during 1969: A contributes $100,000 to capital of K; F earns $80,000 and pays a dividend of $40,000, of which $2,000 was paid to A; K earns $200,000 and pays a dividend of $100,000, of which $8,000 is paid to A; A lends $300,000 to P on a long-term basis; P earns $50,000 and pays no dividends to A. Neither G1 nor G2 elects to report as a group. A's Form FDI-102F for 1969 should show positive direct investment of $350,000 in Schedule A (the $300,000 loan to P plus $50,000 reinvested earnings of P), positive direct investment of $108,000 in Schedule B (the $100,000 loan to K plus $8,000 reinvested earnings of K) and positive direct investment of $2,000 in Schedule C ($2,000 reinvested earnings of F).

(b) Should G2 elect, with approval of OFDI, to report as a group under § 907(c)(2), the Form FDI-102F filed by A for 1969 will not include the $108,000 of positive direct investment made by A in K (Schedule B). The FDI-102F filed by G2 will include all positive direct investment made by the members of G2 (including A's positive direct investment of $108,000) in K (Schedule B).

(c) If A does not own any stock of P, and G1 and G2 both elect, with approval of OFDI, to report as a group under § 907(c)(2), G1 will file a Form FDI-102F for 1969 showing the positive direct investment made by all members of G1 (including A's positive direct investment of $2,000) in F (Schedule C) and G2 will file a Form FDI-102F for 1969 showing the positive direct investment made by all members of G2 (including A's positive direct investment of $108,000) in K (Schedule B). A himself will not file a Form FDI-102F for 1969.

It is essential to recognize that compliance by each member of an associated group is measured separately and without reference to direct investment transactions of the group's other members, whether or not the group elects to report as a group under § 907(c)(2). The only exception to this rule is contained in § 905(b)(2), with respect to cumulation of direct investment transactions with group AFNs by members of a group electing § 503. Accordingly, the Form FDI-102F filed by a member of the group under § 907(c)(2) should indicate, on a supplemental statement, the portion of the group's direct investment allocable to each member of the group.

(iv) *Affiliated and family groups.* Section 907(d) provides that reports filed by an affiliated or family group for any period should aggregate all direct investment transactions and other reportable items attributable to each member during the relevant period.

Example 44. A U.S. corporation (A) owns 60 percent of outstanding voting stock of another U.S. corporation (B), and 80 percent of outstanding voting stock of a third U.S. corporation (C). B owns a 70 percent interest in a U.S. partnership (P). All outstanding stock of A is owned by a U.S. citizen and resident (D). During 1969, A makes positive direct investment of $100,000, B makes positive direct investment of $200,000, C makes positive direct investment of $300,000, D makes positive direct investment of $50,000, and P makes positive direct investment of $150,000. The Form FDI-102F filed by the affiliated group of A, B, C, D, and P for 1969 should show positive direct investment of $800,000, allocated among the appropriate scheduled areas. A, B, C, D, and P need not file a separate Form FDI-102F.

Had A and all other stockholders of B made an election under § 906(b)(1) with respect to B, the Form FDI-102F filed by the affiliated group for 1969 would include only 60 percent of B's positive direct investment, rather than the entire $200,000. Total positive direct investment to be reported by the group will, therefore, be $720,000.

B1000—Subpart J (§§ 1001–1003)

§ B1000–1 Introduction.

For a number of years prior to institution of the Foreign Direct Investment Program, informal efforts were made by the U.S. Government to reduce outflow of investment capital by encouraging financing of foreign business operations with foreign borrowings. This policy has been explicitly incorporated into the regulations by provision that direct investment may be made by DIs with proceeds of long-term foreign borrowing without current charge to allowables. Similarly, a DI's guarantee of an AFN borrowing does not constitute a transfer of capital.

On the other hand, repayment of a long-term foreign borrowing is a transfer of capital under § 312(a)(7) if the proceeds of such borrowing have been expended in making transfers of capital or allocated to positive direct investment. The transfer of capital under § 312(a)(7) is deemed to have been made to the scheduled area or areas where the last deduction or deductions with respect to the proceeds have been made. Furthermore, satisfaction by a DI of the debt obligation of its AFN is a transfer of capital, under § 312(a)(6), from the DI to the AFN, because the DI has thereby indirectly increased its debt or equity interest in the AFN. Repayment by a DI either of its own long-term foreign borrowing or of an AFN borrowing guaranteed by the DI may, therefore, result in positive direct investment in a particular year prohibited by § 201, if such positive direct investment in the relevant scheduled area is in excess of the amount authorized to the DI in that scheduled area during that year under Subpart E. However, § 1002(a) generally authorizes positive direct investment in excess of applicable Subpart E or M allowables attributable to transfers of capital resulting from repayment of certain borrowings enumerated therein.

The general authorization under § 1002(a) applies to: (a) Repayment of long-term foreign borrowings made prior to January 1, 1968; (b) repayment by a DI, pursuant to a guarantee, of AFN borrowings made prior to January 1, 1968; (c) repayment of AFN borrowings not guaranteed by the DI, if the borrowings were made prior to January 1, 1968, from a bank; and (d) repayment of AFN borrowings made from a bank after January 1, 1968, pursuant to a fixed loan commitment established by the AFN prior to that date. Section 1002(a) thus removes any potential prohibition that might otherwise apply to repayment of borrowings contracted prior to the effective date of the Program.

Section 1002(a) also authorizes repayment by a DI of borrowings made by an AFN and guaranteed by the DI, on or after June 10, 1968, provided that the DI files, with respect to the borrowing, a certificate described in § 1002(b). In the certificate, the DI must state, in the light of all facts and circumstances existing at the time of the guarantee, that it has reason to believe either that the DI will not make any repayment of the borrowing within seven years of the guarantee, or that any positive direct investment resulting from repayment within 7 years will not exceed the amount of positive direct investment authorized by Subpart E. The section similarly authorizes repayment of a DI's own long-term foreign borrowing made on or after June 10, 1968, provided that the DI files a similar certificate with respect to the long-term foreign borrowing.

Section 1002(a) further authorizes repayment of a DI's borrowing made during the period from January 1, 1968, through June 9, 1968. During that period the predecessor of Subpart J, General Authorization No. 1, was in effect. General Authorization No. 1 authorized repayment of a DI's long-term foreign borrowing and an AFN borrowing guaranteed by the DI, conditioned upon the filing of a certificate similar to the certificate required by present § 1002(a). Even though the language in the certificate required by General Authorization No. 1 differs somewhat from the representations required by § 1002(b), § 1002(a) authorizes repayment of guaranteed borrowings by AFNs and DI's long-term foreign borrowings made during the period from January 1, 1968, through June 9, 1968 provided that the certificate described in General Authorization No. 1 was properly filed.

Finally, § 1002(a) authorizes repayment by the DI of a long-term foreign borrowing or a borrowing by an AFN, whether or not guaranteed by the DI, if repayment occurs by issuance of stock of the DI pursuant to conversion by holders of debt obligations issued by the DI (or its AFN) in connection with the borrowing.

Although repayments pursuant to § 1002(a) are independent of Subpart E, any resulting positive direct investment is charged against the appropriate allowables and has the effect of reducing such allowables for the year in which

charged. Section 1003 charges positive direct investment first against the allowable in the scheduled area where the transfer of capital is recognized pursuant to § 312(a) (6) or (7), then against allowables in Schedules C, B, and A, in that order, and finally against allowables in future years, in the same order. The charge is equal to the amount of positive direct investment resulting from repayment, but the charge does not reduce allowables in any scheduled area to less than zero in any year. The charge to allowables occurs in the year in which repayment is made, except for repayment by means of conversion of debt obligations into stock of the DI, in which case the charge is not made until the following year (see § 1002(a)(3)).

Section 702 should be read in conjunction with Subpart J. This section is intended to make clear that lenders, absent actual knowledge of a violation of the regulations, may enforce obligations entered into with DIs or AFNs whether or not performance by the obligor is authorized by the regulations.

§ B1001–1 Definition of borrowing by a DI and by an AFN.

Section 1001(b) defines the term "borrowing by a DI" as a borrowing by a DI, repayment of which would constitute a transfer of capital under § 312(a)(7). Since § 312(a)(7) applies to any long-term foreign borrowing (as defined in § 324), the proceeds of which have been expended in making transfers of capital or allocated to positive direct investment, repayment of all long-term foreign borrowings are eligible for authorization under § 1002. Repayment of borrowings by the DI that are not long-term foreign borrowings, and repayments of long-term foreign borrowings, the proceeds of which have not been expended or allocated, do not result in transfers of capital.

Section 1001(a) defines the term "borrowing by an AFN". As is the case with a DI's long-term foreign borrowing, a "borrowing by an AFN" includes not only the typical loan of funds and sale of debt obligations, but may also include every transaction, however designated, the practical economic effect of which is that the AFN acquires an interest in property, with all or part of the payment deferred to some future date. Thus, for example, an installment purchase of property by an AFN may involve a "borrowing" for purposes of Subpart J. (See § B 324–4.)

Section 1002(e)(1) provides that a borrowing by a DI or by an AFN is deemed to have been made on the date the proceeds are received by the borrower, or, if a purchase of property on credit is involved, on the date the property is purchased. If, however, the borrowing involves a public offering of securities, the borrowing is deemed to have been made on the date the securities are issued, and if the borrowing involves the use of an overdraft facility, the borrowing is deemed to have been made when the overdraft is used. The date of a borrowing is significant in determining (1) whether the borrowing, if made by a DI, has a maturity which will qualify such borrowing as a long-term foreign borrowing under §324 and (2) whether any repayments of the borrowing are expected to be made within 7 years from the date thereof.

As is the case with respect to a long-term foreign borrowing under § 324(b)(1), the refinancing of a borrowing by an AFN, by virtue of renewal, extension or continuance thereof or a subsequent borrowing from the same or another lender, is not a repayment of the borrowing or the making of a new borrowing. (See § 1002(a)(2) and § B324–12.)

Delivery of equity securities of a DI to holders of debt obligations issued by an AFN, in exchange for the debt obligations of the AFN, constitutes repayment by the DI of the AFN's borrowing (a transfer of capital under § 312(a)(6)) in the amount of the debt retired). Such treatment is analogous to the treatment of delivery of equity securities of a DI in exchange for the debt obligations issued in connection with a long-term foreign borrowing. (See § B324–11 regarding repayment by conversion with respect to long-term foreign borrowing.)

There are, however, some significant differences between a borrowing by an AFN and a long-term foreign borrowing by a DI.

First, while a DI's long-term foreign borrowing must be made from a foreign person (other than a Canadian person), a borrowing by an AFN may be made from any person, including a United States or a Canadian person, so long as such person is neither an AFN of the DI nor the DI itself.

Second, expenditure or allocation of proceeds of long-term foreign borrowing by the DI will give rise to deductions from net transfer of capital and positive direct investment, under §§ 313(d)(1) and 306(e). Although neither the "borrowing by an AFN" nor a guarantee thereof by the DI constitutes a transfer of capital by the DI, investment by the AFN, of funds received from its borrowing, in other AFNs of the DI will result in transfers of capital under §§ 505 and 312.

Third, while repayment of a DI's long-term foreign borrowing results in a transfer of capital under § 312(a)(7), if the proceeds thereof have been expended or allocated, repayment of a "borrowing by an AFN" by the AFN will not result in a transfer of capital. Repayment of such borrowing by the DI, however, will result in a transfer of capital under § 312(a)(6) to the borrower AFN, since repayment indirectly increases the DI's debt or equity interest in the AFN. Such transfer will include the amount of both principal and interest paid by the DI. The transfer of capital under § 312(a)(7), on the other hand, will be considered to have been made to the scheduled area where the last deduction was made with respect to the proceeds of the long-term foreign borrowing. Any such transfer of capital will be limited to the principal amount of the debt repaid, since payment of interest by the primary obligor is exempt from being a transfer of capital under § 312(c)(8).

§ B1001–2 Borrowing by a business venture AFN.

The identity of a borrower is normally ascertainable by reference to the instrument evidencing the debt obligation. However, when a borrowing transaction is purportedly entered into by a business venture AFN that is a direct branch of a DI (described in § 304(a)(1)(ii)), identity of the actual primary obligor is difficult to ascertain. Similar difficulty is encountered when a borrowing is purportedly made by a business venture AFN that is a branch of an incorporated AFN (as described in § 304(a)(1)(ii)). Since the regulations distinguish between borrowing by a DI and borrowing by an AFN for many purposes, DIs are advised to submit transactions involving questions of this nature to OFDI for an interpretation.

§ B1001–3 Definition of guarantee.

The term "guarantee" is defined in § 1001(c). The written acknowledgment of secondary responsibility referred to in § 1001(c)(1) is confined to acknowledgements given to a bank. Such acknowledgments refer to general assurances of repayment that, in the typical case, are not intended to be legally enforceable against the DI but represent a moral commitment of the DI that the loan will be repaid.

The written guarantee, endorsement, etc., specified in § 1001(c)(2), refers to the customary legally binding commitment whereby the DI guarantees payment of principal and interest by, or collection thereof from, an AFN. It does not include subordination agreements.

The reference to "through-put" agreements, "take or pay" contracts, "keep-well" agreements and similar written agreements in § 1001(c)(3) covers certain types of financial arrangements designed to assure that the AFN will have sufficient funds to repay the relevant borrowing. Generally, a "through-put" agreement is an agreement (typically made by companies in the extractive industries) whereby the DI agrees to put certain types of raw materials through a particular processing, refining or delivery facility of an AFN, while a "take or pay" contract is a supply agreement whereby the DI contracts to pay for production made available by the AFN, whether or not the DI in fact accepts delivery. A "keep-well" agreement refers generally to an agreement whereby the DI agrees to supply sufficient funds to the AFN for working capital to enable repayment of the borrowing in question.

Section 1001(c)(4) provides that mortgages, pledges, or hypothecations of property made by a DI as security for repayment of a borrowing by an AFN will constitute a "guarantee" if the transaction does not involve a transfer of capital by the DI under § 312(a)(9).

Example 1. DI pledges stock of a domestic "affiliate" to a domestic bank as security for a borrowing by an AFN from such bank. The pledge constitutes a guarantee under § 1001(c)(4).

Example 2. DI pledges portfolio securities of foreign corporations (other than AFN)

to a domestic bank as security for a borrowing by an AFN from a foreign branch of such bank. The pledge constitutes a guarantee under § 1001(c)(4).

Example 3. DI pledges a Deutsche mark deposit in a German bank as security for a borrowing by an AFN from such bank. The pledge constitutes a transfer of capital under § 312(a)(9) and does not constitute a guarantee under § 1001(c)(4).

Example 4. DI pledges a demand deposit in a domestic bank as security for a borrowing by an AFN from a foreign branch of such bank. The pledge constitutes a guarantee under § 1001(c)(4).

The term "guarantee" includes a guarantee given by one AFN in respect of a borrowing by another AFN of the same DI, if repayment pursuant to the guarantee would result in a transfer of capital by the DI under § 505. A § 312(a)(6) transfer of capital would be charged to the DI by operation of § 505(a)(3) if the guarantor AFN that makes repayment pursuant to the guarantee is an affiliate of the DI under § 903(a).

Example 5. DI has two AFNs: A wholly owned subsidiary in Panama (P) that in turn has a wholly owned subsidiary in Sweden (S). S borrows from a foreign bank. Repayment of the borrowing is guaranteed by P. If P is called upon to repay the borrowing of S, the payment (whether made directly to the lender or to S) is deemed a transfer from Schedule A to the DI and from the DI to Schedule C, pursuant to § 505(a)(3). Any positive net transfer of capital to Schedule C attributable to the transfer deemed made by the DI will generally be authorized under Subpart J if the DI files a certificate within 10 days after the execution of the guarantee by P.

§ B1001–4 DI's guarantee of an AFN borrowing.

Except for certain borrowings from banks made prior to January 1, 1968, only repayment by a DI pursuant to guarantee of an AFN's borrowing will be authorized by § 1002(a). Thus, in most cases, in order for repayment to be authorized, there must be both a "guarantee" and a "borrowing by an AFN," as those terms are defined in § 1001.

Example 6. DI's AFN arranges to borrow $1,000,000 from a New York bank. On June 1, 1969, AFN receives $1,000,000 from the bank and gives the bank a note in that amount, payable in 2 years, and also gives the bank a guarantee of repayment of principal and interest executed by the DI. On June 1, 1969, the AFN has made a borrowing that is guaranteed by the DI.

Example 7. On June 1, 1969, DI's AFN receives machinery purchased from an English manufacturer with a value of $1,000,000. Under the terms of the purchase agreement, $250,000 is payable upon receipt of the machinery, the remainder being payable in three equal annual installments of $250,000 (plus interest), commencing 1 year from date of receipt of the machinery. Upon receipt of the machinery, the AFN delivers to the seller a guarantee of repayment of principal and interest executed by the DI. On June 1, 1969, AFN has made a borrowing guaranteed by the DI.

Example 8. On June 1, 1969, DI's Schedule C AFN, pursuant to a purchase agreement previously entered into, acquires all the stock of a corporation in Schedule A for $2,000,000. The AFN must pay $500,000 at the closing on June 1, the remainder being payable to the selling shareholders of the foreign corporation in five equal annual installments of $300,000 (plus interest), commencing 1 year from the closing date. At the closing, the AFN delivers to the selling shareholders a guarantee of payment of the principal and interest executed by the DI. On June 1, 1969, the AFN has made a borrowing guaranteed by the DI. (Acquisition of the Schedule A corporation will result in a transfer of capital, under §§ 505 and 312(a)(1), of $2,000,000 from the Schedule C AFN to the DI and from the DI to the Schedule A AFN. Since the borrowing is not a long-term foreign borrowing as defined in § 324(a), no deduction with respect to net transfer of capital will be received by the DI. If the DI must repay the borrowing pursuant to the guarantee, a transfer of capital to the Schedule C AFN will result under § 312(a)(6).)

Example 9. DI's AFN arranges with a group of investment banking organizations for the sale of 12-year debentures in face amount of $10,000,000 to be dated September 1, 1969. The debentures will be guaranteed by the DI as to payment of principal, interest and premium (if any). The debentures also will be convertible into common stock of the DI. On September 5, 1969, an underwriting agreement is signed pursuant to which the debentures are to be sold to the underwriters at a discount of 3 percent and sold to the public at par. At the closing on September 25, 1969, AFN issues the debentures and receives a check from the underwriters for $9,500,000, the 3 percent discount and other underwriting commissions, fees and expenses having been deducted. On September 25, 1969, the AFN has made a borrowing of $10,000,000 guaranteed by the DI.

Example 10. DI's Schedule C AFN (C) arranges with a group of investment banking organizations for the sale of $10,000,000 of 12-year debentures to be dated September 1, 1969. The debentures will be guaranteed by DI as to payment of principal, interest, and premium (if any). Attached to the debentures will be warrants which may be detached after a period of 6 months from the date of issuance and which entitle the holder to purchase a certain number of shares of the common stock of DI at a specified price. The warrants are valued by DI's independent financial counsel at $750,000 (a valuation acceptable to OFDI). On September 5, 1969, an underwriting agreement is signed pursuant to which the debentures are to be sold to the underwriters at a discount of 3 percent and sold to the public at par. At the closing on September 25, 1969, C issues the debentures and receives a check from the underwriters for $9,500,000, the 3 percent discount and other underwriting commissions, fees and expenses having been deducted. C has made a borrowing of $10,000,000 guaranteed by the DI on September 25, 1969. On the same date DI is considered to have made a transfer of capital under § 312(a) to C in the amount of the value of the warrants ($750,000) that are attached to the debentures.

Example 11. On September 15, 1968, DI's AFN entered into a revolving credit arrangement with a foreign bank, pursuant to which AFN could borrow up to $5,000,000 during a period ending September 15, 1975. The agreement provided that each takedown under the arrangement would be evidenced by a 180-day note, each note being renewable by its terms within the overall period of the arrangement. DI executed and delivered to the foreign bank a guarantee of payment of principal and interest of any borrowings made by the AFN pursuant to the revolving credit arrangement. On October 1, 1968, AFN took down $3,000,000 and on February 1, 1969, it took down $2,000,000. AFN made a borrowing guaranteed by the DI of $3,000,000 on October 1, 1968, and another borrowing guaranteed by the DI of $2,000,000 on February 1, 1969.

The authorization contained in § 1002(a) is limited to repayment of a guaranteed borrowing. Payments made by a DI pursuant to guarantees of performance by its AFN of contractual obligations other than the repayment of debt are not authorized by § 1002(a).

Example 12. DI has a Schedule C AFN (C) that is engaged in the business of road construction. C enters into a contract with a foreign government for construction of a highway that must meet certain specifications. DI guarantees performance by C of the contract according to specifications contained therein. If DI is called upon to pay money to the foreign government or to transfer funds to the AFN to enable performance according to the contract specifications, the payment or transfer is not authorized by § 1002(a).

Example 13. DI has a Schedule C AFN involved in the construction business. From time to time, AFN makes bids on certain construction projects, in connection with which the AFN must file a bond that is forfeited if AFN is let a contract that it cannot perform. AFN has an arrangement with its local bank, in the form of an overdraft whereby the bank will pay any such forfeited amounts. DI has issued a guarantee of payment of principal and interest of any amounts paid by the bank pursuant to its arrangement with the AFN. If the AFN utilizes the arrangement to pay a forfeit which results in an overdraft, the AFN, at that time, will have made a borrowing guaranteed by the DI, and repayment by the DI may be authorized under § 1002(a).

Example 14. On July 1, 1969, DI's AFN entered into a 20-year charter-hire agreement with an unaffiliated foreign national (X) for a ship. The terms of the charter-hire agreement with X are constructed by AFN's public accounting firm as an installment purchase under accounting principles generally accepted in the United States, and AFN treats an appropriate portion of the charter-hire payments as return of principal to X and treats the remainder as interest charges. Under the charter-hire agreement, AFN also agrees, among other things, to keep the ship in good repair, to keep it clear of any liens, and to hold X harmless from any liabilities that may arise out of the operation of the ship. At the closing, DI executes and delivers to X a guarantee of payment and performance of all of the obligations of AFN under the charter-hire agreement. At the closing, AFN has made a borrowing guaranteed by the DI in the amount of the aggregate principal portion of charter-hire payments to be made during the term of the charter-hire agreement. The DI's guarantee of any other obligations of AFN under the charter-hire agreement is not a guarantee of a borrowing by the AFN, and any payments or transfers to the AFN to enable it to perform any such obligation cannot be authorized under § 1002(a).

Renewal of a prior guarantee, or execution of a guarantee upon refinancing of a previously guaranteed AFN borrowing, is not considered to be a new guarantee: *Provided*, That the principal amount guaranteed is not increased. Moreover, renewal of a guarantee or execution of a new guarantee with respect to an AFN borrowing that is still outstanding is not considered to be the making of a new guarantee.

Example 15. On September 1, 1968, DI's AFN entered into a revolving credit agreement with a foreign bank (X) that permitted AFN to borrow up to $2,000,000. The borrowing was guaranteed by DI. AFN immediately took down the entire $2,000,000. On September 1, 1969, AFN makes a $2,000,000 borrowing from another foreign bank (Y), giving Y a 3-year note in the principal amount of $2,000,000. The $2,000,000 is used to repay AFN's borrowing from X. Even though DI executes a new guarantee of repayment of the 3-year note in favor of Y, DI is not considered to have made a new guarantee.

Example 16. On September 1, 1968, DI's AFN entered into a revolving credit agreement with the foreign branch of a United States bank for a period of 5 years. Under the agreement, AFN could make borrowings of up to $5,000,000 evidenced by 180-day notes renewable by their terms. The agreement also provided that the DI guarantees repayment of each 180-day note as to the payment of principal and interest. On September 1, 1968, AFN immediately took down the full $5,000,000. On March 1, 1969, AFN executed new 180-day notes for the full $5,000,000 and delivered to the bank a new guarantee of DI with respect to the new notes. DI is not considered to have made a new guarantee.

§ B1002–1 Authorization of positive direct investment attributable to repayment of certain borrowings.

Positive direct investment attributable to a DI's repayment of an AFN's borrowing is authorized by § 1002(a) if:

The borrowing was guaranteed by the DI prior to January 1, 1968 (§ 1002(a)(1));

The borrowing was guaranteed by the DI on or after January 1, 1968, but prior to June 10, 1968, and the DI complied with the certification requirements of § 2(a)(1) of General Authorization No. 1 (§ 1002(a)(1));

The borrowing was guaranteed by the DI on or after June 10, 1968, and the DI complied with the § 1002(b) certification requirements (§ 1002(a)(5));

The borrowing was obtained from a bank prior to January 1, 1968 (§ 1002(a)(2));

The borrowing was obtained from a bank on or after January 1, 1968, pursuant to a fixed loan commitment or line of credit established prior to January 1, 1968 or any renewal or extension thereof (§ 1002(a)(2)); or

The borrowing involved issuance of debt obligations by the AFN convertible into stock of the DI (the date of the borrowing being irrelevant), and repayment by the DI consists of delivery of DI's stock upon exercise of conversion rights (§ 1002(a)(3)).

Positive direct investment attributable to repayment of a DI's long-term foreign borrowing is also authorized by § 1002(a) if:

The borrowing was made prior to January 1, 1968 (§ 1002(a)(4));

The borrowing was made from January 1, 1968 through June 9, 1968, and the DI complied with the certification requirements of § 2(b) of General Authorization No. 1 (§ 1002(a)(4));

The borrowing was made on or after June 10, 1968, and the DI complied with the § 1002(b) certification requirements (§ 1002(a)(6)); or

The borrowing involved the issuance of debt obligations of the DI convertible into stock of the DI, and repayment by the DI consists of delivery of the DI's stock upon exercise of conversion rights (§ 1002(a)(3)).

Section 1002(a) authorizes not only a DI's actual repayment of the enumerated AFN borrowings, but also transfers of capital by a DI to AFNs to enable direct repayment of such borrowings.

However, § 1002(d) provides that positive direct investment by a DI is not authorized under § 1002(a) if repayment of the borrowing is made at the option of the DI. Repayment pursuant to a call or like provision vesting control of the time of repayment in the DI or an AFN, or the existence of unexercised options to renew, extend or continue the borrowing at the time of repayment, will be deemed to result in repayment at the option of the DI.

(i) *Preprogram guarantee of AFN borrowing.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made prior to January 1, 1968, is authorized by § 1002(a)(1). A transfer of capital by the DI to an AFN to enable the AFN to repay a borrowing is similarly authorized, if the borrowing was guaranteed prior to the effective date. For the purposes of § 1002(a)(1), a guarantee will be considered to have been made prior to the effective date if it was executed prior to the effective date, even though the AFN might not have actually made its borrowing until after the effective date. Renewal of such guarantee or execution of a new guarantee in connection with the same borrowing of the AFN or the refinancing thereof for which the first guarantee was executed will not be considered a new guarantee.

Example 17. DI has an AFN (C) in Schedule C. On September 1, 1967, C borrowed $300,000 from a foreign bank for a term of 2 years, repayment of the borrowing being guaranteed by DI on the same date. During 1969, DI has zero historical allowable in Schedule C. On August 31, 1969, when the loan becomes due, DI is called upon under the guarantee to repay the loan, plus $20,000 in accrued unpaid interest, C itself being unable to make repayment. DI makes repayment as demanded. Repayment of the borrowing plus accrued interest in the aggregate of $320,000 is authorized by § 1002(a)(1) regardless of the fact that no positive direct investment is authorized to DI under Subpart E during 1969.

(ii) *Repayment of AFN bank borrowing made or committed prior to January 1, 1968.* A transfer of capital is authorized if made in repayment of, or to enable an AFN to repay, a borrowing by such AFN from a bank made prior to January 1, 1968, or a borrowing by such AFN from a bank made on or after January 1, 1968, pursuant to a fixed loan commitment or line of credit established prior to such date or pursuant to any renewal or extension thereof. Such repayment is authorized, however, only if the liquid assets of the AFN are not sufficient to repay the borrowing at maturity and if the AFN has made every reasonable effort to refinance the borrowing on terms generally available to companies of similar size and financial position. If, on or after January 1, 1968, the amount of such pre-January 1, 1968, fixed loan commitment or line of credit is increased by 10 percent or more, a new fixed loan commitment or line of credit is deemed to have been established at the time of the increase in an amount equal to the amount of the increase (see § 1002(a)(2)); repayments under the new fixed loan commitment or line of credit are not authorized by § 1002(a)(2) but may, if the applicable certification requirements are complied with, be authorized by § 1002(a)(1) or (a)(5).

If an AFN made a pre-January 1, 1968, borrowing from a bank and such borrowing was also guaranteed prior to January 1, 1968, the repayment will be generally authorized under § 1002(a)(1), rather than under § 1002(a)(2). If, however, the borrowing by the AFN was made prior to January 1, 1968, and the guarantee was made after January 1, 1968, § 1002(a)(2) will apply, unless DI, at the time of the guarantee, filed a certificate pursuant to General Authorization No. 1.

Example 18. DI has an AFN (C) in Schedule C. On September 1, 1967, C borrowed $300,000 from a foreign bank (F) for a term of 2 years. Repayment of the borrowing was not guaranteed by DI, but DI repaid the principal and accrued interest of $320,000 voluntarily on August 31, 1969, when the loan became due. At the time of such repayment, C had liquid assets which were just sufficient to meet its current operating expenses, and C had diligently, though unsuccessfully, attempted to refinance the borrowing with F and with other foreign lenders. The repayment by DI is authorized by § 1002(a)(2).

Example 19. DI has an AFN (C) in Schedule C. On December 1, 1967, C entered into a revolving credit agreement with a foreign bank (F) pursuant to which X may borrow up to $1,000,000 over a period ending November 30, 1969. Borrowings under the agreement are to be made against notes with maturities of 90 days which can be renewed within the overall period of the agreement. On January 15, 1968, C took down the entire $1,000,000 and the note was rolled-over until November 30, 1969, at which time the outstanding indebtedness, plus $50,000 in accrued interest, became due. At this time, C had liquid assets which were sufficient to repay only $300,000 of the amount due and C was unable after diligent effort, to refinance the balance with F or with other foreign lenders. Accordingly, the remaining $750,000 due was paid by DI on November 30, 1969. The payment by DI to F of $750,000 is authorized by § 1002(a)(2).

Example 20. On September 1, 1967, an AFN of DI entered into a revolving credit agreement under which AFN could borrow up to $1,000,000, and AFN immediately took down the entire amount. On September 20, 1968, the amount available to X under the revolving credit agreement was increased to $1,500,000, and X borrowed the additional $500,000 in October 1968. As a result, a new $500,000 line of credit is deemed to have been established on September 20, 1968, and repayment by DI of any part of the additional $500,000 borrowing will not, therefore, be authorized by § 1002(a)(2) but would be authorized by § 1002(a)(5) if DI had guaranteed the additional $500,000 borrowing and had complied with the certification requirements of § 1002(b) of Subpart J.

(iii) *Repayment of AFN borrowing pursuant to guarantee made in the period January 1, 1968 through June 9, 1968.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made on or after the effective date through June 9, 1968, is authorized by § 1002(a)(1), if the DI filed a certificate described in § 2(a)(1) of General Authorization No. 1. A transfer of capital by the DI to an AFN

to enable the AFN to repay such borrowing is similarly authorized.

Section 2(a)(1) of General Authorization No. 1 required the DI to state that the DI "has no reason to believe, under existing circumstances, that the affiliated foreign national will be unable to pay or otherwise satisfy such indebtedness without resort to performance under the guarantee * * *." Although, should the DI be called upon to repay the AFN's borrowing pursuant to the guarantee, positive direct investment would be authorized by § 1002(a)(1) even if in excess of the amount authorized to the DI in the year of repayment, the Office may inquire into the good faith of the statement made by the DI in its certificate.

Example 21. DI elects to be governed by § 503 during 1969. On March 15, 1968, DI executed its guarantee of payment of principal and interest under its AFN's 1-year note in the principal amount of $2,000,000, executed that same day. DI filed a General Authorization No. 1 certificate, based upon the belief that AFN could renew the borrowing at the time that it came due. During 1968, the AFN experienced financial difficulties, the market for AFN's products diminished, and DI, at the beginning of 1969, was forced to discontinue the AFN's operations. DI therefore repaid the $2,000,000, pursuant to its guarantee, on the maturity date of the note. The transfer of capital in repayment resulted in positive direct investment in excess of $1,000,000, but the entire amount of positive direct investment attributable to repayment of the borrowing is authorized by § 1002(a)(1). Upon inquiry by the Office into the basis for DI's statement in the certificate, DI may offer as an explanation the changed circumstances which were beyond its control.

(iv) *Repayment of a long-term foreign borrowing made prior to January 1, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made prior to the effective date is authorized by § 1002(a)(4).

Example 22. In 1967, DI purchased all of the stock of a United Kingdom corporation from an unaffiliated foreign national. The purchase price was $5,000,000, $1,000,000 being paid in cash at the closing and the balance being payable (together with interest of $480,000) 2 years from the date of closing. The $4,000,000 balance constitutes a long-term foreign borrowing and payment of such balance in 1969 is authorized by § 1002(a)(4). Payment of the $480,000 in interest does not constitute a transfer of capital and thus does not require authorization (see § 312(c)(8)).

(v) *Repayment of a long-term foreign borrowing made in the period from January 1, 1968 through June 9, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made from the effective date through June 9, 1968, is authorized by § 1002(a)(4), provided that the DI filed a certificate described in § 2(b) of General Authorization No. 1.

Section 2(b) of General Authorization No. 1 required the DI to state that it "has reason to believe that, under existing circumstances, the borrowing will ultimately be repaid or satisfied from sources outside the United States."

Example 23. On March 15, 1968, DI made a long-term foreign borrowing from a foreign bank, the proceeds of which were $2,000,000. DI gave the bank its note with an original maturity of 12 months and filed a General Authorization No. 1 certificate in the belief that it could either renew the note when it became due or repay the borrowing with proceeds of another long-term foreign borrowing. DI immediately loaned all of the proceeds to a Schedule C AFN. During 1968, the AFN experienced financial difficulties, the market for AFN's products diminished, and DI, at the beginning of 1969, was forced to discontinue the AFN's operations. DI was unable to renew the note or refinance the long-term foreign borrowing from another foreign lender, and DI repaid the borrowing from its funds in the United States. The transfer of capital in repayment of the borrowing resulted, at the end of 1969, in positive direct investment in excess of DI's Schedule C allowable and was authorized by § 1002(a)(4). Upon inquiry by the Office into the basis for DI's statement in the certificate, DI may offer as an explanation the changed circumstances beyond its control.

(vi) *Repayment through conversion of debt obligations into stock of DI.* Repayment by reason of the delivery of equity securities of the DI to holders of debt obligations of the DI (including an international finance subsidiary of the DI) or of debt obligations issued by an AFN, pursuant to conversion or similar rights, is authorized by § 1002(a)(3). No certificate is required to be filed in order to authorize such repayment, regardless of when the borrowing was made. A certificate must be filed, however, in order to provide authorization for cash payment of principal upon maturity of a convertible debenture offering, under § 1002(a)(5) and (6), since § 1002(a)(3) does not authorize such cash repayment.

For purposes of § 1003, a transfer of capital resulting from a repayment by conversion is deemed to have been made in the year immediately following the year in which the conversion or similar rights are exercised.

Example 24. In February 1968, an international finance subsidiary of a DI sold $20,000,000 of 12-year debentures in a public offering, the proceeds of which qualify as long-term foreign borrowing proceeds under § 324. The debentures are convertible into common stock of DI commencing 6 months from the date of issue. The proceeds of the debentures were invested in incorporated AFNs of DI in Schedule A, where DI, during 1968, was authorized under § 504 to make positive direct investment of $3,000,000. During 1968, DI delivered $5,000,000 worth of its common stock (in aggregate market value at the time of delivery) to holders of the debentures as a result of the conversion of $3,500,000 in principal amount of the debentures. Such delivery resulted in a $3,500,000 repayment of the borrowing in 1968 (i.e., a transfer of capital to Schedule A during 1968 which is deemed to be made the following year for purposes of § 1003). (See § B1003-1(i).) During the same year, DI made additional positive direct investment of $3,000,000 in Schedule A, which was authorized by § 504(a)(1). The positive direct investment resulting from delivery of the stock was authorized under § 1002(a)(3). Pursuant to § 1003, DI's Subpart E allowables are reduced by $3,500,000 in 1969.

Example 25. In November 1968, a Luxembourg AFN of DI (L) sold $20,000,000 of 12-year debentures in a public offering. Attached to the debentures were warrants entitling the holder to purchase a certain number of shares of DI's common stock at a certain price. A holder of the warrants may also exchange a debenture, upon presentation of the warrant, for common stock of DI. DI's independent financial counsel valued the warrants at $2,000,000 (which valuation was acceptable to OFDI), and DI recognized a transfer of capital to L in that amount in connection with issuance of the debt and warrant package. During 1969, an aggregate principal amount of $3,000,000 of debentures was presented along with the warrants, and DI issued common stock in exchange therefor. The exchange constitutes the satisfaction of an AFN debt obligation, resulting in an additional transfer of capital under § 312(a)(6) in the principal amount of the debt surrendered ($3,000,000). Under § 1002(a)(3), the transfer of capital is deemed to be made in the year following exchange, so that DI's Schedule C allowable will not be charged, under § 1003, until 1970.

(vii) *Guarantee made on or after June 10, 1968.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made on or after June 10, 1968, is authorized by § 1002(a)(5), provided that the DI filed a certificate described in § 1002(b). A transfer of capital by the DI to an AFN to enable the AFN to repay such borrowing is similarly authorized.

Section 1002(b) requires the DI to state that it has reason to believe either that it will make no transfers of capital in repayment of the AFN borrowing within 7 years of the date of the guarantee; or, if it does make transfers of capital in repayment of the borrowing within the 7-year period, positive direct investment resulting therefrom, if any, will be authorized by the DI's Subpart E allowable in the appropriate scheduled areas.

Example 26. During 1968, DI had historical Subpart E allowables of $300,000 in Schedule C, $750,000 in Schedule B and $1,250,000 in Schedule A. DI had two AFN's in Schedule C, one being a French corporation (F) that had existed for a number of years. F had maintained a substantial level of earnings for the past 3 years. The other AFN was an Italian corporation (X) that had been organized in 1967 and had lost money in that year, but that DI expected would break even in 1968 and perhaps have small earnings in 1969. On July 1, 1968, DI negotiated an overdraft facility for X from an Italian bank, pursuant to which X could make overdrafts of up to $1,000,000. The term of the facility was 1 year, and DI guaranteed repayment of any amount outstanding at the end of that year. DI filed a certificate under § 1002(b) stating that DI had reason to believe that no transfers of capital would be involved in repayment of the guaranteed borrowing, because renewal of the overdraft facility was anticipated until such time as X would have the financial resources to be able to repay the borrowing itself. DI had reason to believe that, should X not be able to repay at any time, F would be able to loan funds to X out of its substantial cash reserves, while still being able to fulfill any earnings repatriation requirements of the regulations.

Through the remainder of 1968, X and F encountered unprecedented business reverses, causing X to operate again at a loss, and resulting not only in a loss for F, but also necessitating substantial invasion of capital reserves. During 1968, X took down the full $1,000,000 under the overdraft facility. During June 1969, the Italian bank indicated

that it would not renew the overdraft facility for $1,000,000, but only for $500,000. DI attempted and failed to secure financing from other sources to refinance the $500,000. Therefore, on June 30, 1969, DI repaid $500,000 to the Italian bank pursuant to the guarantee. This repayment was authorized by § 1002(a)(5), and the positive direct investment resulting therefrom had the immediate effect, pursuant to § 1003, of reducing DI's Schedule C historical allowable to zero and DI's Schedule C loss allowable under § 504(e) by $200,000. If OFDI should inquire into the inability of DI to perform according to its reasonable expectations at the time of filing the certificate, DI may offer the unforeseen, changed circumstances as an explanation.

(viii) *Repayment of long-term foreign borrowing made on or after June 10, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made on or after June 10, 1968, is authorized by § 1002(a)(6): *Provided*, That the DI filed a certificate described in § 1002(b).

Section 1002(b) requires the DI to state that it has reason to believe either that (a) no transfers of capital will be involved in repayment of the long-term foreign borrowing within 7 years of the date of the borrowing; or, (b) if transfers of capital are made in repayment of the borrowing within the 7-year period, positive direct investment resulting therefrom, if any, will be authorized by the DI's Subpart E allowable in the appropriate scheduled area.

Example 27. On September 1, 1968, DI made a long-term foreign borrowing of $5,000,000 from a foreign bank, giving the bank its 12-month note. DI immediately loaned the funds to its Schedule C AFN (C). Although the terms of the note did not make it renewable, DI was assured by the lender that, if there would be no material change in the DI's business and financial condition and in the prevailing money market, it would give favorable consideration to requests by the DI to roll-over the loan until August 31, 1975. Based on existing circumstanes, DI did not anticipate any material adverse change in its business or financial condition and intended to request renewal to August 31, 1975. In this situation, DI filed a certificate under § 1002(b)(1). During the remainder of 1968 and in 1969, however, both C and DI suffered unexpected business reversals, and in August 1969, the lender indicated that it would renew the note only to the extent of $2,500,000. DI attempted and failed to find financing from other sources, and therefore repaid the borrowing to the extent of $2,500,000 from U.S. sources on August 31, 1969. The positive direct investment resulting therefrom is authorized by § 1002(a)(6). If OFDI inquires into the inability of DI to perform according to its reasonable expectations at the time of filing the certificate, DI may offer the unforeseen and changed circumstances as an explanation.

§ B1002–2 Standard Certificate Form FDI–106.

All certificates filed on or after June 10, 1969, must be made on Standard Certificate Form FDI–106. (Prior to June 10, 1969, the format of submission was immaterial so long as the certification contained all information and statements required by Subpart J.)

As indicated in the FEDERAL REGISTER notice published on August 8, 1968 (33 F.R. 11268), certificates submitted prior to August 12, 1968, pursuant to and in compliance with § 1002(b) as published in proposed form on June 8, 1968 (33 F.R. 8506), are acceptable as filed. Furthermore, new certificates need not be filed where prior submissions were made in accordance with the regulations or proposed regulations in effect at the time of filing, notwithstanding the fact that the borrowing or guarantee may not actually have taken place until after Subpart J was published in final form in 1968 or until after the 1969 amendment requiring use of the Standard Certificate Form.

The certificate must be delivered to OFDI within 10 days after the date of a borrowing by the DI, or the date of DI's guarantee of an AFN borrowing, as the case may be. For purposes of computing the 10-day period, the date of a borrowing by the DI is fixed according to the rules of § 1002(e)(1). The date of a guarantee is not simply the date on which DI executes the guarantee or when the last act necessary to complete a deposit, pledge or hypothecation has taken place. Rather, the date of the guarantee of an AFN borrowing is the first date on which both the guarantee and the borrowing are in existence, under § 1002(e)(1). Thus, if on January 1 DI executes a written repayment guarantee with respect to AFN borrowings up to $1 million and the AFN borrows only $500,000 on that date, then borrows another $500,000 on June 1, DI may file two certificates, each covering a $500,000 guarantee of an AFN borrowing, the first by January 10, and the second by June 10.

As noted above, however, if a DI executed a guarantee of an AFN borrowing prior to January 1, 1968, but the AFN did not actually borrow until after that date, OFDI will not require a certificate to have been filed, in order for repayment to be authorized. Also, if a DI executed a guarantee in the period January 1, through June 9, 1968, but the AFN borrowing took place on or after June 10, 1968, the DI is not required to replace its General Authorization No. 1 certificate with a Subpart J certificate.

The following sections explain the substantive requirements of Form FDI–106, except for those portions that are self-explanatory.

(i) *Item 1.* The certificate should be filed only by DI (or a duly authorized representative). If an international finance subsidiary of a DI (see § 323) makes a borrowing guaranteed by the DI, the borrowing is treated as if made by the DI itself and only one certificate need be filed. A guarantee by one AFN of a borrowing by another AFN in a different scheduled area would likewise require a certificate filing only by the DI.

When a shareholder guarantees a borrowing by a principal DI, a single certificate should be filed by the principal DI on the basis of its allowable, unless the principal DI is an affiliate of the shareholder or unless the shareholder has consented to an election under § 906(b)(2). Transfers of capital pursuant to such guarantee that result in positive direct investment will reduce the principal DI's allowables as provided in § 1003. If the principal DI is an affiliate of the shareholder guaranteeing the borrowing, the member of the affiliated group filing reports under § 602 should file the certificate. (See § 907(d).) If the shareholder has consented to an election under § 906(b)(2), the shareholder (and any other consenting shareholder guaranteeing the borrowing) should file a single certificate. Positive direct investment attributable to transfers of capital made by a consenting shareholder pursuant to such guarantee will be deducted from the allowables of such consenting shareholder in accordance with the provisions of § 1003.

In the case of a guarantee described in § 1002(a)(5) by an indirect owner of a borrowing by an AFN of the principal DI, the principal DI should file a single certificate, whether or not the election under § 906(b)(1) has been made, unless the principal DI is an affiliate of the shareholder. In this case, the member of the affiliated group filing report under § 602 should file the certificate. Positive direct investment attributable to transfers of capital made pursuant to such guarantee will be deducted from the allowables of the principal DI.

(ii) *Item 2.* DI should check the appropriate box beside "long-term foreign borrowing" or "guaranteed borrowing" by an AFN. The guaranteed borrowing of an AFN includes, by implication, a borrowing by an AFN that is guaranteed by another AFN of the DI. If such is the case, the name of the guarantor AFN should also be included, along with the name of the borrower AFN and the country where the borrower AFN is located.

(iii) *Item 5.* In entry a(1), the term "credit facility" refers to an arrangement with a lender (such as a line of credit or revolving credit arrangement) whereby funds may be taken down from time to time over a specified period up to a stated maximum aggregate amount, as described in § 1002(e)(3). In such cases, a DI may file a single certificate with respect to such credit facility, instead of filing separate certificates for each borrowing by the DI or guarantee of an AFN's borrowing pursuant to the arrangement involved. (Although § 1002(e)(3) provides that a certificate with respect to a credit facility should be filed on or prior to the date of the first takedown, OFDI will treat such certificates as timely filed if they are delivered within 10 days after the first takedown.) A credit facility will be certified only when first made or at the time of its renewal. A DI must file a new certificate upon expiration of a credit facility and the execution of a new credit facility, but only to the extent that borrowings pursuant to the credit facility are not outstanding at the time of renewal. If borrowings are outstanding, the renewal of the credit facility is simply a renewal of the borrowing, and no new certificate need be filed. (The renewal or refinancing, as described in § 1002(e)(2), of a takedown under a credit facility or of an isolated borrowing need not be certified at that time, since the renewal or

refinancing is not the making of a new borrowing or guarantee of an AFN borrowing (see § 324(b)(1).)

Entry a(2) deals with a single takedown pursuant to a credit facility. This entry normally applies only when the DI did not file a certificate with respect to the entire credit facility, but is filing separately for each separate takedown pursuant to a credit facility. In such case, the first two boxes should be checked. In a few isolated instances, however, such as where DI desires to change the statement made in a certificate or where changed or additional facts provide a more favorable basis for making a certificate, the DI may desire to file a second certificate for a single takedown under a credit facility for which a certificate has previously been filed. In that event, the first and third boxes should be checked.

Entry a(3) refers to a borrowing that is not connected with a credit facility, i.e., is not made pursuant to an arrangement described in § 1002(e)(3).

Example 28. On September 1, 1969, DI enters into a revolving credit arrangement with a foreign bank pursuant to which DI may borrow up to $5,000,000 through August 31, 1972. Borrowings under the arrangement are to be made against notes with maturities of 180 days, renewable within the overall period of the arrangement. Funds borrowed under this arrangement are to be invested by DI in a Schedule A AFN, where the DI has a historical allowable of $7,500,000. DI believes, as of September 1, 1968, that positive direct investment in Schedule A in 1971, when all outstanding indebtedness will be paid in full, will not exceed $6,500,000. In this situation, DI would have filed a single certificate under § 1002(b)(2), stating the belief that all repayments made within 7 years from the date of each borrowing under the revolving credit arrangement will be authorized by § 504. In completing item 5 of Form FDI–106, DI would have checked the first two boxes of entry a.(1), entering $5,000,000 as the amount of the credit facility, entering August 31, 1972, as the stated maturity date, and entering the expected date and amount of the first takedown, if that information was known.

On August 31, 1972, consider the following alternative possibilities:

(a) All borrowings made under the arrangement have been repaid in full. DI and the bank renew the revolving credit arrangement on the same terms for an additional 3-year period, ending August 31, 1974. Funds borrowed under the arrangement as renewed are also to be invested in Schedule A AFNs. In this situation, DI must file a new certificate under § 1002(b)(2) stating the belief that all repayments made within 7 years from the date of each borrowing will be authorized by § 504. DI will check the first and third boxes of entry a(1) and, since no portion of the credit was outstanding at the time of renewal, will enter "zero" for the portion of the arrangement that is certified by a previous certificate. DI will also enter the amount of the credit facility ($5,000,000) and the maturity date, August 31, 1974.

(b) The arrangement is renewed, with $5,000,000 of borrowings under the prior arrangement still outstanding. The funds to be borrowed under the renewed arrangement are to be used to refinance the outstanding indebtedness. Since, by virtue of the provisions of § 1002(e)(2), funds borrowed under the renewed arrangement to refinance existing indebtedness will not constitute new borrowings, DI is not required to file any additional certificates because of the renewal of the arrangement.

(c) The arrangement is renewed, with $3,000,000 of borrowings under the prior arrangement outstanding. Thus, $3,000,000 of borrowing under the renewal will be used to refinance outstanding indebtedness, and does not constitute a new borrowing. The remaining $2,000,000 will constitute a new borrowing, when DI takes down that amount. DI plans to invest the $2,000,000 in the Schedule A AFN, so that DI may file a single certificate with respect to the $2,000,000 borrowing it may make under the renewal agreement. If DI files a single certificate, the first and third boxes under entry a(1) should be checked and $3,000,000 should be shown as the portion of the maximum amount of the arrangement that has been previously certified and need not now be certified. The amount of the arrangement is $5,000,000 and the stated maturity date is August 31, 1975. However, DI will certify only to $2,000,000 of borrowings ($5,000,000 less $3,000,000).

The filing requirements and amounts to be certified would be exactly the same if the credit facility arrangement and borrowings thereunder were by the Schedule A AFN with DI's guarantee.

(iv) *Item 6.* DI must check the box preceding the category of § 324(e) under which a borrowing qualifies as a long-term foreign borrowing.

(v) *Item 7.* If the borrowing by DI or by an AFN involves issuance of bonds or debentures, the DI must indicate, by checking the appropriate boxes, whether the securities are convertible or nonconvertible, and whether they are issued in a private placement or a public offering.

For purposes of Item 7, bonds or debentures are convertible not only if according to their terms they may be exchanged for stock of the DI, but also if they may be so exchanged upon presentation of a warrant attached to the bonds or debentures (whether or not the warrant is detachable). If an offering with warrants attached is made by a DI, a certain portion of the funds or other property received from the offering will be attributable to sale of the warrants and, therefore, will not constitute proceeds of long-term foreign borrowing. In such case, the DI should indicate the value of the warrants, based upon a valuation by one or more of the principal underwriters or by DI's independent financial counsel. (OFDI reserves the right to review the reasonableness and accuracy of any such valuation.) The value of the warrants should be deducted from aggregate principal amount of the bonds or debentures, and the difference is the amount of potential repayment that must be certified. (See § 324.) If such an offer is made by an AFN of DI, attachment of warrants will not have an effect on the amount of the borrowing. However, DI must reflect, on the appropriate Form FDI–102, a transfer of capital from DI to AFN in the amount of the value of the warrants. The DI must certify with respect to potential repayment of the full aggregate principal amount of the debt.

The term "public offering" for purposes of the second proviso in § 1002(c)(2) means generally that at least half of the issue must be distributed through normal investment banking channels abroad, or sold to foreign purchasers engaged in the business of dealing in securities, in a manner affording reasonable prospects of an effective secondary market for the securities.

(vi) *Item 8.* Item 8 follows the structure of § 1002(b). Statement A restates § 1002(b)(1), and Statement B restates § 1002(b)(2). In order to obtain authorization to repay a borrowing described in § 1002(a) (5) or (6), a DI must make one of the two statements by checking the appropriate box opposite A or B. If existing facts and circumstances permit, a DI may make both statements in the alternative. With respect to either statement, a DI must check at least one of the boxes. If none of the premises expressly stated under Statement A or B corresponds to the particular facts of the transaction, the DI must check the box marked "Other" and write the particular reason for making the statement.

In order to make Statement A, a DI must have reason to believe, based on all the facts and circumstances existing at the time the certificate is delivered to OFDI, that there will not be any repayment of the borrowing within 7 years of the date of the borrowing, or the date of the guarantee if the borrowing is by an AFN. For purposes of determining the 7-year period when a guaranteed borrowing by an AFN is involved, the date of the guarantee of the borrowing is considered to be the first date when both the guarantee and the borrowing by the AFN are in existence, e.g., when the guarantee has been executed and the borrowing has been taken down.

When making Statement A, a DI need consider only whether repayment of the borrowing can be postponed for a period of 7 years. Whether positive direct investment resulting from repayment at that time will be authorized by the DI's Subpart E allowables is irrelevant. For example, a DI that has only a § 503 allowable may make the statement with respect to a $10 million borrowing made in 1969, even though repayment in 1976 would exceed the present § 503 allowable. However, when the borrowing is repaid in 1976, § 1003 requires that positive direct investment resulting from repayment will be a first charge against Subpart E allowables.

Statement B may be made if a DI cannot make Statement A, or may be made in addition to such statement. In order to make Statement B a DI must have reason to believe, based on all the facts and circumstances existing at the time the certificate is delivered to OFDI, that any repayment within seven years of the borrowing either will not result in positive direct investment in Schedules A, B, or C, or that, if such repayment does result in positive direct investment, such positive direct investment will be authorized during the year when repayment is made by the DI's Subpart E allowables in the scheduled area in which the transfer of capital under § 312(a) (6) or (7) is incurred. When making such statement, a DI may assume that the § 503 allowable will continue to be the amount in effect during the year when the certificate is filed. Thus, a DI filing during 1969 may

assume that the § 503 allowable will continue, in future years, at $1 million. Similarly, a DI may assume that historical allowables will continue, in future years, at the amounts set by § 504 (a) and (c) in the year of filing, that for purposes of § 504(b) earnings allowables will continue to be based on 30 percent of earnings in the appropriate prior year or years, and that the § 506 incremental earnings allowable (available commencing in 1970) will continue at the same level. On the other hand, where the transaction involved is a borrowing by an AFN with the DI's guarantee, DI must make a reasonable estimate of future AFN earnings, based on facts and circumstances existing at the time the certificate is filed.

When filing each certificate with respect to a borrowing, the DI must also take into consideration the projected use of allowables in the year when repayment falls due. For example, a DI electing to be governed by § 503 during 1969 and expecting to use the § 503 allowable through 1971 could not file certificates in 1969 containing Statement B during 1969, with respect to two borrowings, each for $1 million and each requiring full principal repayment in 1971.

The following examples illustrate situations in which the assurances contained in Statement A would be appropriate:

Example 29. DI borrows $1,000,000 from a foreign bank on September 1, 1969, giving the bank a note maturing on August 31, 1976. The DI may file a certificate under § 1002(b) by checking the box opposite Statement A and the box opposite the first reason therefor, since no principal payments are required within seven years.

Example 30. DI borrows $1,000,000 from a foreign bank on September 1, 1969, giving the bank a note having a maturity date of August 31, 1974, but containing express terms that permit renewal until August 31, 1976. The DI may file a certificate under § 1002(b) by checking the box opposite Statement A and the box opposite the second reason therefor, because the borrowing (including the express provisions for its renewal) is for a term of 7 years.

Example 31. DI borrows $10,000,000 from a foreign bank on September 1, 1969, giving the bank a note maturing on August 31, 1972. DI intends to refinance the borrowing within the 3-year period through sale of $20,000,000 principal amount of convertible debentures to foreign nationals, which sale will qualify as a long-term foreign borrowing. The debentures will have an original maturity of more than 7 years. The DI may file a certificate under § 1002(b) by checking the box opposite Statement A and the box opposite the third reason therefor, because DI believes that the borrowing can be refinanced for a period of more than 7 years.

Example 32. DI's sole AFN in Schedule C borrows $1,000,000 from a foreign bank on September 1, 1969, giving the bank its note maturing on August 31, 1971. The note is guaranteed by DI. DI has reason to believe, under existing circumstances, that the AFN will have sufficient financial resources in 1971 (generated by depreciation, earnings, and borrowings) to repay the loan and to pay all dividends required to satisfy limitations on positive direct investment imposed by the Regulations. (See § 1002(c)(3).) DI may file a certificate under § 1002(b)(1) by checking the box opposite Statement A and the box opposite the fourth reason therefor, because DI does not anticipate being called upon to make any principal repayments of the borrowing pursuant to the guarantee.

The following examples illustrate situations in which the assurances contained in Statement B would be appropriate:

Example 33. DI borrows $500,000 from a foreign bank in 1969, using the proceeds to purchase all voting stock of a company in Schedule A. The borrowing is repayable in 1971, but DI does not anticipate having any allowable for positive direct investment under § 504 or § 506 during 1971. The DI believes, under existing circumstances, that the acquired company will earn $40,000 in 1971, all of which will be reinvested, but (apart from repayment of the loan and such reinvested earnings) does not intend to make any other positive direct investment in excess of $250,000. In this situation, DI may file a certificate under § 1002(b)(2), checking Statement B. Repayment of the $500,000 borrowing in 1971, plus the $40,000 of reinvested earnings in 1971, plus $250,000 of other positive direct investment would result in positive direct investment of $790,000 during that year, all of which would be authorized by § 503.

Example 34. During 1969, DI has historical allowables of $400,000 in Schedule C, $5,000,000 in Schedule B and $10,000,000 in Schedule A. The § 504(a) historical allowable is elected and, under the upstream provision of § 504(c)(1), DI has a total allowable in Schedule C of $600,000 for 1969, based on 1968 annual earnings of DI's Schedule C AFNs of $2,000,000. During 1969, DI makes a long-term foreign borrowing, giving a note for $1,000,000, due in 1971. DI intends to invest the $1,000,000 in Schedule C AFNs. DI has reason to believe, based on existing circumstances, that the Schedule C AFNs will have annual earnings in 1970 of $4,000,000, giving DI a Schedule C allowable during 1971 of $1,200,000. DI further has reason to believe that the AFNs, in 1971, will reinvest no more than $200,000 of their earnings. Under these circumstances, DI may file a certificate under §1002(b)(2), checking Statement B, because there is reason to believe that repayment of the borrowing in 1971 will be authorized within the Schedule C allowable for that year. (Note that DI cannot base certification on the allowable available in Schedule B or A, even though such allowable would be charged in 1971 (pursuant to § 1003) if the Schedule C allowable is not sufficient to absorb the charge when the debt is repaid.)

Example 35. During 1969, DI elects the historical § 504(a) allowable, with a Schedule B allowable of $1,200,000. During 1969, DI's Schedule B AFNs have earnings of $2,000,000, all of which DI desires to reinvest (resulting in positive direct investment of $2,000,000). DI makes a long-term foreign borrowing during 1969 with an original maturity of 1-year, the proceeds of which are $800,000, and allocates the proceeds to positive direct investment in Schedule B at the end of 1969. DI has reason to believe that the AFNs in Schedule B will again have $2,000,000 of earnings during 1970, but that they will be able to declare $800,000 of dividends. DI further plans, during 1970, to liquidate certain Schedule B holdings, which liquidation will result in a negative net transfer of capital during 1970 of $900,000. Under these circumstances, DI may file a certificate under § 1002(b)(2), checking Statement B, because there is reason to believe that positive direct investment resulting from repayment of the borrowing in 1970 will be authorized under the Schedule B allowable.

§ B1002–3 Certification with respect to convertible debt.

Section 1002(c)(2) provides that, under certain circumstances, a DI may exclude potential transfers of capital resulting from conversion of debt instruments into equity securities of the DI in determining (for purposes of Subpart J) whether positive direct investment resulting from repayment will be authorized by Subpart E allowables. No certificate is required with respect to positive direct investment resulting from the conversion itself (§ 1002(a)(3)). Accordingly, the certification to which § 1002(c)(2) is addressed relates to (i) repayment by a DI pursuant to guarantee of an AFN's convertible debt (under § 1002(a)(5)), (ii) certification of cash repayment of a DI's convertible long-term foreign borrowing (under § 1002(a)(6)), or (iii) certification of other borrowing unrelated to the convertible debt (under § 1002(a) (1) or (4)) at a time such debt is outstanding.

The effect of § 1002(c)(2) is that, in the stated circumstances, a DI may rely on future allowables, and their availability to authorize cash repayment of borrowings, without regard to the potential charge to such allowables resulting from a conversion. For example, if a DI operating under § 503 has made a public offering of 20-year convertible debentures in principal amount of $20 million, and subsequently makes a $1 million long-term foreign borrowing having an original maturity of 1 year, a § 1002(b)(2) certificate may properly be executed notwithstanding that conversions of the outstanding convertible debt could use up DI's § 503 allowable for the year the $1 million borrowing matures (assuming the criteria in the proviso to § 1002(c)(2) are satisfied).

On the other hand, if a convertible debt fails to meet either of the two conditions in the proviso to § 1002(c)(2), potential conversions must be taken into account when filing certificates. If the convertible debt does not have an original maturity of 7 years, potential charges to positive direct investment resulting from conversions must be considered by the DI in determining whether sufficient allowables will exist during any year to authorize cash retirement of the convertible debt or of any other borrowing by the DI or an AFN. Similarly, potential charges against allowables must also be taken into account by the DI if a nonpublic debt issue is convertible within three years of the date of issuance. (Potential charges against allowables resulting from conversion need not be taken into account, even if the debt is convertible within 3 years of the date of issuance, if the convertible debt is a public offering.)

Since the DI need not, when making a certificate under § 1002(b)(1) stating that no principal repayments will be made within 7 years of the borrowing, consider the availability of allowables to authorize positive direct investment resulting from repayment at that time, the form of the convertible debt will not matter when the DI files under that provision. However, whenever DI makes a

certificate under § 1002(b)(2), and convertible debt is outstanding that falls into either of the categories of the proviso to § 1002(c)(2), potential conversions must be considered by the DI.

Example 36. DI qualifies only for the § 503 allowable in 1968–70. In September 1968, DI purchased all stock of a German corporation from an unaffiliated foreign national (X) in exchange for a $5,000,000 debenture issue maturing in 10 years and convertible (in whole or in part) into common stock of DI commencing three years from date of issuance. Interest on the debentures is payable semiannually, but in the event of default on payment of any interest installment, X has the right to declare the entire principal sum to be immediately due and payable. However, DI was in good financial condition and did not anticipate default in interest payments. DI filed a certificate under § 1002(b)(1), since no principal repayments are required to be made within 7 years from the date of issue. (Repayment by reason of conversion would be authorized by § 1002(a)(3), without regard to the Subpart J certification requirements.) In 1970, DI desires to make a long-term foreign borrowing of $1,000,000 with an original maturity of 2 years, and to allocate the proceeds thereof to positive direct investment in Schedule B. Without regard to any charge against the § 503 allowable resulting from conversion of the debenture, DI may file a certificate with respect to the long-term foreign borrowing under § 1002(b)(2) if there is reason to believe that the entire § 503 allowable will be available to authorize repayment in 1972.

Example 37. In 1968, DI made a public offering of $2,000,000 principal amount of convertible debentures, maturing in 1988 and convertible after 6 months from the date of issue. The proceeds were immediately invested in Schedule C. DI filed a certificate under § 1002(b)(1) with respect to the borrowing. In 1969, DI made a $5,000,000 long-term foreign borrowing from a foreign bank, repayable at the rate of $1,000,000 annually for the next 5 years, and DI allocated the proceeds thereof to Schedule C positive direct investment. In 1969, DI has a § 504(b) Schedule C allowable of $2,500,000, and has reason to believe that (except for any positive direct investment resulting from conversion of the convertible debt) curtailment of the bank loan can be accomplished within this allowable over the next 5 years. (DI expects to have annual earnings of $6,000,000 in Schedule C, to cause Schedule C AFNs to declare dividends of $4,500,000 per year, and does not expect to make any positive net transfer of capital for the next 5 years.) DI does not have to make allowance for positive direct investment resulting from potential conversions of the debenture issue when analyzing its ability to file a certificate with respect to the bank borrowing under § 1002(b)(2).

Example 38. On September 1, 1969, DI publicly offers $20,000,000 principal amount of debentures with maturity of 25 years, convertible into stock of DI at any time after 6 months from the date of issue. The offering qualifies as a long-term foreign borrowing, and DI immediately invested the proceeds in Schedule C, where DI has a historical allowable of $2,000,000. Under the underwriting agreement, DI must make mandatory sinking fund payments, and a trustee must make redemption of debentures in principal amount of $1,000,000 in each of the years 1974 through 1993. Because original maturity of the debenture issue is only 5 years, and not 7 years, consideration must be given to whether the $1,000,000 repayment of principal that will be charged to DI's Schedule C allowable during the years 1971–74, together with potential conversions, can be made within the allowable for that schedule. While DI cannot certify under § 1002(b)(2) in these circumstances, a certificate under § 1002(b)(1) could still be executed if DI has reason to believe that any cash principal repayments or conversions in excess of the Schedule C allowable could be refinanced with a maturity date at least 7 years from the date of the borrowing.

§ B1003–1 Effect of transfers of capital in repayment of borrowings.

Section 1002 provides that positive direct investment attributable to transfers of capital in connection with repayments of certain borrowings are generally authorized, subject to § 1003. Repayments may be made, consistent with the regulations, even though positive direct investment attributable to the resulting transfers of capital may exceed a DI's available allowables during the year of repayment. To the extent DI has available allowables in that year, § 1003 generally requires such allowables to be reduced by the amount of repayment. If the charge required exceeds the allowables available in the year of repayment, the excess will be carried over and charged against allowables in succeeding years until reductions so made total the amount of repayment. Accordingly, repayment of a borrowing is permitted, but a DI's allowables are correspondingly reduced in the year of repayment and, if necessary, in succeeding years.

The amount of positive direct investment made by a DI under § 1002 is called the "repayment charge." The repayment charge is generally incurred in the year of repayment, even if it is necessary to carry forward part or all of the charge into succeeding years.

The allowables elected by DI under Subpart E (and M, if applicable) are reduced, but not to less than zero, until such reductions equal the repayment charge. Section 1003(c)(2) provides that reductions of § 504 allowables in Schedule C are made first under § 504 (a) or (b), and then under § 504(e). A repayment charge incurred in connection with a U.S.-flag air carrier's foreign air transport operations reduces first its Subpart M allowable and then its § 504 allowables.

Section 1003(c)(1) provides that allowables are reduced first in the scheduled area where positive direct investment was made under § 1002 and, commencing in 1969, to the extent the repayment charge exceeds allowables available for that scheduled area, then in Schedules C, B and A, in that order.

To the extent that the repayment charge in any year exceeds all applicable Subpart E and M allowables, allowables in the following year or years are reduced in the same manner.

(i) *The repayment charge.* A repayment charge is incurred in the amount of positive direct investment resulting from transfers of capital enumerated in § 1002(a)(1)–(6), viz., (a) those to repay or enable the AFN to repay certain borrowings of the AFN; (b) those consisting of the delivery of equity securities of the DI upon conversion of certain debt obligations of the DI or an AFN; or (c) those made in repayment of long-term foreign borrowings of the DI.

Although the repayment charge is generally incurred in the year that positive direct investment is made, transfers of capital resulting from conversion of debt obligations are deemed (solely for purposes of § 1003) to occur in the year immediately following the year of conversion. (See § 1002(a)(3).)

Repayment of a long-term foreign borrowing by a direct investor (including delivery of equity securities upon conversion) results in a transfer of capital to the scheduled area where the proceeds were expended or allocated at the time of repayment and with respect to which a deduction was made under § 203(d), § 306(e), or § 313(d)(1). If proceeds of the borrowing were utilized to offset positive direct investment in more than one scheduled area at the time of repayment, the transfer of capital resulting from repayment will be charged proportionally based on the deduction taken in each scheduled area. (See § 312(a)(7).) Note that when there is repayment of a long-term foreign borrowing that was not expended or allocated, no transfer of capital will result, because no deduction from net transfer of capital or positive direct investment was previously taken.

Transfers of capital to repay or to enable an AFN to repay a borrowing made by the AFN are charged against the DI's allowables in the scheduled area of the AFN.

(ii) *Reduction of allowables.* Section 1003 (c) and (d) prescribe the manner in which allowables under Subparts E and M are reduced because of a repayment charge incurred pursuant to § 1002.

Example 39. During 1969, DI repays a $1,000,000 long-term foreign borrowing, the proceeds of which had been expended in Schedule A. Under § 1002, DI has made positive direct investment in Schedule A of $1,000,000, constituting the "repayment charge" for purposes of § 1003. DI's allowables under § 504(a), which is elected for 1969, are $600,000 in A, $300,000 in B and $300,000 in C.

Under § 1003(c)(1), the Schedule A allowable ($600,000) is first reduced to zero; then, to the extent the repayment charge exceeds the reduction in A, the excess reduces allowables first in C (by $300,000, to zero) and then in B (by $100,000, to $200,000). Therefore, in 1969 DI may make no positive direct investment in C, no additional positive direct investment in A, and positive direct investment in B is limited to $200,000.

Example 40. During 1968, DI, with allowables of $2,000,000 in Schedule A and zero in Schedules B and C, repaid a $1,000,000 1967 borrowing used to acquire all outstanding shares of a German corporation. Since the "repayment charge" was incurred during 1968 (see § 1003(a)), no reduction of any allowables could be made under the applicable 1968 regulations, which did not provide (as does § 1003(c)(1) of the 1969 regulations) for reducing allowables in other scheduled areas.

Although the $1,000,000 repayment charge may be applied in subsequent years (under § 1003(c)(3) as in effect for 1968), only Schedule C allowables or the worldwide § 503 or § 506 allowables may be charged.

There is a special rule applicable to the charge against a Schedule C allowable. Section 1003(c)(2) provides that the reduction of Schedule C allowables shall first be made in the "historical" or

the "earnings" allowables under § 504 (a) or (b), and then in the "carryforward reinvested earnings" allowable under § 504(e).

Example 41. In 1970, DI elects § 504(a) with an allowable of $2,000,000 in Schedule C. In addition, DI has a carryforward allowable of $1,000,000 from 1968 under § 504(f)(3)(i) and a carryforward reinvested earnings allowable from 1969 under § 504(e) of $1,000,000. During 1970 DI sends $2,500,000 to its Schedule C AFN to enable it to repay a loan, resulting in positive direct investment under § 1002(a) of $2,500,000 in Schedule C, and makes no other direct investment.

Under § 1003(c)(2), DI's § 504(a) allowable is reduced to zero; the excess of $500,000 then reduces its § 504(e) reinvested earnings allowable by $500,000.

In 1971, DI will have a reinvested earnings allowable in Schedule C under § 504(e) of $500,000 and a positive direct investment allowable under § 504(f)(3)(i) of $1,000,000 (which also can be carried downstream), in addition to its § 504(a) allowable.

A special rule also applies to U.S.-air carriers engaged in international air transportation. Section 1003(c)(3) provides that where a transfer of capital resulting in a repayment charge is primarily related to operations in foreign air transportation (as defined in § 1302(a)), the Subpart M allowable shall be reduced first and then the § 504 (a) or (b) allowable.

Example 42. In 1969, DI, a U.S.-flag airline, has a foreign air transport allowable of $1,000,000 and § 504(a) allowables of $500,000 in Schedule A, $600,000 in Schedule B and $400,000 in Schedule C.

In 1969 DI repays a $1,500,000 borrowing made in connection with its operations in foreign air transportation, resulting in a repayment charge of $1,500,000 under §§ 1002 and 1003.

First, DI's foreign air transport allowable is reduced to zero and the excess of $500,000 is charged against its § 504(a) allowables in Schedules C, B, and A, in that order. Therefore, DI's Scheduled C allowable is reduced to zero and its B allowable is reduced to $500,000. The $500,000 allowable in Schedule A is not affected.

Allowables under § 506, the "incremental earnings allowable" (to be effective initially in 1970), will be the last allowable to be reduced in any year in which reductions under § 1003 are applied.

Example 43. DI elects to be governed by § 503 in 1970 and has a § 506 allowable of $100,000. DI makes a $1,050,000 repayment under § 1002.

After the reductions under § 1003, DI has $50,000 of its § 506 allowable left.

Section 1003 provides that all applicable allowables (including carryforwards) otherwise available in the year of repayment of a borrowing are reduced to the extent of the repayment charge, i.e., §§ 503, 504 (a) or (b), 504(e), 504(d), 504(f), 1302, and 506. To the extent the repayment charge is not equaled by reductions in allowables for any year, the difference is "carried forward" to the following year, and the same procedure for reducing allowables is repeated.

Example 44. DI elects § 503 in 1969 and repays a $1,500,000 borrowing, of which $900,000 had been expended in Schedule C and $600,000 in Schedule A.

In 1969, DI's § 503 allowable is reduced to zero. The remaining $500,000 repayment charge is carried to 1970.

In 1970, DI elects § 504(a) with allowables of $500,000 in Schedule A, $400,000 in Schedule B and $100,000 in Schedule C.

Since the underlying borrowing had been expended in more than one scheduled area, the repayment charge must be allocated between Schedules A and C. Accordingly, under §§ 1003 and 312(a)(7) a repayment charge of $200,000 is incurred in Schedule A (⅖ x $500,000) and a repayment charge of $300,000 is incurred in Schedule C (⅗ x $500,000).

The Schedule A allowable is therefore reduced by $200,000 from $500,000 to $300,000; the Schedule C allowable is reduced to zero; and the excess of $200,000 reduces the Schedule B allowable to $200,000.

B1100—Subpart K (§§ 1101–1107)

§ B1100–1 Introduction.

Subpart K is intended to reflect the exchange of letters of March 7, 1968, between the U.S. Secretary of the Treasury and the Canadian Minister of Finance. The Secretary of the Treasury, in his letter to the Minister of Finance, stated that Canada would be granted an exemption from the U.S. balance of payments programs affecting capital flows administered by OFDI and by the Board of Governors of The Federal Reserve System. The Minister of Finance, in turn, gave assurances of Canada's intention to insure that the exemption would not result in "pass-through" transactions adversely affecting the U.S. balance of payments programs.

While retaining the Schedule B classification for Canada, Subpart K permits unlimited positive direct investment in Canada and excludes direct investment in Canada from the base period and post-January 1, 1968 direct investment calculations for Schedule B. Borrowings by a DI from a Canadian person, however, do not qualify as long-term foreign borrowings under § 324.

§ B1101–1 Canadian AFNs and non-Canadian Schedule B AFNs.

Paragraph (a) of § 1101 defines a "Canadian affiliate" as an AFN in Canada, and paragraph (b) defines a "non-Canadian Schedule B affiliate" as an AFN in a Schedule B country other than Canada. The term "Canadian affiliate" should not be confused with the definition of "affiliate" in § 903(a). Thus, a "Canadian affiliate" will include a corporation organized under the laws of Canada (or any province thereof) in which the DI has a 10 percent or greater voting interest, and a partnership organized under the laws of Canada and a business venture conducted in Canada in which the direct investor has a 10 percent or greater profit interest (see §§ 304, 305, 901, and 902). Such "Canadian affiliates" are referred to in this Bulletin as "Canadian AFNs."

Example 1. DI has a wholly owned subsidiary (S) organized under the laws of Canada and a wholly owned subsidiary (T) organized under the laws of the United Kingdom. DI also owns 100 percent of an apartment house complex (U) in Canada and is a 50 percent participant in a partnership (V) organized under Canadian law engaged in the real estate business. T has an 80 percent interest in a subsidiary (X) organized under the laws of Canada, and T also has a branch sales office (W) in Montreal. S has a 60 percent interest in a subsidiary (Z) organized under the laws of Australia. S and X are incorporated Canadian AFNs of DI. T and Z are incorporated non-Canadian Schedule B AFNs of DI, U, V, and W are unincorporated Canadian AFNs of DI.

§ B1102–1 Authorized positive direct investment in Canadian AFNs.

Section 1102 authorizes a DI to make positive direct investment in Canadian AFNs in an unlimited amount during any year.

Example 2. In 1969, DI acquires all the stock of a Canadian corporation (C) from its sole stockholder, an individual citizen and resident of Germany, for $1,000,000 in cash. The transfer of capital is made to Canada and is generally authorized under § 1102.

Example 3. In 1969, DI acquires all the stock of a German corporation (C) from an individual citizen and resident of Canada for $1,000,000 in cash. The transfer of capital is made to Germany (Schedule C) and thus does not fall within the scope of § 1102.

Example 4. During 1969 DI purchases, for $2,000,000, the stock of a Canadian corporation (C) that owns a subsidiary (A) located in Panama. This transaction results in a transfer of capital both to Canada (authorized under § 1102) and to Schedule A. The purchase price must be apportioned between C and A in a manner that will fairly reflect the relative values of the interests acquired in the two corporations (such as relative book value, relative price/earnings ratios, etc.).

Example 5. In 1969, DI acquires, for $1,000,000 in cash, all the stock of a German corporation (C) from a Canadian corporation in which DI has a 10 percent voting interest. The transfer of capital is made to Canada and is generally authorized under § 1102.

Example 6. In 1969, DI acquires, for $1,000,000 in cash, all the stock of a German corporation (C) from a Lebanese corporation (A) in which DI has a 10 percent voting interest. C has a wholly owned Canadian subsidiary. DI has made a $1,000,000 transfer of capital to Schedule A, and no apportionment is made since the acquisition is from another AFN.

It should be noted that the authorization for unlimited positive direct investment in Canada does not constitute an exemption from the reporting requirements of § 602. Accordingly, even DIs with only Canadian AFNs are nevertheless required to file Forms FDI–101, FDI–102, and FDI–102F, absent a specific exemption from reporting based upon other factors.

(i) *Calculation of positive direct investment in Canada (§§ 1103–1104).* Although Canada is technically a Schedule B country, it is necessary, in view of the unlimited positive direct investment in Canadian AFNs authorized by § 1102, that positive direct investment in Canadian AFNs be excluded from the calculation of positive direct investment in Schedule B during the base period years and during 1968 and succeeding years. Accordingly, § 1103 (a) and (b) provide, in essence, that in computing a DI's net transfer of capital to all AFNs in Schedule B during any year under § 313(c), the only factors considered are transfers of capital between the DI and incorporated non-Canadian Schedule B

AFNs and the DI's share of the aggregate net change in net assets of unincorporated non-Canadian Schedule B AFNs. Similarly, § 1104 provides that, in determining a DI's share in reinvested earnings of incorporated AFNs in Schedule B during any year, only the DI's share in reinvested earnings of incorporated non-Canadian Schedule B AFNs is taken into account.

In calculating positive direct investment, Canada is treated, in effect, as being in its own separate scheduled area. For example, a transfer of capital by an incorporated Canadian AFN to an incorporated United Kingdom AFN is treated under § 505(a)(3) as a transfer of capital to the DI from Canada in calculating positive direct investment in Canadian AFNs and as a transfer of capital from the DI to Schedule B in calculating positive direct investment in non-Canadian Schedule B AFNs; if the transferee AFN is in Schedule A or Schedule C, the transfer of capital from the DI would be charged to Schedule A or C, respectively.

Similarly, in calculating a DI's share of an incorporated Canadian AFN's reinvested earnings, Canada is also treated as a separate scheduled area. Consequently, the gross amount of a dividend paid by a Canadian AFN to a non-Canadian AFN effectively reduces the DI's share in reinvested earnings of all incorporated AFNs in Canada, while the net amount of the dividend (i.e., net of foreign withholding taxes) effectively increases the DI's share in reinvested earnings of all incorporated AFNs in the payee's scheduled area.

The provisions of §§ 1103 and 1104 are thus designed to permit computation of direct investment separately for Canada, Schedule A, Schedule B (excluding Canada) and Schedule C. Such provisions are also designed, in conjunction with § 505, to prevent Canadian AFNs from being used as a "pass-through" for direct investment in foreign countries other than Canada.

Example 7. DI owns an incorporated AFN (X) in Canada and another incorporated AFN (B) in the United Kingdom. In 1969, B makes a 3-year loan to X in the amount of $500,000. Under § 505(a)(3), B is treated as having made a $500,000 transfer of capital to DI, thereby reducing DI's net transfer of capital to incorporated AFNs in Schedule B in 1969 by $500,000, and DI is treated as having made a transfer of capital in the same amount to X, thereby increasing DI's net transfer of capital to incorporated Canadian AFNs in 1969 by $500,000. All resulting positive direct investment in Canada is authorized by § 1102. If the loan had been from X to B, the DI would be deemed to have made a $500,000 transfer of capital to B.

Example 8. DI has branch sales operations in Canada (X) and Australia (B), and no other AFNs in Schedule B. In 1969 X's net assets increase by $150,000 and B's branch assets increase by $400,000. DI's net transfer of capital to B in 1969 is $400,000. DI's net transfer of capital to X during 1969 is $150,000.

Example 9. DI has a wholly owned subsidiary in Canada (X) and a wholly owned subsidiary in Japan (B). In 1969 X has earnings of $50,000 and B has earnings of $100,000. X pays a dividend of $25,000 to DI. B pays no dividend. DI's share in reinvested earnings of incorporated non-Canadian Schedule B AFN is $100,000, the earnings and dividend paid by X not being taken into account. DI's share in reinvested earnings of the incorporated Canadian AFN is $25,000.

Example 10. DI has a wholly owned subsidiary in Canada (X) that, in turn, has a wholly owned subsidiary in the United Kingdom (B). During 1969 X earns $500,000 and pays a dividend of $400,000 to DI; B earns $500,000 and pays a dividend of $300,000 to X. DI's share in reinvested earnings of B is $200,000 and in reinvested earnings of X is $400,000 (the $400,000 dividend paid by X is reduced by the $300,000 dividend received from B).

The exemption provided in § 505(b) for short-term trade credits extended by one AFN to another does not apply if either of the AFNs involved in the transaction is a Canadian AFN (see § 1103(c)). Therefore, if a wholly owned Canadian AFN extends a 6-month trade credit of $100,000 to a French AFN on September 1, 1969, the transaction results in a $100,000 transfer of capital from the Canadian AFN to the DI, and a $100,000 transfer of capital from the DI to the French AFN. Similarly, if the French AFN extends a 6-month trade credit of $100,000 to the Canadian AFN, the transaction results in a $100,000 transfer of capital from the French AFN to the DI, and a $100,000 transfer of capital from the DI to the Canadian AFN.

§ B1105–1 Canadian foreign balances.

Section 1105 provides generally that, for purposes of § 203(c), "Canadian foreign balances" shall not be included in computing a DI's average end-of-month liquid foreign balances. Accordingly, the regulations do not restrict the amount of liquid foreign balances held by a DI in Canada, and the amount of Canadian foreign balances are excluded for purposes of calculating the $25,000 "de minimus" exemption under § 203(e)(1).

"Canadian foreign balances" are defined in § 1105(a) to include: (a) Money on deposit in a Canadian bank (as defined in § 1101(c)), including fixed interest deposits, without regard to the currency deposited and without regard to the terms of such deposits; and (b) negotiable instruments, nonnegotiable instruments and commercial paper of Canadian persons.

The term "Canadian bank," as defined in § 1101(c), includes Canadian branches and offices within Canada of banks organized outside Canada and banks organized under the laws of Canada or of any province of Canada; the term does not include offices of Canadian banks located outside Canada.

§ B1106–1 Long-term foreign borrowing from Canada.

Section 1106 provides, in general, that a DI's borrowing from a Canadian person, whether before or after January 1, 1968, cannot be a "long-term foreign borrowing," as defined in § 324.

A "Canadian person" is defined in § 1101(d) as an individual resident of Canada, a Canadian bank, or a corporation or other entity (other than a bank) organized under the laws of Canada or any political subdivision thereof. The term "Canadian person" includes foreign branches of Canadian corporations (other than Canadian banks), and also includes pension, profit-sharing and other similar trusts organized under or governed by the laws of Canada or any political subdivision thereof. For example, the pension fund of a Canadian corporation and the London branch of a Canadian insurance company are each considered a "Canadian person."

(i) *Public offerings prior to April 1, 1968.* A borrowing prior to April 1, 1968, involving the public offering of a DI's instruments of indebtedness is considered long-term foreign borrowing for purposes of § 324 if less than 25 percent of the aggregate principal amount of such instruments was sold to "Canadian persons" during the original offering. In the event 25 percent or more of the aggregate principal amount of such debt instruments was sold to Canadian persons during the original offering, the portion proved by the DI (to the satisfaction of OFDI) to have been sold to non-Canadian or non-U.S. persons will be considered a long-term foreign borrowing for purposes of § 324.

Example 11. On March 1, 1968, DI organized an international finance subsidiary (IFS) (see § 323) in the United States for the principal purpose of borrowing funds from nonaffiliated foreign nationals and investing such funds in debt or equity securities of AFNs. On March 15, 1968, IFS made a public offering outside the United States of $50,000,000 in 20-year convertible debentures, $10,000,000 of which were purchased by Canadian persons for investment. The entire $50,000,000 constitutes "proceeds of long-term foreign borrowings".

Example 12. If $15,000,000 of the foregoing debentures had been purchased by a Canadian insurance company for investment during the original offering, only the remaining $35,000,000 would constitute proceeds of a long-term foreign borrowing.

Example 13. If, in Example 12, in addition to the $15,000,000 purchased by the Canadian insurance company, $5,000,000 of the debentures had been acquired by a Canadian nominee of a person within the United States during the original offering, only $30,000,000 of the proceeds would constitute proceeds of a long-term foreign borrowing.

(ii) *Public offerings on or after April 1, 1968.* A borrowing on or after April 1, 1968, involving the public offering of a DI's instruments of indebtedness is considered a long-term foreign borrowing in its entirety if such instruments are sold through underwriters in accordance with agreements limiting such sales to persons other than Canadian or U.S. persons, and if the borrowing otherwise qualifies under § 324. It should be noted that sales to Canadian underwriters or securities dealers for resale to non-Canadian and non-U.S. persons will not disqualify the borrowing from being treated in its entirety as a long-term foreign borrowing. Similarly, sales to Canadian agents or fiduciaries acting on behalf of non-Canadian and non-U.S. persons will not affect the status of the borrowing under § 324.

Following is an example of a provision in the agreement between the DI and Canadian underwriters that would be

considered acceptable by OFDI for purposes of preserving the long-term foreign borrowing status of an offering:

Each Underwriter [agrees] [has agreed] that it will not directly or indirectly sell any Debentures to Canadian persons except for (i) sales to Underwriters or securities dealers who are Canadian persons but who agree that they are purchasing Debentures as principals for resale to persons who are not Canadian or United States persons, and (ii) sales to agents or fiduciaries who are Canadian persons but who are acting for the benefit of persons who are not Canadian or United States persons. For the purpose of this paragraph, a Canadian person includes an individual who is a resident of Canada, a corporation, pension, profit-sharing or other trust or other entity (other than a bank) organized under or governed by the laws of Canada or any political subdivision thereof (including the foreign branch of any Canadian corporation other than the foreign branch of a Canadian bank), and any branch or office within Canada of any of the following: Any bank or trust company organized under the banking laws of Canada or any province thereof, or any private bank or banker subject to supervision and examination under the banking laws of Canada or any province thereof.

B1300—Subpart M (§§ 1301–1303)

§ B1300–1 Introduction.

Subpart M applies to direct investment activities of DIs that are U.S.-flag air carriers, including scheduled and supplemental air carriers and air taxi operators.

Under § 1301, such DIs may elect to exclude from transfers of capital the transfer to foreign inventory of certain categories of equipment related to the DIs' operations in foreign air transportation.

Sections 1302 and 1303 provide a 30 percent foreign air transport earnings allowable for U.S.-flag air carrier DIs electing to be governed by § 504, based upon financial reports required by the Civil Aeronautics Board with respect to U.S.-flag carriers' international and territorial operations.

§ B1301–1 Exclusions from transfers of capital.

Under § 1301, a U.S.-flag air carrier may elect to exclude from net transfers of capital (as determined under § 313) any increases in certain equipment accounts of incorporated or unincorporated AFNs: *Provided*, That the equipment is necessary to the carrier's own operations in foreign air transportation, as distinguished from any separate operations in air transportation of an AFN or the operations of third persons to whom the DI or an AFN may be providing support or selling parts and services. If the election is made, related charges for depreciation or other expenses must also be excluded in determining earnings of the AFNs.

A DI electing under this section must do so with respect to all applicable AFNs in all scheduled areas. The election may be made for any compliance year beginning with 1968. The election is made on the last quarterly report (Form FDI–102) for the year for which it is made. Once made, the election is thereafter binding on the DI and may not be changed for subsequent years without permission from OFDI.

§ 1302–1 Earnings allowable for foreign air transport operations.

Section 1302 authorizes U.S.-flag air carriers to make positive direct investment, in connection with their foreign air transport operations, of up to 30 percent of aggregate annual foreign air transport earnings for the immediately preceding year. The § 1302 allowable is not subject to schedular limitations, but it may be used only for positive direct investment that is primarily related to the DI's own operations in foreign air transportation.

Section 1302 applies automatically to foreign air transport operations of any DI that does not elect to be governed by § 503 for the year involved. If § 1302 is applicable, both transfers of capital related to the DI's foreign air transport operations and aggregate annual foreign annual air transport earnings will be excluded from the computation of DI's allowables under § 504 (a) or (b).

A U.S.-flag air carrier's choices are, therefore, as follows:

The § 503 minimum allowable for all operations;

An adjusted § 504(a) historical allowable for all operations plus a § 1302 allowable for foreign air transport operations only; or

An adjusted § 504(b) earnings allowable for all operations plus a § 1302 allowable for foreign air transport operations only.

(i) *Aggregate annual foreign air transport earnings.* The § 1302 allowable is based upon "aggregate annual foreign air transport earnings", defined in § 1302 (b) largely in terms of Civil Aeronautics Board income statement accounts. For this purpose, there is excluded from territorial and international operating profits reported to the Civil Aeronautics Board all related air transport interest and amortization charges, substantially all net operating revenues not directly attributable to air transport (such as profits or losses from hotels, income from foreign-flag air transport operations and other corporate investments) and relevant foreign taxes.

(ii) *Relation of § 1302 to § 504.* Investments not related to a carrier's foreign air transportation operations are treated separately for all years (including the base period years 1964–66). Accordingly, a carrier may make positive direct investment, as provided in § 504, in the same manner and subject to the same limitations as other DIs, except that the historical and earnings allowables under § 504 are adjusted by § 1302(d) to exclude consideration of the carrier's foreign air transport operations.

While § 1302 allowables may not be used to authorize positive direct investment in activities other than foreign air transport operations, § 504 allowables may, if the direct investor so chooses, be added to the § 1302 allowables for use in such operations (see § 1302(c)(1)).

(iii) *Carryforwards.* Unused foreign air transport allowables may be carried forward to subsequent years (see § 1302 (c)(2)).

The following examples illustrate the effect of § 1302:

Example 1. During 1968, a U.S.-flag air carrier (DI) has foreign air transport earnings of $25,000,000 and unrelated investment earnings in Schedule A of $5,000,000. DI has Schedule A historical allowables under § 504 (a) of $3,000,000 as a result of equity investment in and loans to hotels, and ground transportation operations associated therewith, in the base period years of 1965 and 1966. Under § 1302, DI would have a worldwide air transport earnings allowable of $7,500,000 (30 percent of $25,000,000). During 1969, the carrier may make worldwide positive direct investment related to air transport activities of $7,500,000 and, assuming that the historical allowable under § 504 (a) is elected, unrelated positive direct investment in Schedule A of $3,000,000. Any unused nonair transport allowable may be used by DI worldwide for air transport activities, as well as on a schedular basis for operations not related to foreign air transport. Any unused air transport allowable may only be used in succeeding years for foreign air transportation operations. Any unused carryforward of allowables under § 504(f) may be used worldwide if devoted to foreign air transportation, or in the appropriate scheduled areas if used for other operations.

Example 2. A U.S.-flag air carrier has allowables under § 504, unrelated to air transport activities, of zero. For 1969, the carrier elects § 503 and during 1969 transfers $1,000,000 to Schedule C as a contribution to the capital of a wholly owned hotel corporation in that scheduled area. No other relevant transactions occur. Such investment is authorized by § 503. No further positive direct investment is authorized during 1969 either in air transport or nonair transport activities.

(iv) *Repayment charges under § 1003.* Section 1302 allowables are, like the allowables of Subpart E, reduced by repayment charges incurred under § 1003 (see § 1003(c)(1) and, in particular, § 1003 (c)(3)).

§ 1303–1 Coordination of §§ 503, 504, 506, and 1302.

Section 1302(d) provides that foreign air transport earnings are to be excluded from "annual earnings" computed under § 504(b)(4). However, since "aggregate annual earnings" under § 506 and "aggregate annual losses" under § 503 are each derived from the § 504(b)(4) computation, § 1303(a) provides that foreign air transport earnings excluded from § 504(b)(4) should be taken into account for purposes of computing aggregate annual earnings under § 506 and aggregate annual losses under § 503.

Section 1303(b) provides that all reference to § 504 in § 506 (a)(4) and (c) shall be deemed to include reference to § 1302(a).

The following example illustrates the operation of §§ 1302 and 1303:

Example 3. During each of the years 1969 and 1970, DI, a U.S.-flag air carrier, has $1,000,000 in earnings from hotel operations in Schedule B and $3,000,000 of foreign air transport earnings. DI has no § 504(a) historical allowable, and hotel and foreign air transport earnings during 1966–67 were zero.

In 1970 DI elects § 504(b). DI's § 504(b) annual earnings for 1969 were $1,000,000

(since foreign air transport earnings were excluded under § 1302(d)). DI's § 504(b) allowable for 1970 is $300,000 ($1,000,000×30%). DI's § 1302 foreign air transport allowable is $900,000 ($3,000,000×30%). In 1970 DI also has a § 506 allowable of $400,000, computed as follows (000 omitted):

§ 506(a)(4) aggregate annual earnings for 1970	$4,000
Under § 1303(a), § 504(b)(4) earnings of $1,000 are added to § 1302(b) foreign air transport earnings of $3,000.)	
Less base period aggregate annual earnings [1]	0
Incremental earnings	$4,000
40 percent of incremental earnings	$1,600
Less the largest of the allowables available under § 503 ($1,000); § 504(a) and § 1302 ($900); and § 504(b) and § 1302 ($1,200), as required by § 1303(b)	−$1,200
§ 506 allowable	$400

During 1970 DI makes positive direct investment of $400,000 in connection with hotel operations, and positive direct investment of $1,100,000 in connection with foreign air transport operations. Such positive direct investment is authorized by §§ 504(b), 1302, and 506. DI then has a carryforward under § 506 of $100,000 because, under § 506(c), positive direct investment to the extent authorized by § 504 (and § 1302, as provided by § 1303(b)) is deemed made pursuant to those sections and not under § 506. Only the excess of $300,000 is charged against DI's § 506 allowable.

§ B1302–2 Reporting.

Each DI that is a U.S.-flag air carrier engaged in foreign air transport operations was required to file, on or before June 30, 1969, a revised Form FDI–101, indicating historical investment in activities other than air transport ventures. Separate Forms FDI–102 and FDI–102F for air transport investment and earnings and for other investment and earnings will thereafter also be required to be filed by such DI's electing to be governed by § 504 (see § 1302(e)).

If a U.S.-flag air carrier should commence foreign air transport activity after June 30, 1969, a revised Form FDI–101 should be filed within 30 days after such status is established. Thereafter, the same reporting requirements applicable to other U.S.-flag foreign air transport carriers will apply.

[F.R. Doc. 69–12987; Filed, Nov. 4, 1969; 8:45 a.m.]

Title 16—COMMERCIAL PRACTICES

Chapter I—Federal Trade Commission

[Docket No. C–1588]

PART 13—PROHIBITED TRADE PRACTICES

American Dental Laboratories, Inc., et al.

Subpart—Advertising falsely or misleadingly: § 13.15 *Business status, advantages, or connections:* 13.15–30 Connections or arrangements with others; 13.15–235 Producer status of dealer or seller; 13.15–235(k) Laboratory; § 13.42 'Connection of others with goods; § 13.50 *Dealer or seller assistance;* § 13.60 *Earnings and profits.* Subpart—Misrepresenting oneself and goods—Business status, advantages or connections: § 13.1530 *Producer status of dealer;* Misrepresenting oneself and goods—Goods: 13.1608 Dealer or seller assistance; § 13.1615 *Earnings and profits;* § 13.1745 *Source or origin;* 13.1745–60 Maker or seller. Subpart—Using misleading name—Vendor: § 13.2445 *Producer or laboratory status of seller.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order, American Dental Laboratories, Inc., et al., Affton, Mo., Docket C–1588, Sept. 10, 1969]

In the Matter of American Dental Laboratories, Inc., a Corporation, and Ed Zenthoefer and Ray Kowalskey, Individually and as Officers of Said Corporation

Consent order requiring Affton, Mo., distributors of toothbrush vending machines and supplies to cease misrepresenting that they will furnish profitable locations to purchasers of their vending machines, that they will train such purchasers, that no soliciting will be required, that they are connected with the DuPont Company or any motel chain, and to cease using the word "Laboratories" in their trade name which misrepresents that they operate a laboratory.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondents American Dental Laboratories, Inc., a corporation, and its officers, and Ed Zenthoefer and Ray Kowalskey, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of vending machines and vending machine supplies, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That respondents will furnish satisfactory or profitable sales-producing locations or misrepresenting, in any manner, the sales potential or character of the locations in which respondents place their vending machines and products at the time of the purchase of the machines.

2. That purchasers of respondents' products will earn any stated amount of gross or net profits or other earnings.

3. The past earnings of respondents' purchasers; provided, however, it shall be a defense in any enforcement proceeding instituted hereunder to establish that the past earnings represented, are those of substantial number of purchasers and accurately reflect the average earnings of these purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made.

4. That the net profits from the operation of said vending machines will be sufficient to return the investment of the purchaser within 1 year or misrepresenting any other period of time in which the net profits from the operation of said vending machines will be sufficient to return the investment of the purchaser.

5. That purchasers of respondents' vending machines will be trained by the respondents as to the operation of the machines or the methods to be used in servicing the locations where installed.

6. That no selling or soliciting will be required.

7. That respondents' vending machines will average as many as seven vends per day, per machine, or misrepresenting in any manner, respondents' machines average.

8. That respondents or their representatives are connected with the DuPont Co. or otherwise misrepresenting respondents' relationship with DuPont or any other company or the source of their merchandise.

9. That respondents have an agreement with Holiday Inns of America, or any other motel or restaurant chain, to accept respondents' vending machines, or otherwise misrepresenting the class or type of locations available to customers of respondents.

10. That respondents grant exclusive sales territories to their customers; provided, however, it shall be a defense in any enforcement proceeding instituted hereunder to establish that exclusive sales territories are in fact granted by respondents.

11. That respondents' machines or other merchandise will be delivered within thirty (30) days after the contract is signed, or misrepresenting in any manner the amount of time that will transpire between the time the contract is signed and the time the merchandise is delivered.

12. That respondents, or any other organization, are planning to place national advertising respecting the vending machines or other merchandise respondents sell, or misrepresenting in any manner the promotional or advertising assistance respondents will provide for their customers.

B. Using the word "Laboratories" as part of any business name or representing in any other manner, directly or by implication, that a laboratory is operated by or for the said business, or that the said business differs in any manner from its true nature.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days

[1] Base period earnings are computed in the same manner as aggregate annual earnings for the current year. They were assumed to be zero here for simplicity.

after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Issued: September 10, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13194; Filed, Nov. 4, 1969; 8:49 a.m.]

[Docket No. C-1590]

PART 13—PROHIBITED TRADE PRACTICES

Empress Sterling Corp. and Ernest M. Bernstein

Subpart—Advertising falsely or misleadingly: § 13.42 *Connection of others with goods;* § 13.70 *Fictitious or misleading guarantees;* § 13.75 *Free goods or services;* § 13.105 *Individual's special selection or situation;* § 13.155 *Prices:* 13.155-35 *Discount savings;* § 13.175 *Quality of product or service.* Subpart—Misrepresenting oneself and goods—Business status, advantages or connections: § 13.1505 *Operations as educational or religious;* Misrepresenting oneself and goods—Goods: § 13.1625 *Free goods or services;* § 13.1647 *Guarantees;* § 13.1663 *Individual's special selection or situation;* § 13.1715 *Quality;* Misrepresenting oneself and goods—Prices: § 13.1810 *Fictitious marking.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order, Empress Sterling Corp. et al., Richmond, Va., Docket C-1590, Oct. 6, 1969]

In the Matter of Empress Sterling Corporation, a Corporation, and Ernest M. Bernstein, Individually and as an Officer of Said Corporation

Consent order requiring a Richmond, Va., marketer of cookware, tableware and other household products to cease misrepresenting that prospective customers are being called long distance, that its offering prices constitute a saving, that prospective purchasers have been specially selected or will receive any article free, making deceptive guarantee claims, inferring that its products are advertised nationally, and implying that it is connected with the publishers of the International Sunday School Lessons.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That the respondents, Empress Sterling Corp., a corporation, and its officers, and Ernest M. Bernstein, individualy and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of cookware, tableware, chinaware, books, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons called by local telephone are being called by long distance telephone.

2. Representing, directly or by implication, that any price amount is respondents' regular selling price for any item of merchandise or that purchasers save $50 or any other amount from respondents' selling price unless the amount referred to as respondents' selling price is the price at which said item of merchandise has been openly and actively sold or offered for sale, for a reasonably substantial period of time, in good faith, by respondents in the recent regular course of business; or misrepresenting, in any manner, the price at which respondents' merchandise has been sold or offered for sale.

3. Falsely representing that savings are afforded purchasers or prospective purchasers; or misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers.

4. Representing, directly or by implication, that the prospective purchaser has been specially selected for enrollment in a club or other organized group plan, or has won a prize or award; or misrepresenting, in any manner, the nature or purpose of a purchaser solicitation.

5. Representing, directly or by implication, that a price is the retail price of a product in respondents' trade area unless such price does not appreciably exceed the price at which substantial sales of said product are being made in said trade area.

6. Representing, directly or by implication, that purchasers of respondents' products will not have to pay any c.o.d., postage, interest, carrying or service charges.

7. Representing, directly or by implication, that any article of merchandise is being gven free or as a gift, or without cost or charge, in connection with the purchase of other merchandise unless the stated price of the merchandise required to be purchased in order to obtain said article is the same or less than the customary and usual price at which such merchandise has been sold separately for a substantial period of time in the recent and regular course of business in the trade area in which the representation is made.

8. Representing, directly or by implication, that their products are guaranteed unless the nature, conditions and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and where the guarantee extends for the "Life" or "Lifetime" or the like and relates to any life other than that of the original purchaser, the life referred to shall be clearly and conspicuously disclosed.

9. Representing, directly or by implication, that their products are advertised in Good Housekeeping magazine or in leading national magazines; or misrepresenting the manner or extent of their advertising.

10. Representing, directly or by implication, that their Royal Heiden Society Bohemian chinaware products are the finest, that is, the best quality imported Bohemian china that can be purchased in this country; or misrepresenting, in any manner, the quality or value of their products.

11. Representing, directly or by implication, that the user of respondents' stainless steel cookware products will save $10 to $12 per month from the purchaser's food purchasing bill; or falsely representing the savings which accrue to users of respondents' cookware products.

12. Representing, directly or by implication, that they have made any arrangement, or are working in cooperation with, an organization known as International Sunday School Lessons in the sale of their Bible products; or misrepresenting, in any manner, respondents' connections or affiliations with businesses or organizations.

13. Representing, directly or by implication, that they will emboss or print the purchaser's name in gold on the covers of their book products, when in fact the names are merely printed on an adhesive-backed tape which is affixed to the covers.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: October 6, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13195; Filed, Nov. 4, 1969; 8:49 a.m.]

[Docket No. C-1593]

PART 13—PROHIBITED TRADE PRACTICES

Kasbar Quilting Corp. et al.

Subpart—Invoicing products falsely: § 13.1108 *Invoicing products falsely:* 13.1108-40 Federal Trade Commission Act. Subpart—Misbranding or mislabeling: § 13.1185 *Composition:* 13.1185-90 Wool Products Labeling Act; § 13.1212 *Formal regulatory and statutory requirements:* 13.1212-90 Wool Products Labeling Act. Subpart—Neglecting, unfairly or deceptively, to make material disclosure: § 13.1852 *Formal regulatory and statutory requirements:* 13.1852-80 Wool Products Labeling Act.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended, secs. 2-5, 54 Stat. 1128-1130; 15 U.S.C. 45, 68) [Cease and desist order, Kasbar Quilting

Corp. et al., Brooklyn, N.Y., Docket C-1593, Oct. 10, 1969]

In the Matter of Kasbar Quilting Corp., a Corporation, and Joseph A. Kasbar and Adel Kasbar, Individually and as Officers of Said Corporation

Consent order requiring a Brooklyn, N.Y., manufacturer of quilted interlining fabrics, to cease misbranding and falsely invoicing its wool products.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondents Kasbar Quilting Corp., a corporation, and its officers, and Joseph A. Kasbar and Adel Kasbar, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Kasbar Quilting Corp., a corporation, and its officers, and Joseph A. Kasbar and Adel Kasbar, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of quilted interlining materials or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That the respondent corporation forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them, of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: October 10, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13196; Filed, Nov. 4, 1969; 8:49 a.m.]

[Docket No. C-1589]

PART 13—PROHIBITED TRADE PRACTICES

Metomic Manufacturing Corp. and Martin Zahler

Subpart—Advertising falsely or misleadingly: § 13.170 *Qualities or properties of product or service:* 13.170-30 Durability or permanence; § 13.175 *Quality of product or service.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order Metomic Manufacturing Corp. et al., Brooklyn, N.Y., Docket C-1589, Sept. 15, 1969]

In the Matter of Metomic Manufacturing Corp., a Corporation, and Martin Zahler, Individually and as an Officer of Said Corporation

Consent order requiring a Brooklyn, N.Y., manufacturer and distributor of electroplating kits to cease misrepresenting the quality or durability of the plating imparted by its process.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondent Metomic Manufacturing Corp., a corporation, and its officers, and Martin Zahler, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of electroplating kits, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the coating produced by the use of said kits or components is comparable in durability and other aspects to the finish imparted by commercial electroplating.

2. Representing, directly or by implication, that their kits or components are capable of imparting a chrome plating to any other material.

3. Representing, directly or by implication, that their kits or components produce results through an electroplating process.

4. Representing, directly or by implication, that their kits or components contain enough materials to completely plate such objects as automobile bumpers, washing machines, or any other large object.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: September 15, 1969.

By the Commission.[1]

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13197; Filed, Nov. 4, 1969; 8:49 a.m.]

[1] Commissioner Elman dissenting.

[Docket No. 8548]

PART 13—PROHIBITED TRADE PRACTICES

National Dairy Products Corp.

Subpart—Discriminating in price under section 2, Clayton Act—Price discrimination under 2(a): § 13.737 *Localized price cutting.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 2, 49 Stat. 1526; 15 U.S.C. 13) [Modified order to cease and desist, National Dairy Products Corp., New York, N.Y., Docket No. 8548, Oct. 2, 1969]

In the Matter of National Dairy Products Corp., a Corporation

Order modifying a cease and desist order dated June 28, 1967, 32 F.R. 11432, which prohibited a major food products distributor from discriminating in price among its customers, by limiting the prohibition, pursuant to a decision of the U.S. Court of Appeals, Seventh Circuit, 412 F. 2d 605, dated June 19, 1969, to the jam, jelly, and preserve products of the respondent company's Kraft Foods Division.

The modified order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondent National Dairy Products Corp., a corporation, and its officers, representatives, agents and employees, directly or through any corporate device, in connection with the sale or offering for sale of jam, jelly, and preserve products of its Kraft Foods Division, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling such products to any purchaser for resale at a price which is less than the price charged any other purchaser for resale at the same level of distribution when such lower price is either the result of a reduction from the regular list price of the products or is the result of a promotional offer involving a concession from regular list price; provided, however, that in addition to the defenses set forth in sections 2(a) and 2(b) of the statute it shall be a defense in any enforcement proceeding instituted hereunder for respondent (1) to establish that its lower price was the result of a promotional offer involving a price concession which does not undercut the lowest net price and/or the terms and conditions resulting from a promotional offer made to the purchaser receiving the lower price by any seller of a competitive product within the previous 12 months, or (2) to establish that such lower price does not undercut the lowest price concurrently offered generally throughout the same trading area by any other seller of a competitive product having a substantially smaller annual volume of sales of such products than respondent's annual volume of sales of the product on which the discriminatory price was granted.

It is further ordered, That respondent, National Dairy Products Corp., shall, within thirty (30) days after service

upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

Issued: October 2, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13198; Filed, Nov. 4, 1969; 8:49 a.m.]

[Docket No. C-1594]

PART 13—PROHIBITED TRADE PRACTICES

Sportpiper Of Miami, Inc., and Louis Goldleaf

Subpart—Misbranding or mislabeling: § 13.1185 *Composition:* 13.1185-80 Textile Fiber Products Identification Act; § 13.1212 *Formal regulatory and statutory requirements:* 13.1212-80 Textile Fiber Products Identification Act. Subpart—Neglecting, unfairly or deceptively, to make material disclosure: § 13.1852 *Formal regulatory and statutory requirements:* 13.1852-70 Textile Fiber Products Identification Act.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended, 72 Stat. 1717; 15 U.S.C. 45, 70) [Cease and desist order, Sportpiper Of Miami, Inc., et al., Miami, Fla., Docket C-1594, Oct. 10, 1969]

In the matter of Sportpiper Of Miami, Inc., a Corporation, and Louis Goldleaf, Individually and as an Officer of Said Corporation

Consent order requiring a Miami, Fla., clothing manufacturer to cease misbranding its textile fiber products and failing to preserve required records.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondents Sportpiper of Miami, Inc., a corporation, and its officers, and Louis Goldleaf, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Indentification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising, or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by section 4(b) of the Textile Fiber Products Identification Act.

B. Failing to maintain and preserve proper records showing the fiber content of the textile fiber products manufactured by said respondents, as required by section 6 of the Textile Fiber Products Identification Act and Rule 39 of the regulations promulgated thereunder.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: October 10, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13199; Filed, Nov. 4, 1969; 8:49 a.m.]

[Docket No. 8759]

PART 13—PROHIBITED TRADE PRACTICES

Swingline, Inc.

Subpart—Acquiring corporate stock or assets: § 13.5 *Acquiring corporate stock or assets.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 18) [Order of divestiture, Swingline, Inc., Long Island City, N.Y., Docket No. 8759, Oct. 9, 1969]

In the Matter of Swingline, Inc., a Corporation

Order requiring a Long Island City, N.Y., manufacturer of stapling, tacking, and riveting devices, to divest itself to an eligible company, approved by the Commission, of all the assets, patents, and equipment of an acquired company (Speedfast, Inc.), to cause its wholly owned subsidiary (Spotnails, Inc.) to grant a royalty-free license to said eligible company, to refrain for a period of 10 years from acquiring any competitor without prior approval of the Federal Trade Commission, and take other steps to restore competition in the industry as provided in the order.

The order of divestiture is as follows:

I. For the purposes of this order, the following definitions shall apply:

(a) "Portable industrial pneumatic staplers and nailers" are tools which utilize compressed air to drive various types of metallic fasteners to attach wood, fabric, sheet metal, and other substances to each other.

(b) "Fasteners" are metallic staples, nails, brads, pins, and corrugated clips, which are used in the machines described in subparagraph I(a).

(c) The term "heavy duty," when used in conjunction with the fasteners defined in subparagraph I(b), shall describe staples, nails and corrugated clips having a gauge measurement of eighteen (18) or less, and pins and brads having a gauge measurement of sixteen (16) or less. When used in conjunction with the machines described in subparagraph I(a), the term "heavy duty" shall mean that such machines are designed to drive heavy duty fasteners.

II. *It is ordered,* That respondent shall as soon as practicable, but in no event in excess of one (1) year from the date this order becomes final, present a financially sound and eligible company (hereinafter referred to as "eligible company") and a contract between respondent and said eligible company, both subject to Commission approval. Said contract shall provide that the eligible company will within one (1) year following Commission approval, enter into business as a producer and seller of heavy duty portable industrial pneumatic nailers and staplers, and as a manufacturer and seller of fasteners therefor.

III. *It is further ordered,* That respondent, in connection with the requirements of paragraph II of this order, will present an eligible company with sufficient capital resources and financial capability to assure, to the satisfaction of the Commission, that said eligible company can provide for itself the following:

(1) Manufacturing space suitable for the operation of a heavy duty portable industrial pneumatic nailer, stapler, and fastener plant with capacity to produce annually a minimum of $2 million of said fasteners and $500,000 of said nailers and staplers;

(2) Such machinery, equipment, facilities, and other property as may be necessary to make such plant a sound and going concern for the manufacture and sale annually of $2 million of heavy duty fasteners, and such machinery, equipment, facilities, and other property as may be necessary to make such plant a sound and going concern for the finishing, assembling and selling annually of a minimum of $500,000 of heavy duty portable industrial pneumatic nailers and staplers;

(3) Adequate working capital for the opening and early expansion of the business above described for a period of three (3) years beginning with the opening of the plant for business.

IV. *It is further ordered,* That respondent shall within 1 year from the date this order becomes final divest itself to eligible company absolutely and in good faith of all the following assets, properties, rights and privileges, tangible or intangible, acquired by said respondent as a result of its acquisition of the stock of Speedfast, Inc., relating to the

production, distribution and sale of all heavy duty portable industrial pneumatic nailers and staplers manufactured and sold by Speedfast prior to its acquisition by respondent; all inventory in stock of said nailers and staplers and of parts therefor; names of suppliers of said nailers, staplers and parts; a list of all customers to which Speedfast products have been sold, prior to and since September 1, 1965; and all plans, drawings, blueprints, tooling, patents, trademarks, and tradenames both domestic and foreign, which relate to the production distribution and sale of the said heavy duty portable industrial pneumatic nailers and staplers. Each of said heavy duty portable industrial pneumatic nailers and staplers is listed in Appendix A hereto,[1] and each of said patents, trademarks and tradenames is listed in Appendix B hereto.[1]

V. *It is further ordered*, That respondent shall cause its wholly owned subsidiary Spotnails, Inc., to grant a royalty-free license to eligible company, if such license is desired by said company, under any or all of said Spotnails' patents, patent applications and know-how existing at the date of said divestiture and relating to the manufacture, use or sale of all heavy duty portable industrial pneumatic nailers and staplers which were or are produced, distributed or sold by Spotnails. Each of said heavy duty portable industrial pneumatic nailers and staplers is listed in Appendix C hereto,[1] and each of said presently existing patents and patent applications to be so licensed is listed in Appendix D hereto.[1]

VI. *It is further ordered*, That respondent shall cause to be granted to eligible company a license for a reasonable royalty, if such license is desired by said company, under any and all future patents, patent applications and know-how issued, filed or acquired by respondent or any of its subsidiaries and, to the extent that it has the right to do so, by any of its officers, directors, agents, representatives, and employees within a period of 3 years from the date of divestiture relating to the manufacture, use or sale of heavy duty portable industrial pneumatic staplers and nailers: *Provided*, That the first Spotnails roundhead nailer shall be included under such license regardless of when the patent for such nailer shall issue.

VII. *It is further ordered*, That pending divestiture, respondent shall not take any action with respect to any of the assets, properties, rights and privileges of the former Speedfast, Inc., required to be divested hereby, which may impair their usefulness for the manufacture, sale or distribution of heavy duty portable industrial pneumatic nailers and staplers, or their market value.

VIII. *It is further ordered*, That, in accomplishing the aforesaid divestiture, respondent shall not sell or transfer the assets, properties, rights or privileges described in paragraph IV of this order, directly or indirectly, to any person who, at the time of such divestiture, is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of respondent, or to a subsidiary or affiliated corporation of respondent, or to any person who is not approved in advance by the Federal Trade Commission.

IX. *It is further ordered*, That respondent shall agree to purchase from the eligible company, for a period of three (3) years after opening of its plant, heavy duty fasteners, or to assign customers' orders therefor to said eligible company, in the following amounts: Two Hundred Fifty Thousand Dollars ($250,000) during the first year; Three Hundred Fifty Thousand Dollars ($350,000) during the second year; and Two Hundred Thousand Dollars ($200,000) during the third year. Respondent shall agree to assign to said company all orders for heavy duty fasteners previously manufactured and sold by Speedfast, and not manufactured and sold by Spotnails prior to August 16, 1965, which are ordered under the trade name or trademark "Speedfast." The purchases or assignments of customers' orders required by the first sentence of this paragraph shall be reduced by the dollar amount of customers' orders assigned to eligible company pursuant to the second sentence of this paragraph.

X. *It is further ordered*, That respondent shall assign to the eligible company all orders received for Speedfast heavy duty portable industrial pneumatic nailers and staplers and parts therefor, which have been and are currently sold under the Speedfast trade name or trademark.

XI. *It is further ordered*, That respondent's contract with the eligible company for purchase and/or assignment of customers' orders under paragraph IX will be in form approved by the Commission with prices to be paid to the eligible company by respondent equal to the lowest Spotnails' prices to distributors for the items, or items of like kind, and with prices on any and all assigned orders billed directly by the eligible company to the customers or distributors at the price set forth in such assigned orders. The fasteners to be purchased or orders assigned therefor as provided in paragraph IX shall be manufactured to respondent's specifications or to the specifications stated on the assigned orders. Said contract may, upon the agreement of both parties, also provide that the eligible company may consider any such assigned business which it has been directly servicing with the customers as its own continuous volume at the risk of holding against competitors other than respondent. Such purchases by respondent from eligible company shall consist of fasteners which said eligible company informs respondent it has the capability of supplying, but in no case shall such purchases exceed actual orders by respondent.

XII. *It is further ordered*, That respondent shall cause Spotnails to supply the eligible company, for a period of 6 months from the date said company commences selling heavy duty portable industrial pneumatic staplers and nailers or fasteners therefor, to the extent that said company so requests, with fasteners suitable for use in the Speedfast heavy duty portable industrial pneumatic staplers and nailers listed in Appendix A,[1] at a price of 50 percent of the list price published by Spotnails for such fasteners.

XIII. *It is further ordered*, That respondent shall provide the eligible company with a current list of all customers to whom its wholly owned subsidiary Spotnails, Inc. is selling. This list shall contain an appropriate designation of those customers who purchased in significant volume.

XIV. *It is further ordered*, That, for a period of 1 year from the date of divestiture hereunder, respondent shall cause Spotnails to furnish at its cost to the eligible company such technical assistance as may be necessary to enable said company to commence to engage in the manufacture of the Speedfast heavy duty portable industrial pneumatic nailers and staplers listed in Appendix A hereto[1] and to fasteners therefor. In the event that said company elects under paragraphs V and VI of this order to acquire a license under Spotnails patents and know-how, and provided that said company shall in fact engage in the manufacture of Spotnails heavy duty portable industrial pneumatic staplers and nailers and fasteners therefor, respondent shall cause Spotnails for a period of not more than 1 year from the date of such license to furnish at its cost to said company such technical assistance as may be necessary to enable said company to commence to engage in the manufacture of Spotnails heavy duty portable industrial pneumatic staplers and nailers and fasteners therefor.

XV. *It is further ordered*, That, upon the grant of licenses described in paragraph V of this order, and if requested by eligible company in writing, respondent and its officers, directors, agents, representatives and employees shall, in writing (with a copy to said company), authorize its vendors to supply to the eligible company, for a period of 3 years from the date of disposition of the assets, properties, rights and privileges ordered divested hereunder, and upon terms and conditions comparable to those afforded to Spotnails, the components which are made by such vendors to Spotnails' specifications and which are used to assemble the heavy duty portable industrial pneumatic nailers and staplers listed in Appendix C hereto.[1] In the event that, during said 3-year period, said vendors' ability to supply any of such components shall become impaired so that any of said vendors shall become unable to supply sufficient quantities of any such components to satisfy the requirements of both Spotnails and eligible company, the

[1] Filed as part of the original document.

respondent shall cause Spotnails to authorize any such vendor to divide its supply of such components between Spotnails and the eligible company in a manner that reasonably reflects the past purchases by each.

XVI. *It is further ordered,* That respondent shall cause Spotnails, if eligible company requests, to notify employees of Spotnails that said company is interested in hiring personnel, and, in addition, shall cause Spotnails to release any and all Spotnails personnel who desire to work for said company from their employment obligations and from any obligations and confidentiality relating to heavy duty portable industrial pneumatic staplers and nailers, saving any and all rights to confidentiality relating to any products not subject to divestiture or license.

XVII. *It is further ordered,* That for a period of ten (10) years from the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or assets of any concern, corporate, or noncorporate, engaged in the production, distribution or sale of portable industrial pneumatic staplers, nailers, or tackers or fasteners therefor. For the purposes of this paragraph, the definitions in the complaint shall apply.

XVIII. *It is further ordered,* That respondent shall, within sixty (60) days after the date of service of this order, and every ninety (90) days thereafter until respondent has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of all contacts and negotiations with persons relating to carrying out the provisions of this order, and copies of all written communications to and from such persons.

XIX. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating subsidiaries and divisions.

By "Final Order" further order requiring report of compliance is as follows:

It is further ordered, That the time within which respondent shall begin submitting the compliance reports ordered in paragraph XVIII of the order, as set forth in the initial decision, shall commence with the service of this order upon respondent.

Issued: October 9, 1969.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 69-13200; Filed, Nov. 4, 1969; 8:49 a.m.]

Title 47—TELECOMMUNICATION

Chapter I—Federal Communications Commission

[FCC 69-1174]

PART 73—RADIO BROADCAST SERVICES

Noncommercial Educational FM Stations Operating on Unreserved FM Channels

Memorandum opinion and order. In the matter of clarification of Subparts B and C of Part 73 of the Commission's rules and regulations (noncommercial educational FM stations operating on unreserved FM channels); request by WBAI-FM, Inc., for declaratory ruling.

1. The Commission has under consideration a "Request for Declaratory Ruling" filed on October 10, 1969, by WBAI-FM, Inc., licensee of FM Station WBAI, New York City, a noncommercial educational station operating on Channel 258, which is an unreserved or "commercial" channel. The request concerns the question of whether such stations, noncommercial educational in character even though they operate on unreserved channels, are governed by the provisions of Subpart B of Part 73 of the Commission's rules, § 73.201 et seq., which relate to commercial FM stations, or by the provisions of Subpart C of that part, § 73.501 et seq., governing noncommercial educational FM stations. WBAI was cited for violation of three of the sections of the "commercial" rules—§ 73.282 concerning program logging, § 73.287 concerning station identification, and § 73.254 concerning annual equipment performance measurements—and it claims that these citations were in error since it is governed instead by the educational FM rules, specifically §§ 73.582, 73.587, and 73.554, which it did not violate. It seeks a declaratory ruling to this effect, to remove uncertainty (Administrative Procedure Act, section 554(d)). There are 18 such noncommercial educational FM stations on unreserved or "commercial" FM channels.

2. We recognize that, as to stations such as WBAI, the rules at present are ambiguous as to whether the regular commercial FM rules or the noncommercial education FM rules apply. Therefore, it is not appropriate to impose any penalty on WBAI-FM, Inc., or its parent Pacifica Foundation, in connection with the matters discussed herein, and none will be imposed.[1] To remove the uncertainty for the future, we are amending Subpart C as set forth hereinbelow. As to the basic merits of the three situations—which set of rules should apply—the conclusions discussed below appear appropriate and are embodied in the rule amendment herein.

3. *Program logging.* With respect to program logging, it is clear that the noncommercial educational FM rules should apply, since the character of these stations' programing is completely different from that of commercial AM, FM, and TV stations, even though they operate on unreserved or "commercial" FM channels, and is the same as the much more numerous FM stations on reserved channels. The provisions of § 73.582 are much simpler than those of the corresponding commercial-station rule, § 73.282, and are geared to the much smaller amount of information which noncommercial educational stations are required to furnish with initial and renewal applications (they use FCC Forms 340 and 342 instead of Forms 301 and 303).[2] Therefore it is appropriate that § 73.582 should apply instead to § 73.282, and the rule adopted herein so provides.

4. *Station identification.* The rules concerning required station identification—§§ 73.287 and 73.587—are much the same in their requirements, the difference being that the former, governing commercial stations, permits an ID not to be given on schedule only where certain types of material would be interrupted ("single speech, play," etc.) while the educational rule permits postponement of an ID when it would interrupt "a single continuous program of longer duration than 30 minutes." WBAI claims that the rules recognize a valid distinction in this respect between commercial and educational operations, and that the latter present many types of programs which do not fall within the types listed in the commercial rule as permitting ID postponement but which nonetheless would suffer from a required interruption.[3]

5. The justification for applying the educational rather than the commercial rule in this case is less clear than in the matter of program logging mentioned above. However, the ID rules for all of the aural services—which are now unduly complex and in part obsolescent—are in the process of revision in Docket 18243. Pending this revision, it does not appear appropriate to require stations such as WBAI to meet the more stringent requirements of the commercial rule. Accordingly, the rule amendment adopted herein makes the educational rule applicable for the time being.

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[1] The citation to WBAI included a number of matters. The statement that no penalty will be imposed relates only to those involved in the "Request for Declaratory Ruling" and discussed here, i.e., situations where WBAI would not have been in violation if the educational FM rules, rather than the commercial FM rules, are regarded as applicable.

[2] Apart from other violations of § 73.282 not involved here, the citation stated that WBAI's program logs failed to show program classifications as required by that rule for the programs of commercial stations. § 73.582, for educational FM stations, does not contain this requirement.

[3] It appears from the citation and WBAI's response that an ID was not made where it would have interrupted a discussion program. This would not fall within the "single speech" exception of § 73.282, but it would come within the "single continuous program" exception of § 73.587.

6. *Annual equipment performance measurements.* Section 73.254, for commercial FM stations, provides that stations shall make equipment performance measurements of their transmitters at least annually (audio frequency response, audio frequency harmonic distortion, and AM and FM output noise levels); they shall keep the records of such measurements for 2 years. WBAI was cited for several violations of this rule. Its position is that, while it has made such measurements at times in the past, it is not required to do so because of the nonapplicability of this rule. The corresponding educational FM rule, § 73.554, contains certain specifications for transmitter performance but does not require performance measurements.

7. We are of the view that in this situation the regular commercial rule should, and does, apply to stations such as WBAI. In general, equipment performance measurements are necessary in order to insure proper station operation, and there is no reason why these stations should be any less subject to equipment performance measurement requirements than commercial stations operating in the same band. In fact, WBAI–FM does not urge that this requirement is not generally a good thing; its argument is simply that noncommercial educational FM stations on reserved channels are not required to do this, that (subscription-supported as it is) WBAI–FM is no more able to bear the expense involved than they are, and that whatever the reasons are for exempting such stations, they apply equally to WBAI.

8. We are of the view that educational FM stations generally—other than low-power 10-watt stations—should no longer be exempt from this requirement, and in a notice of proposed rule making adopted today we propose to make them subject to it. For the period in the meantime, we hold that such stations on unreserved or "commercial" channels are subject to the commercial rule, § 73.254, since the operations do not differ technically in any respect from commercial stations on these channels. We point out that, on the other hand, there are some differences between the situations of stations such as WBAI and those of educational FM stations on the 20 reserved channels (Channels 201–220), even those which are not 10-watters. Many of the educational stations on the reserved channels, other than 10-watters, operate with relatively small facilities, effective radiated power of less than 1 kw and low antenna height, whereas WBAI operates with 5.40 kw. E.R.P. and antenna height above average terrain of 1,220 feet, the maximum permitted for a high-power (Class B) facility in the New York City area under present rules. Therefore, technically improper operation is a matter of significance over a much greater distance than is the case with a typical FM facility on a reserved channel.

9. *Conclusions and rule amendment.* For the reasons discussed above, we conclude that stations such as WBAI—noncommercial educational stations operating on unreserved or "commercial" channels—are subject to the educational FM rules in Subpart C of Part 73, rather than the commercial FM rules in Subpart B of that part, in most respects including program logging and station identification. However, they are subject to the provisions of Subpart B with respect to assignment and classification rules (§§ 72.201–73.213), and the requirements concerning transmitters, performance and measurements (§ 73.254), rather than the corresponding educational FM rules. We are accordingly adopting a new section concerning such stations, § 73.506, making this explicit.[4] Since this is declaratory, clarifying, and interpretative in nature, notice and prior proceedings are not required under the Administrative Procedure Act (5 U.S.C. 553).

10. In view of the foregoing: *It is ordered,* That, pursuant to authority contained in sections 4(i) and 303 of the Communications Act of 1934, as amended, Subpart C of Part 73 of the Commission's rules is amended by adding the following new § 73.506, effective December 12, 1969:

§ 73.506 Noncommercial educational broadcast stations operating on unreserved channels.

Noncommercial educational FM stations which operate on channels listed in § 73.202 rather than § 73.501, but which comply with § 73.503 as to licensing requirements and the nature of the service rendered, shall comply with the provisions of the following sections of Subpart B of this part: §§ 73.201 through 73.213 (Classification of FM Broadcast Stations and Allocation of Frequencies); § 73.254 (Required Transmitter Performance); and such other sections of Subpart B of this part as are made specifically applicable by the provisions of this Subpart C. In all other respects such stations shall be governed by the provisions of this subpart and not Subpart B of this part.

11. *It is further ordered,* That the "Request for Declaratory Ruling" filed on October 10, 1968, by WBAI–FM, Inc., is granted to the extent indicated hereinabove, and in all other respects is denied.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Adopted: October 29, 1969.

Released: October 31, 1969.

FEDERAL COMMUNICATIONS COMMISSION,[5]

[SEAL] BEN F. WAPLE, *Secretary.*

[F.R. Doc. 69-13128; Filed, Nov. 4, 1969; 8:45 a.m.]

[4] It should be emphasized that this provision of the rules will apply only to stations on these channels which are truly noncommercial educational, those complying with the provisions of § 73.503 concerning the nature and character of the service rendered. New § 73.506 so states. It does not apply to other stations even though their service may be largely noncommercial in character; they are subject to the regular commercial rules in Subpart B.

[5] Commissioner Bartley dissenting.

[Docket No. 17873; FCC 69-1176]

PART 73—RADIO BROADCAST SERVICES

Remote Control Operation of Standard Broadcast Stations

Report and order. In the matter of amendment of Part 73 of the Commission's rules and regulations to permit standard broadcast stations operated by remote control to transmit telemetry signals directly related to the technical operation of the broadcast station; Docket No. 17873, RM–320.

1. This proceeding was initiated by a notice of proposed rule making, adopted November 15, 1967, in response to a petition filed by Moseley Associates, Inc., of Santa Barbara, Calif. This firm has developed a system by which transmitter meter readings, and other information pertinent to the supervision of the technical operation of a standard broadcast station, can be transmitted to a remote control point by means of tones amplitude modulated directly on the carrier of the broadcast station. Moseley proposed that the frequencies of these tones be restricted to a band of 20 to 36 c/s, and that the modulation amplitude not exceed 10 percent. It was Moseley's contention that within these parameters, a broadcast station could transmit such tones simultaneously with its regular programs without compromising the technical quality of such programs, or causing annoyance to listeners. The employment of such a system would free the station licensee from his dependence on wire lines for bringing transmitter operating data to a remote control point, and make for greater reliability of operation, and a reduction in operating expense.

2. While the Commission has followed a consistent policy of rejecting proposals to utilize the broadcast carrier for purposes other than broadcast program transmission, it held that, in this case, Moseley's proposal was basically related to the broadcast function, and otherwise had sufficient merit to justify its consideration in a rule making proceeding. Rules were proposed which specified the technical parameters set forth by the petitioner, but comment was requested as to whether the 10 percent modulation ceiling could or should be further restricted. A rule was proposed to insure that the addition of the telemetry signal would not result in overmodulation, and rules generally requiring that such data transmission not produce a sensible degradation of program quality or effects resulting in harmful interference to other broadcast stations. In addition to the comments it requested on these proposed rules, the Commission asked for information as to the accuracy of indication of type approved AM modulation monitors when the envelope contains frequencies in the 20 to 30 c/s range, and as to whether automatic gain control amplifiers and peak limiters might affect the accuracy of the telemetery system.

3. While December 26, 1967, and January 5, 1968, were set as the final dates

for filing comments and reply comments, respectively, at the request of the parties several extensions of time were granted by appropriate Commission orders, the last dates for filing comments being set as January 16, 1969, and for filing reply comments, January 30, 1969.

4. Subsequent to these dates, the Consumer Products Division of Electronic Industries Association (EIA), on April 3, 1969, filed a "Motion", which embodies further comments, and a Request for the late acceptance of this document. Since EIA's "Motion" contains information important to the resolution of this proceeding and its acceptance will not prejudice any other party, it will be accepted and considered with other timely filed comments.

5. Twenty-one parties participated in this proceeding, viz.:

WMBO, Auburn, N.Y.
KGMI, Bellingham, Wash.
Mt. Washington TV, Inc.
WSM, Nashville, Tenn. (WSM).
WKIK, Leonardtown, Md.
Montana Power Co.
KTMS, Santa Barbara, Calif.
Marti Electronics (Marti).
Moseley Associates, Inc. (Moseley).
Columbia Broadcasting System, Inc. (CBS).
Bonneville International Corp.
WSAU, Wausau, Wis.
WKBH, La Crosse, Wis.
KEEE Radio, Nacogdoches, Tex.
James Greenwood, Chief Engineer, WTAE AM-FM.
National Association of Broadcasters (NAB).
Collins Radio Co. (Collins).
WGN Continental Broadcasting Co. (WGN).
Electronic Industries Association (EIA).
Radio Corp. of America (RCA).
Gates Radio Co. (Gates).

The majority of the participants filed formal and timely comments; in some instances pertinent information was contained in Petitions for extension of time. Moseley Associates, Inc., and the National Association of Broadcasters filed reply comments. NAB's document is properly a supplement to its earlier filed comments, and, as such, is late. However, in the circumstances it will be accepted.

6. At least half of the filings, principally by broadcast station licensees, contained no technical information, but consisted principally of testimony as to the need for a telemetry system such as contemplated by the proposed rules to improve the reliability of meter readings reproduced at remote control points.

7. Technical data with respect to the performance of type approved modulation monitors were submitted by several parties. While we do not have information on all such types of monitors, there would appear to be no general problem with respect to the response of such monitors in the range 20 to 30 c/s, although Collins points out that in the monitors it tested reliance must be placed on the peak indicator in assessing the total effect of tone and program modulation—even when a sinusoidal signal was substituted for the program portion of the envelope there was a considerable error in the indication of the semipeak meter of the total effect of this signal and the telemetry tones. Moseley calls attention to the importance of avoiding overmodulation of negative peaks, not only because spurious signals may be emitted, but, under such conditions, the reliability and accuracy of the remote indications transmitted by the system is compromised.

8. Various makes and types of transmitters have been modulated with low frequency tones in the range proposed both in house and in field tests, and no difficulty in achieving the desired degree of modulation has been reported.

9. With respect to another question on which we requested specific comments—the effect of automatic level control amplifiers and peak limiters on the telemetry system, it appears that there are adverse effects if the telemetry tones are injected into the program line at a point where these circuit components would operate on the tones. However, as Moseley, McMartin, and others point out, the proper point for injection of the tones is after program limiting has taken place. To avoid possible overmodulation resulting from injection at this point at least one of the available telemetry systems automatically reduces the program level by 0.8 decibel during the periods when tones are being injected.

10. To make such systems function reliably with low levels of tone modulation it has been found necessary to insert a high-pass filter in the program line to minimize the presence of program components falling in the frequency range encompassed by the telemetry signals. It was demonstrated that this can be done without jeopardizing the ability of the transmitter to meet the requirements of § 73.40(a)(4) of the rules as to its audio frequency transmitting characteristics. Where such a filter is employed it should be retained in the program line when equipment performance measurements are made pursuant to § 73.47 of the rules.

11. In this proceeding we are primarily concerned with the formulation of rules which will insure that a telemetry system of the type discussed will not adversely affect the quality of programs broadcast by a station using the system, or produce harmful interference to other stations. On the other hand, if the modulation of tones on the broadcast carrier for telemetry purposes is authorized but the restrictions placed on such use are so great as to effectively preclude the operation of a feasible system, or severely limit its utility, the adoption of such rules is an exercise in futility.

12. The range of telemetry tones and the maximum percentage of modulation of these tones set forth in the proposed rules are those requested by Moseley. The only substantial area of controversy revolves around whether a telemetry system can operate within these parameters without causing a substantial derogation of program quality.

13. RCA initially raised this question in its Request for Additional Time To File Comments, filed March 25, 1968, in which it stated "* * * laboratory tests just completed on AM receiving equipment indicate that transmission of telemetry tones in the proposed frequency range at amplitudes above 2 percent may cause serious interference with reception by high fidelity AM receivers during main program lulls and during low amplitude program transmissions." It requested additional time in which to conduct field tests.[1]

14. In a "Motion" filed on July 26, 1968, EIA opposed "adoption of the proposed rule at this time." It based its opposition on the results of

(a) Laboratory tests by 6 EIA member companies, which included measurements and listening tests with standard signal generators "with simultaneous and sequential modulation with program material and simulated telemetering tones. It was unanimously concluded that 10 percent modulation by the telemetering tones would cause serious deterioration of the received signal for many types of receivers, including better grade table radios. It appeared that a modulation level of about 2 percent maximum might be acceptable * * *".

(b) Field tests at Chicago, Ill., and Pittsburgh, Pa., were conducted on June 17, 1968, and July 15, 1968, respectively. WIND, Chicago, and WTAE, Pittsburgh, transmitted the signals for these tests, pursuant to Commission authorizations. In both tests, audio oscillators were used to simulate the telemetering tones, which were transmitted separately and simultaneously with various kinds of program material with tone modulation percentages of 10, 5, 2, and 1. Tone frequencies between 35 and 20 c/s were employed. Listening observations were made on a variety of receivers, including large consoles. EIA reports that at Chicago noticeable distortion and interference was observed on console receivers at 2 percent tone modulation, and the tones were objectionable at 1 percent with voice modulation and in program pauses. It also found 2 percent tone modulation "quite noticeable and objectionable on table and portable receivers and on one car radio * * *."

15. At Pittsburgh EIA found the "overall effect * * * considerably less objectionable" than at Chicago, but noted that "on the two consoles used, critical listening could observe the presence of telemetering tones at 5 percent modulation during high percentage modulation of piano music or speech."

16. "The intermodulation effect using a 2 kHz tone at 30 percent modulation and the telemetering tones at 2 percent

[1] In a pleading filed on July 26, 1968, RCA stated that it had decided to coordinate its field tests and comments through EIA, and accordingly would file no separate comments.

modulation was observable on the consoles. This effect was also clearly audible on several table radios." [2]

17. "During several of the tests utilizing 10 percent and 5 percent modulation by the telemetering tones and high percentage modulation with popular music, several small portable receivers exhibited signs of blocking and motorboating due to the tones." [2]

18. Prior to the initiation of this proceeding, in support of the Moseley petition, WSM, Nashville, Tenn., had conducted field tests, pursuant to Commission authorization, of telemetry with low frequency tones, using Moseley's equipment. Tests were run intermittently over a 90-day period, ending July 23, 1964. Tones between 22 and 36 cycles were employed with modulation of from 5 to 10 percent. The results of these tests were reported to the Commission on December 2, 1964. Among the conclusions reached, WSM stated: "Listening tests did not reveal any inteference to our normal program service from the telemetering signals."

19. Field tests were conducted by WGN, Chicago, Ill., on January 9, 1968, and the results thereof were reported in an engineering statement appended to the comments filed by WGN Continental Broadcasting Co. in this proceeding. In these tests continuous tones were used over the range 20–36 c/s, at 5 and 10 percent modulation, and aural observations were made at seven different locations by WGN engineering personnel and officers, on 14 different broadcast receivers considered to be a representative sample of present day receivers. Various types of program material were employed. WGN reports "The consensus of the monitoring personnel at the remote locations was that the inserted telemetry signals were perceptible. The 5 percent modulation being much less perceptible to the monitors, and therefore, has much less possibility of public annoyance." (WGN supports the proposed rules subject to the reservation that modulation by the telemetry signals be limited to 5 percent.)

20. On the basis of the material filed by EIA and its opposition to adoption of the proposed rules, NAB and Moseley concluded that further field tests were necessary, and, the time for filing comments having run, NAB filed a petition on August 21, 1968, for additional time in which to conduct these tests. A Commission order, adopted September 9, 1968, set a new deadline for additional comments as January 6, 1969, and for reply comments as January 20, 1969.

21. On January 16, 1969, Moseley filed with its comments the results of a test conducted in conjunction with KTMS Santa Barbara, Calif. This test was conducted over a 5-day period, with tones having a duration between 2 and 4 minutes being placed on the KTMS carrier at half-hour intervals, except on the fourth day of the series, when no tones were used. KTMS carried its regular programs. Tones of 29 and 35 c/s were employed the first and second days, the first day at 5 percent modulation and the second day at 10 percent. On the third day 29 c/s at 10 percent was used, with 22 c/s at 3 percent and 10 percent during different portions of the day. The last day tones were of 29 c/s at 5 percent and 10 percent, and 35 c/s at 5 percent modulation.

22. In addition to observers at Moseley laboratories and at KTMS a panel of seven listeners was recruited. These listeners were told to indicate on appropriate written forms any effects noted which detracted from the technical quality of KTMS's program transmissions. During the initial days of the tests the listeners were not told specifically of what to look for. Then each was individually apprised of what was being done, and told what effects should be observed. While the panel reported several disturbances, they were either noted at times tones were not being transmitted, or were of such a nature that they could not reasonably be attributed to such transmissions.

23. NAB presented with its reply comments reports on tests concluded in cooperation with KXYZ, Houston, Tex., and WFAA/WBAP, Dallas/Fort Worth, Tex. In the Houston test a 28 c/s tone was modulated on the carrier at a 10 percent level for a 1-minute period, once every quarter hour, between 8 a.m. and 4 p.m., for a period of 7 days. Regular programs were, of course, carried by KXYZ. The conclusion to this report states: "A cross-section of receivers was used to monitor these tests by station engineering, programming, and general administrative personnel. The listening report submitted by the station states that: 'During these tests there were no complaints or reports at any time that the sub-audible tones could be heard or were objectionable.' "

24. The Dallas/Fort Worth tests were conducted with telemetry equipment manufactured by Marti Electronics, operated so that meter readings were reproduced at three separate locations. The Marti equipment provided tones between 22 and 28 c/s, which were transmitted for 1 minute each half hour for a period of 510 hours, at a modulation level of approximately 5½ percent. Personnel of WFAA, WBAP, and Marti periodically monitored the transmissions, using 18 different receivers, including types having extremely good bass response. The report states: "A cross-section of receivers was used to monitor these tests by station engineering, programing, and general administrative personnel. The listening report submitted by the station states that: 'During these tests there were no complaints or reports at any time that the sub-audible tones could be heard or were objectionable.' "

25. Moseley and NAB urged that the results of these new tests provide further substantiation of their position that the proposed rules be adopted.

26. In a motion filed January 30, 1969, EIA, stated that, because of short notice it had been unable to participate in the above described tests, and requested that further action in this proceeding be held in abeyance until such time as further joint tests could be made. It was particularly interested in the performance of the Marti telemetry equipment.

27. A further motion was filed by EIA on April 3, 1969, accompanied by a request for acceptance of late filed comments. In this motion, EIA indicated that on March 20, 1969, NAB had sponsored a field test of Marti equipment over radio Station WTOP, Washington, D.C., which was observed at a receiver site in Bethesda, Md.

28. EIA stated it would withdraw its previous objections to the rule making proposal, subject to the following:

(1) Telemetry tones from 20–28 Hz at 5½ percent modulation do not appear to cause any harmful interference.

(2) Modulation level of tones in the 20–36 Hz range should not exceed 6 percent at any time.

(3) We still have strong reservations about the use of tones in the 30–36 Hz range at 5 percent modulation but will withdraw our objections at this time.

(4) Implicit in the above is the understanding from many discussions with FCC staff that it is FCC policy to allow no harmful interference to continue, and that complaints of such interference will be investigated and resolved on an individual basis.

We will accept EIA's late filed motion.

29. Except for EIA's Chicago tests, where the reported effects were so severe as to suggest some deficiency in the test procedure—perhaps an inaccurate setting of modulation levels—the results of the field tests, no matter by whom conducted, are not necessarily inconsistent with each other. The subjective element in all of the tests is considerable. Even though two trained observers agree an effect is perceptible, they may disagree as to the level at which it can be deemed obtrusive, and a judgment as to whether an untrained observer, not looking for the effect, would notice it, or find it annoying. Our conclusions, set forth below, are based upon a full evaluation of the complete test reports, and on the reports of Commission engineers who observed the tests at Pittsburgh and Washington.

30. The perceptibility, even to trained observers, in the presence of program material of tones of fairly short duration of frequencies no higher than 30 c/s at modulation levels approximating 5 percent is so marginal that their employment is quite unlikely to be detected by the broadcast listener. While the perceptibility of tones up to 35 cycles and with modulation percentages as high as 10 percent is undoubtedly higher, the Moseley test at KTMS with a panel of listeners indicates that a system held

[2] We quote these two results, since they are presented by EIA as having a significant bearing on the problem. In our view, the intermodulation test demonstrated only that, at least under the conditions of the test, transmitter or receivers were demonstrating considerable nonlinearity, which would be reflected, in less easily observable form, in distortion of program material, even without the low frequency tones. The incipient "blocking and motorboating" exhibited by some of the small receivers, if anything, is a commentary on the extreme audio level at which these receivers were operated in an attempt to discern the presence of the low frequency tones.

within these limits is unlikely to present a listener problem. Under these conditions, steady tones with modulation levels of 5 to 10 percent can be perceptible in program pauses to a listener with a receiver with extended bass response, especially so if this response is exaggerated by bass boost. We do not believe, however, that the vast majority of listeners would notice, much less be disturbed by their use, particularly since the tones, as normally employed, would be of short duration.

31. Nevertheless, if sufficiently accurate and reliable performance of the telemetry function can be achieved with modulation levels substantially less than 10 percent, and with a range of tones not extending as far upward in frequency as we have proposed, the risk is minimized that, in the exceptional case, a listener might find the tone transmissions disturbing.

32. In at least three of the tests reported (in connection with WSM, WFAA/WBAP, and KTMS) the tone modulation was employed to transmit meter readings to remote points. In all three instances it was reported that when the system was properly installed and operated, satisfactory performance of the telemetry function was achieved with modulation levels approximating 5 percent. In the Dallas/Fort Worth test, furthermore, the tone range utilized was between 22 and 28 c/s. It would thus appear practical to set both the maximum modulation level and the upper frequency limit for the telemetry tones at lower figures than we had initially proposed. We shall therefore set the upper limit for the tone modulation level at 6 percent, and the value of the highest frequency telemetry tone at 30 c/s. We believe this action should meet EIA's reservations with respect to the matter.

33. Moseley has urged that, even though satisfactory functioning of the telemetry system has been demonstrated at lower modulation levels, the 10 percent ceiling should be retained in the rules to permit its employment where low signal levels and/or noise make it necessary for reliable operation. We have no information as to the field strength of the signals in the above tests at the points the tones were utilized for telemetry purposes, or as to the minimum recovered audio level required to actuate the telemetry equipment now available. Obviously, the higher the modulation level permitted the more generally applicable will be the equipment. Usually, we believe, remote control points are at locations where the transmitted signal is reasonably strong and noise-free. Sometimes this is not the case. We rather doubt in the most difficult case (as for instance, during a period when a station may be operating "pre-sunrise" with extremely low power) that the feasibility of employing such a telemetry system will hinge on whether the modulation ceiling is set at 6 or 10 percent.

34. While the proponents of this system of telemetry have emphasized the fact that the transmitted tones will be of short duration (only long enough to permit meter readings) and the Commission's evaluation of the acceptability of the system rests at least partially on the assumption that this normally will be the case,[3] in the proposed rules any numerical limitation on the length of individual transmissions, or the total duration of transmissions in any 1-hour period was intentionally omitted. The reason for this omission is that, although our rules require the logging of specified operating parameters at half hour intervals, a licensee is responsible for the proper operation of his station on a continuous basis, and we wished to avoid the imposition of any rule which, even indirectly, might appear to limit that responsibility. Thus, should periodic meter readings reveal a possible irregularity in transmitter functioning, we would expect more frequent, and perhaps continuous monitoring of operating parameters until the irregularity is corrected.

35. On further reflection, we believe that preclusion of continuous tone transmission in normal operation can be accomplished without limiting necessary transmitter supervision by including in the rules a stipulation that the low frequency tones may only be transmitted during periods when the transmitter operating parameters are actually being observed at the remote control point. We have included such a requirement in the rules we adopt.

36. In its comments, CBS called attention to its long-standing "HomeALERT" proposal for a system under which especially designed broadcast receivers would be activated for the reception of urgent news or emergency weather warnings by the transmission of a low frequency tone by the broadcasting station to which they are tuned. This tone would be transmitted continuously during the period of time the receiver is actuated for the urgent announcement. The technical description of this alerting system appended to CBS's comments states that the actuating tone would be in a range between 30 and 50 c/s, and would be transmitted at a modulation level of 20 percent.

37. CBS is concerned that any rules adopted for low frequency telemetry not set technical standards incompatible with those which its proposed alerting system may employ. It suggests that its proposal and the proposal which initiated this proceeding are interrelated and should be considered together. CBS accordingly requests that we "move at once to implement a public signalling system on a basis compatible with the use of subsonic carrier tones for telemetric information."

38. As CBS is aware, its HomeALERT system is only one of a number of proposed public alerting systems which has been the subject of exhaustive study by a special working group of the National Industry Advisory Committee (NIAC). HomeALERT was one of four such systems selected for field testing some time ago, after which NIAC recommended a two-tone system employing activating tones of 853 and 960 c/s. This system is compatible with telemetry systems operating pursuant to the rules under consideration in this proceeding.

39. In response to a public notice of February 13, 1969 (FCC 69-134), which set May 1, 1969, as a deadline for the submission of proposals for public alerting systems not previously examined by the special working group, the International Electric Corp. offered data on the "Cue Signal system" and the Department of the Army outlined a public alerting system currently under study by the Office of Civil Defense. Neither of these systems utilizes activating tones below 100 c/s. Therefore, should one of these alerting systems be adopted, no conflict with telemetry system operation is anticipated.

40. Since it is unlikely that a public alerting system having activating characteristics similar to HomeALERT will be adopted we do not find it necessary to link AM telemetering to public alerting in the manner requested by CBS.

41. It should be noted that telemetry systems operated pursuant to these rules are quite restricted in the rate at which they can convey information and, their use will be limited to remote systems utilizing visual meter observations and manual logging, or to automatic logging with a graphical record.

42. James Greenwood has suggested in his comment that the employment of frequency shift keying of the broadcast carrier for telemetry purposes not only would minimize the possibility of interference with programming but would possible a much higher rate of information transmittal-facilitating digital read out and print out at the remote control point. He cites various tests that have been conducted which demonstrate the general feasibility of this technique.

43. By adopting these rules, which should make possible the installation of comparatively simple telemetry systems in the many stations utilizing manual logging, we do not preclude possible later consideration of other more sophisticated systems which may formally be proposed and supported by adequate technical and experimental data. However, we do not believe that action in this proceeding should be further delayed for such consideration at this time.

44. *Accordingly, it is ordered,* Effective December 8, 1969, that Part 73 of the rules and regulations is amended as set forth below.

45. Authority for the rule amendments adopted herein is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

46. *It is further ordered,* That this proceeding is terminated.

[3] As pointed out by Moseley and Martl, the bandwidth of the system is insufficient to permit the transmission of modulation indications, and they must be observed at the remote point by other means. Since this is the case, there should be no occasion for the continuous transmission of the telemetry tones when the transmitter is functioning normally.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Adopted: October 29, 1969.

Released: October 31, 1969.

FEDERAL COMMUNICATIONS COMMISSION,[4]
[SEAL] BEN F. WAPLE,
Secretary.

Section 73.67 is amended by adding a new paragraph (c) to read as follows:

§ 73.67 Remote control operation.

* * * * *

(c) The broadcast transmitter carrier may be amplitude modulated with a tone for the purpose of transmitting to the remote control point essential meter indications and other data on the operational condition of the broadcast transmitter and associated devices, subject to the following conditions:

(1) The tone shall have a frequency no higher than 30 cycles per second.

(2) The amplitude of modulation of the carrier by the tone shall not be higher than necessary to effect reliable and accurate data transmission, and shall not, in any case, exceed 6 percent.

(3) The tone shall be transmitted only at such times and during such intervals that the transmitted information is actually being observed or logged.

(4) Measures shall be employed to insure that during the periods the tone is being transmitted the total modulation of the carrier does not exceed 100 percent on negative peaks.

(5) Such tone transmissions shall not significantly degrade the quality of program transmission or produce audible effects resulting in public annoyance.

(6) Such tone transmissions shall not result in emissions of such a nature as to result in greater interference to other stations than is produced by normal program modulation.

[F.R. Doc. 69-13129; Filed, Nov. 4, 1969; 8:45 a.m.]

[Docket No. 18271; FCC 69-1185]

PART 83—STATIONS ON SHIPBOARD IN MARITIME SERVICES

PART 85—PUBLIC FIXED STATIONS AND STATIONS OF MARITIME SERVICES IN ALASKA

Transition of Ship and Coast Stations From Double Sideband to Single Sideband Radiotelephony on Certain Frequencies

Second report and order. In the matter of amendments of Parts 2, 81, 83 and 85 to effect orderly shifts from present double sideband (DSB) and/or single sideband (SSB) to new (replacement) frequencies; to establish a revised schedule of dates, technical standards, frequencies and other requirements for the transition of ship and coast stations from DSB to SSB radiotelephony on frequencies within the revised frequency allotments adopted by the World Administrative Radio Conference, Geneva—1967, for the exclusive HF maritime mobile service bands between 4 and 23 Mc/s.; Docket No. 18271.

1. A notice of proposed rule making in the above-captioned matter was released on August 8, 1968, and was published in the FEDERAL REGISTER on August 16, 1968 (33 F.R. 11669). By its order released September 24, 1968, and published in the FEDERAL REGISTER on September 28, 1968 (33 F.R. 14603), the Commission granted an extension of time in which to file comments. The dates for filing comments and replies thereto have passed.

2. The Commission has been requested by Hull Electronics Co. (HULL), Southern California Marine Radio Council (SCMRC), and Benmar Division of Computer Equipment Corp. (BENMAR), to immediately release the report and order in this proceeding. These requests are directed to the matter of availability of frequencies for use by limited coast and ship stations and, more specifically, to frequency changes as required by the WARC agreement.

3. These commentators, as well as others, have pointed out a number of problems which are anticipated in completing the change-over to the replacement limited coast/ship station frequencies by the completion date set by the WARC, namely, by March 1, 1970. One of these problems is that the Commission has not made final the list of frequencies which will be available for use by limited coast and ship stations as replacements for frequencies currently available.

4. In the comments filed with the Commission in this proceeding, none of the commentators indicated any problem existed with regard to the specific frequencies set forth in the notice for us by limited coast and ship stations. The Commission concurs that there is need to finalize and to make available the list of replacement frequencies for limited coast and ship stations, as requested by HULL, SCMRC, and BENMAR, and that this action should be effected immediately.

5. In the notice the Commission proposed, in accordance with the WARC implementation schedule, that these replacement frequencies would become available on January 1, 1970, and, further, that the current frequencies be withdrawn effective February 28, 1970. In various letters received from west coast fishing interests and others, hundreds of fishing vessels must leave port on January 1, 1970, and will be at sea for an indefinite period. In view thereof, to facilitate conversion by these vessels to the replacement frequencies, the Commission has advanced the date of availability of the replacement frequencies to December 1, 1969, and extended to April 1, 1970, the effective date for withdrawal of the current frequencies. Details in regard to current frequencies and associated replacement frequencies, date of availability of the replacement frequencies, and date of withdrawal of current frequencies are set forth below.

6. Operation on the replacement frequencies during the period December 1 through December 31, 1969 and on the current frequencies during the period March 1 through March 31, 1970 will be on a secondary basis to stations operating in accordance with the time schedule set by the WARC. Operation on the replacement frequencies prior to January 1, 1970 may be subject to interference from ship stations using wideband telegraphy, facsimile or special transmission systems and operation on the current frequencies after March 1, 1970 may be subject to interference from ship stations using single sideband duplex mode of operation.

7. For the reasons stated herein, the Commission finds that good cause exists for making these rule changes effective November 5, 1969. This action is taken pursuant to 5 U.S.C. 553.

8. An application for modification submitted solely for a frequency change that is necessary to comply with any rule amendments adopted as a result of this proceeding may be submitted without a fee.

9. In view of the foregoing: *It is ordered*, That, pursuant to the authority contained in section 303 (c), (f), and (r) of the Communications Act of 1934, as amended, Parts 81 and 83 of the Commission's rules are amended effective November 5, 1969, as set forth in paragraph 5 above.

10. The formal codification of the changes described above will be accomplished by a subsequent order of the Commission in this docket.

(Secs. 4, 303, 48 Stat., as amended 1066, 1082; 47 U.S.C. 154, 303)

Adopted: October 29, 1969.

Released: October 31, 1969.

FEDERAL COMMUNICATIONS COMMISSION,[5]
[SEAL] BEN F. WAPLE,
Secretary.

Carrier frequencies (kc/s)		Conditions of use
Available until Apr. 1, 1970	Available after Dec. 1, 1969	
(1)	(2)	(3)
4133.0	4139.5	1, 2, 3, 4
4136.5	4136.3	1, 2, 3, 4
	4434.9	1, 4
6200.5	6210.4	1, 2, 3, 4
6204.0	6213.5	1, 2, 3, 4
6207.5	6518.6	1, 2, 3, 4, 5
8273.0	8281.2	1, 2, 3, 4
8276.5	8284.4	1, 2, 3, 4
12407.0		1, 3
12410.5	12421.0	1, 2, 3, 4
12414.0	12424.5	1, 2, 3, 4
12417.5	12428.0	1, 2, 3, 4
16537.0		1, 3
16540.5		1, 3
16544.0		1, 3
16547.5		1, 3
16551.0	16565.0	1, 2, 3, 4
16554.5	16568.5	1, 2, 3, 4
16558.0	16572.0	1, 2, 3, 4
22078.0		1, 3
22081.5	22094.5	1, 2, 3, 4
22085.0	22098.0	1, 2, 3, 4
22088.5	22101.5	1, 2, 3, 4
22092.0	22105.0	1, 2, 3, 4
22095.5	22108.5	1, 2, 3, 4

[4] Commissioner Robert E. Lee absent; Commissioner Johnson dissenting.

[5] Commissioner Robert E. Lee absent; Commissioner Johnson concurring in the result.

Assignment of the specific carrier frequencies designated above and use of frequency assignments of which those frequencies are the authorized carrier frequencies shall be subject to the express limitations and conditions set forth in this paragraph:

(i) (i) The applicant must show that the desired communications are primarily over distances for which frequencies above 27.5 Mc./s. would not be suitable;

(ii) These frequencies are available on a shared basis only and shall not be construed as available for the exclusive use of any one station licensee;

(iii) Normally no more than one frequency from each of the frequency bands will be authorized;

(iv) These frequencies are not authorized for use in communicating with stations aboard aircraft;

(v) Transmitter peak envelope power shall not exceed 1 kW; and

(vi) The class of emission shall be A3J.

(2) During the period December 1, 1969, to April 1, 1970, transition may be effected from the currently available frequency listed in column (1) to the replacement frequency listed in column (2).

(3) Authorization for use of the frequency listed in column (1) is withdrawn effective April 1, 1970.

(4) The frequency listed in column (2) will be available for assignment on and after December 1, 1969.

(5) Use should be limited to daytime.

[F.R. Doc. 69-13130; Filed, Nov. 4, 1969; 8:45 a.m.]

Chapter II—Director of Telecommunications Management

[Telecom Circular 3300.3]

PART 203—GOVERNMENT AND PUBLIC CORRESPONDENCE TELECOMMUNICATIONS PRECEDENCE SYSTEM

Correction

In F.R. Doc. 69-12735 appearing at page 17294 in the issue of Friday, October 24, 1969, the introductory paragraph of paragraph (b) of § 203.6 *Criteria*, should read as set forth below:

(b) *Immediate, Immediate Emergency, Urgent.* Immediate, Immediate Emergency, or Urgent telephone calls or messages shall be handled as fast as possible and ahead of all other calls or messages except those having a higher precedence. Any message or call of a lower precedence in the process of transmission will be halted, if feasible, to clear the channel for this transmission. It will be reserved generally for calls or messages pertaining to:

Title 36—PARKS, FORESTS, AND MEMORIALS

Chapter II—Forest Service, Department of Agriculture

PART 200—ORGANIZATION, FUNCTIONS, AND PROCEDURES

Changes in Field Organization Addresses

Part 200, Chapter II, Title 36 of the Code of Federal Regulations is amended as follows:

1. Paragraph (e) of § 200.2 is revised as follows:

§ 200.2 Field organization.

* * * * *

(e) The addresses of Regional Foresters, Research Station Directors, Area Directors, and Forest Supervisors are given below. Location of specific Ranger District headquarters may be obtained from Forest Supervisors.

NATIONAL FORESTS BY REGIONS

REGION 1, NORTHERN REGION

Regional Forester, Federal Building, Missoula, Mont. 59801.

* * * * *

REGION 2, ROCKY MOUNTAIN REGION

Regional Forester, Federal Center, Building 85, Denver, Colo. 80225.

State in which forest is located	National Forest	Headquarters of supervisor
Colorado	Arapaho	Golden.
	Grand Mesa-Uncompahgre.	Delta.
	Gunnison	Gunnison.
	Pike	Colorado Springs.
	Rio Grande	Monte Vista.
	Roosevelt	Fort Collins.
	Routt	Steamboat Springs.
	San Isabel	Pueblo.
	San Juan	Durango.
	White River	Glenwood Springs.
Nebraska	Nebraska	Chadron.
South Dakota	Black Hills	Custer.
Wyoming	Bighorn	Sheridan.
	Medicine Bow	Laramie.
	Shoshone	Cody.

REGION 3, SOUTHWESTERN REGION

Regional Forester, 517 Gold Avenue SW., Albuquerque, N. Mex. 87101.

* * * * *

REGION 4, INTERMOUNTAIN REGION

Regional Forester, 324 25th Street, Ogden, Utah 84401.

* * * * *

REGION 5, CALIFORNIA REGION

Regional Forester, 630 Sansome Street, San Francisco, Calif. 94111.

California	Angeles	Pasadena.
	Cleveland	San Diego.
	Eldorado	Placerville.
	Inyo	Bishop.
	Klamath	Yreka.
	Lassen	Susanville.
	Los Padres	Goleta.
	Mendocino	Willows.
	Modoc	Alturas.
	Plumas	Quincy.
	San Bernardino	San Bernardino.
	Sequoia	Porterville.
	Shasta-Trinity	Redding.
	Sierra	Fresno.
	Six Rivers	Eureka.
	Stanislaus	Sonora.
	Tahoe	Nevada City.

REGION 6, PACIFIC NORTHWEST REGION

Regional Forester, 319 Southwest Pine Street, Portland, Oreg. 97208 (Post Office Box 3623).

* * * * *

REGION 8, SOUTHERN REGION

Regional Forester, 50 Seventh Street NE., Atlanta, Ga. 30323.

Alabama	William B. Bankhead.	Montgomery.
	Conecuh	Do.
	Talladega	Do.
	Tuskegee	Do.
Arkansas	Ouachita	Hot Springs.
	Ozark-St. Francis	Russellville.
Florida	Apalachicola	Tallahassee.
	Ocala	Do.
	Osceola	Do.
Georgia	Chattahoochee-Oconee.	Gainesville.
Kentucky	Daniel Boone	Winchester.
Louisiana	Kisatchie	Pineville.
Mississippi	Bienville	Jackson.
	Delta	Do.
	DeSoto	Do.
	Holly Springs	Do.
	Homochitto	Do.
	Tombigbee	Do.
North Carolina	Croatan	Asheville.
	Nantahala	Do.
	Pisgah	Do.
	Uwharrie	Do.
South Carolina	Francis Marion and Sumter.	Columbia.
Tennessee	Cherokee	Cleveland.
Texas	Angelina	Lufkin.
	Davy Crockett	Do.
	Sabine	Do.
	Sam Houston	Do.
Virginia	George Washington.	Harrisonburg.
	Jefferson	Roanoke.

REGION 9, EASTERN REGION

Regional Forester, 633 West Wisconsin Avenue, Milwaukee, Wis. 53203.

* * * * *

REGION 10, ALASKA REGION

Regional Forester, Federal Office Building, Post Office Box 1628, Juneau, Alaska 99801.

* * * * *

FOREST AND RANGE EXPERIMENT STATIONS

Name of station and headquarters of director

Intermountain—507 25th Street, Ogden, Utah 84401.

North Central—Forest Service, Folwell Avenue, St. Paul, Minn. 55101.

Northeastern—6816 Market Street, Upper Darby, Pa. 19082.

Pacific Northwest—809 Northeast Sixth Avenue, Post Office Box 3141, Portland, Oreg. 97208.

Pacific Southwest—1960 Addison Street, Berkeley, Calif. 94701.

Rocky Mountain—240 West Prospect Street, Fort Collins, Colo. 80521.

Southeastern—Post Office Building, Post Office Box 2570, Asheville, N.C. 28802.

Southern—Federal Building, 701 Loyola Avenue, New Orleans, La. 70113.

Institute of Tropical Forestry—University of Puerto Rico Experiment Station Grounds, Post Office Box AQ, Rio Piedras, P.R. 00928.

Forest Products Laboratory—Post Office Box 5130, North Walnut Street, Madison, Wis. 53705.

STATE AND PRIVATE FORESTRY AREAS

Director, Northeastern Area—6816 Market Street, Upper Darby, Pa. 19082.

Director, Southeastern Area—50 Seventh Street NE., Atlanta, Ga. 30323.

NOTE: In Regions 1 through 6 and 10, State and Private Forestry activities are directed from Regional headquarters.

2. Paragraphs (b) and (d) of § 200.9 are revised to read as follows:

§ 200.9 Rules governing inspection and copying.

* * * * *

(b) The Department of Agriculture has established a schedule of fees for copies of information. The Forest Service charges for copies of records in accordance with the Department fee schedule.

* * * * *

(d) Informational material published for general public distribution is furnished without charge.

Effective date. This amendment shall become effective on the date of its publication in the FEDERAL REGISTER.

(5 U.S.C. 552)

THOMAS K. COWDEN,
Assistant Secretary of Agriculture.

OCTOBER 31, 1969.

[F.R. Doc. 69-13205; Filed, Nov. 4, 1969; 8:49 a.m.]

Title 32—NATIONAL DEFENSE

Chapter I—Office of the Secretary of Defense

SUBCHAPTER A—ARMED SERVICES PROCUREMENT REGULATIONS

MISCELLANEOUS AMENDMENTS TO SUBCHAPTER

The following amendments to this subchapter are issued by direction of the Assistant Secretary of Defense (Installations and Logistics) pursuant to the authority contained in Department of Defense Directive No. 4105.30, dated March 11, 1959 (24 F.R. 2260), as amended, and 10 U.S.C. 2202.

PART 1—GENERAL PROVISIONS

1. Sections 1.320, 1.322-1, 1.322-2, 1.322-3, 1.322-4, and 1.322-5(b) are revised, and new §§ 1.322-6 and 1.322-7 are added, as follows:

§ 1.320 Industrial security.

Certain required procedures designed to safeguard classified defense information are set forth in the Department of Defense Industrial Security Regulation, DoD 5220.22-R (Implemented for the Army by AR 380-131; for the Navy by OPNAV Instruction 5540-8E; for the Air Force by AFR 205-4; and for the Defense Supply Agency by DSAM 8500.1), and DD Form 441 "Security Agreement" and its attachment, the Department of Defense Industrial Security Manual together with Supplements thereto. Security requirements governing work to be performed outside the United States, its possessions, and Puerto Rico by United States or foreign nationals, or work to be performed in the United States by foreign nationals (including companies located in the United States which are owned, controlled, or influenced by nationals of a foreign country), are subject to security agreements which the United States maintains with a number of foreign countries. The requirements of these agreements are set forth in the Department of Defense Industrial Security Regulation. The Defense Supply Agency administers the Industrial Security Program on behalf of all the Departments.

§ 1.322-1 General.

(a) *Description of procedure.* Multiyear procurement is a method for competitive contracting for known requirements for military supplies or services in quantities and total cost not in excess of planned requirements for 5 years, set forth in or in support of, the Department of Defense 5-Year Defense Program, even though the total funds ultimately to be obligated by the contract are not available to the contracting officer at the time of entering into the contract. Under this method, contract quantities are budgeted for and financed in accordance with the program year for which each quantity is authorized. This procedure provides for solicitation of prices based either on award of the current 1-year program quantity only, or, in the alternative, on the total multiyear quantities. Award is made on whichever of these two alternative bases reflects the lowest unit prices to the Government. If award is made on the multiyear basis, funds are obligated only for the first year's quantity, with succeeding years' contract quantities funded annually thereafter. In the event funds are not made available to support one or more succeeding year's quantities, cancellation is effected. The contractor is protected against loss resulting from cancellation by contract provisions allowing reimbursement of unrecovered nonrecurring costs included in prices for canceled items.

(b) *Policy.* (1) Multiyear procurement shall be used to the maximum extent consistent with paragraphs (c), (d), and (e) of this section. Advantages of this method include, for example:

(i) Lower costs;

(ii) Enhancement of standardization;

(iii) Reduction of administrative burden in the placement and administration of contracts;

(iv) Substantial continuity of production or performance;

(v) Stabilization of work forces; and

(vi) Broadening the competitive base with opportunity for participation by firms not otherwise willing or able to compete for lesser quantities, particularly in cases involving high startup costs.

(2) The principal objective of the multi-year procedure is to generate realistic competition by minimizing competitive disadvantage and by increasing contractor interest in particpating in procurements which involve high startup costs and make-ready expense and which also may require substantial capital investment by contractors for expansion of their facilities. Under this procedure:

(i) Nonrecurring costs are distributed over a large number of units, thus narrowing any price advantage of a firm already in production or performance;

(ii) There is greater assurance of depreciation recovery for capital investment; and

(iii) The competitive base is broadened with better prospects for lower prices, where firms otherwise might be unwilling or unable to compete.

(3) Another major objective is to obtain lower prices in those procurements which do not necessarily involve high startup cost but which do provide opportunity for substantial cost savings and other advantages through assurance of continiuty for production or performance over longer periods of time. In determining whether substantial cost savings and related advantages can be realized, consideration may be given to whether:

(i) Production or performance closeout or shutdown costs, including employee severance pay, represent a substantial cost contingency in prices quoted on only 1 year's program;

(ii) Stabilization of work forces will provide greater assurance of sustaining and improving efficiency and quality;

(iii) Substantial cost and quality advantage will accrue through avoidance of the possible need for establishing and "proving out" quality control techniques and procedures for a new contract each year;

(iv) Costly preproduction or pilot testing will be avoided;

(v) The ability to recruit and retain highly skilled personnel will be enhanced through assurance to employees of longer periods of employment than would be the case in single-year procurement, thereby avoiding costs of repeated training of new personnel;

(vi) The ability to vary production or performance rates during peak and off-peak periods in each program year will result in economies; and

(vii) Substantial in-house savings in maintenance and supply operations will accrue from standardization of supplies or services accomplished by procurement from a single source throughout the multiyear period.

(c) *Set-asides.* Total small business set-asides are compatible with the multiyear method of procurement and may be used when both procedures are appropriate. Partial set-aside procedures (both small business and labor surplus area) generally are not compatible with the multiyear procedure when high startup costs are involved because of the potential duplication of such costs by the set-aside contractor and the non-set-aside contractor. However, when the multiyear procedure is based not on high startup costs but on the opportunity for cost savings through assurance of continuity of production over longer periods of time, partial set-aside procedures are compatible with the multiyear procedure. Furthermore, even when high startup costs are involved, use of partial set-aside procedures together with the multiyear procedure may be appropriate in exceptional circumstances, such as where the criteria for partial set-asides are met under Subparts G and H of this part, and it is likely that broader or more realistic competition will result from a combination of both procedures, and this broader competition is likely to more than offset any duplication of startup costs. When reviewing a proposed procurement involving possible use of this procedure, in addition to consideration of the criteria established in this paragraph and paragraph (b) of this section, the contracting officer shall invite the advice and counsel of the activity's small business specialist and the SBA representative, if one is assigned to that activity, permitting either or both to review all pertinent facts and make recommendations thereon.

(d) *Multiyear subcontracts.* The same benefits and advantages that are derived

from multiyear prime contracts may frequently be increased by multiyear subcontracts thereunder. The prime contractor in the exercise of his management responsibilities must freely choose the subcontract types that best satisfy his needs. However, multiyear prime contractors should be encouraged to employ multiyear subcontracts selectively and only when:

(1) The subcontract item or service is of stable design and specification;

(2) The quantity required is known and firm;

(3) Effective competition is assured; and

(4) The use of multiyear subcontracts can reasonably be expected to result in reduced prices.

In such cases, the prime contractor is adequately protected against cancellation since appropriate cancellation charges for such multiyear subcontracts are included within the cancellation charge of the multiyear prime contract. Multiyear subcontracts may be particularly desirable under a sole source multiyear prime contract since effective competition at the subcontract level may thereby be enhanced and the attendant cost reductions realized by the prime contractor and the Government.

(e) *Use of options.* (1) The use of options can be of assistance to the contracting officer when some future requirements are definite and additional quantities are likely, though not definitive as to amount: *Provided,* The option quantities are not disproportionately large in relation to the known requirements.

(2) The solicitation document (IFB or RFP) shall contain language to require the bidders (offerors) to submit prices for option quantities which reflect only the recurring costs to produce additional items, and specifically excludes those costs of a startup and nonrecurring nature which have been amortized in the unit prices of the definitive program year quantities.

§ 1.322–2 Procedures for supply contracts.

(a) Except as provided in paragraph (j) of this section, the multiyear procurement method for supplies should be used when all of the following criteria are present:

(1) Reduced unit prices can reasonably be anticipated over annual buys by reason of continuity of production or elimination of repetitive substantial startup costs, including such costs as preproduction engineering, special tooling, plant rearrangement, initial rework, initial spoilage, and pilot runs;

(2) There is reasonable expectation that effective competition can be obtained;

(3) There are known requirements for the quantities to be purchased under the multiyear contract;

(4) The design and specifications of the item are not expected to change to an extent that would involve a major impact on contract price; and

(5) The items being procured are not regularly manufactured and offered for sale in substantial quantities in the commercial market, except that (i) when quantities to be procured by the Government represent a substantial portion of the total market and would require special manufacturing runs for all or substantially all of the Government's requirements and (ii) significant cost savings would result from multiyear procurement; this procedure may be authorized by the head of a procuring activity or his designee with the procurement file fully documented as to reasons why the expected substantial savings are not obtainable under annual procurements.

(b) Formal advertising, including two-step formal advertising, is the preferred method for use in multiyear procurement. In cases where the period of production is such that a contingency for labor and material costs is likely otherwise to be included in the multiyear contract price, the contracting officer should normally use a provision for price escalation.

(c) Solicitations shall include:

(1) A statement of the requirements, separately identified by bid or proposal item in the schedule, for—

(i) The first program year; and

(ii) The multiyear procurement including the quantities for each program year thereunder;

(2) When previous production procurements of the item have been made with competition—

(i) A provision that a price may be submitted for the total requirements of the first program year, or for the total multiyear requirements, or both, or

(ii) When competition in future procurements of the items would be impracticable after award of a contract covering the first program year quantity alone and the head of a procuring activity determines that, in order to eliminate the possibility of a first program year "buy-in," these provisions will be in the best interests of the Government—provisions that a price may be submitted only for the total multiyear quantity and that prices on a single-year basis will not be considered for any purpose;

(3) When there has been no previous competition for the production of the item—

(i) (*a*) Provisions that a price must be submitted for the total requirements of the first program year, that a price may be submitted for the total multiyear quantity; and that a bid or offer on the multiyear quantity only will be considered nonresponsive, and

(*b*) A provision that if only one responsive bid or offer on the multiyear requirements is received from a responsible bidder or offeror, the Government reserves the right to disregard the bid or offer on the multiyear quantity and to make an award only for the first program year requirements; or

(ii) When competition in future procurements of the items would be impractical after award of a contract covering the first program year quantity alone and the head of a procuring activity determines that, in order to eliminate the possibility of a first program year "buy-in," these provisions will be in the best interests of the Government—

(*a*) Provisions that a price may be submitted only for the total multiyear quantity and that prices on a single-year basis will not be considered for any purpose, and

(*b*) A provision that if only one responsive bid or offer on the multiyear requirements is received from a responsible bidder or offeror, the Government reserves the right to cancel the solicitation and resolicit on a single-year basis by whatever procedures are then appropriate;

(4) A provision that the unit price of each item in the multiyear requirement shall be the same for all program years included therein;

(5) Criteria for comparing the lowest evaluated submission on the first program year's requirement against the lowest evaluated submission on the multiyear requirements (see § 1.322–3 (c));

(6) When the solicitation permits bids or offers on either the first program year requirements or the multiyear requirements or both, a provision that in the event the Government determines prior to award (but see §§ 2.208 and 3.505 of this chapter) that only the first program year quantities are actually required, the Government may evaluate bids or offers and make award solely on the basis of prices bid or offered on the first program year requirements;

(7) A provision setting forth a separate cancellation ceiling (on a percentage basis) applicable to each program year subject to cancellation (see paragraph (d) of this section);

(8) A prominently placed provision directing attention to the multiyear features of the solicitation, and to—

(i) The Limitation of Price and Contractor Obligations clause (see § 1.322–5(a)) which limits the payment obligation of the Government to the requirements of the first program year and to those of such succeeding program years as may be funded by the Government (see § 1.322–5(b));

(ii) The Cancellation of Items clause (see § 1.322–5(b)) which allows the Government to cancel, by a specified date or within a specified period, all remaining program years; and

(iii) The cancellation set forth in the schedule; and

(9) A statement in the solicitation schedule that award will not be made on less than the quantity stated as the first program year requirements.

(d) The term "cancellation" as used in multiyear procurement refers only to the cancellation of the total requirements of all remaining program years. Such cancellation results from (1) notification from the contracting officer to the contractor of nonavailability of funds for contract performance for any subsequent program year, or (2) failure of the contracting officer to notify the contractor that funds have been made available for performance of the succeeding program year requirement. For each program year except the last, the contracting officer shall establish a cancellation ceiling applicable to the remaining program years which are subject to cancellation.

Cancellation ceilings will be lower for each succeeding program year in that such ceilings must exclude all amounts allocable to items included in prior program years. Such ceilings shall be expressed in the schedule and shall apply to all bidders alike. The reduction in the cancellation ceilings percentage for each program year shall be in direct proportion to the reduction in the quantity remaining subject to cancellation. For example, if the total nonrecurring costs are estimated at 10 percent of the total multiyear price and program year quantities for 5 years are 30, 30, 20, 10, and 10, the cancellation percentages after deducting 3 percent for the first program year would be 7 percent, 4 percent, 2 percent, and 1 percent of the total multiyear price applicable to the second, third, fourth, and fifth program years respectively. In determining cancellation ceilings, the contracting officer must estimate reasonable preproduction, labor learning and other nonrecurring costs, to be incurred by an "average" prime or subcontractor which would be applicable to and which normally would be amortized in all items to be furnished under the multiyear requirements. They include such costs as plant rearrangement, special tooling, preproduction engineering, initial rework, initial spoilage, pilot runs, and unrealized labor learning. They shall not include any costs of labor or materials, or other expenses (except as indicated above) which might be incurred for production of the items subject to cancellation for each program year. The total estimate must then be compared with the best estimate of the procurement cost to arrive at a reasonable percentage figure. To perform this calculation, it is essential that the contracting officer obtain in-house engineering cost estimates which will identify the detailed recurring and nonrecurring costs, and indicate labor learning implications. Cancellation dates for each program year's requirements shall be established with due regard for production lead time and the date by which funding therefor can reasonably be accomplished.

(e) Original cancellation ceilings may be revised from information developed after issuance of a solicitation discloses that such ceilings are not realistic. In the case of formal advertising, such changes shall be by amendment of the invitation for bid prior to bid opening. In two-step formal advertising, discussion conducted during the first step may indicate the need for revised ceilings in step two. Negotiations with offerors in a negotiated procurement may provide information requiring a change in cancellation ceilings for all offerors, prior to final negotiation and contract award. In order to assure that all interested sources of supply are thoroughly aware of how multiyear procurement is accomplished, use of presolicitation or prebid conferences may be advisable. During such conferences the contracting officer should ascertain whether escalation provisions are appropriate (see § 2.104–3 of this chapter) and whether the proposed cancellation ceiling is adequate.

(f) For each program year requirement, funds shall be obligated to cover the quantities to be delivered thereunder. There is presently no requirement to fund cancellation charges.

(g) In the event of a cancellation the contractor is entitled to payment as consideration therefor in accordance with the terms of the Cancellation of Items clause (see § 1.322–5(b)) in an amount not to exceed the cancellation ceiling.

(h) The Schedule shall contain a provision limiting the payment obligation of the Government to a monetary amount there described as being available for contract performance. Such amount for the first program year requirements shall be inserted by the contracting officer upon award of the contract and shall be modified for successive program years upon availability of funds for such years (see §1.322–5(a)).

(i) In the event the contract is terminated for the convenience of the Government in whole, including items subject to cancellation, the Government's obligation shall not exceed the amount set forth in the Schedule as available for contract performance, plus the applicable amount established as the cancellation ceiling.

(j) Limitations: Multiyear procurement of supplies shall not be used:

(1) When funds covering the procurement are limited by statute for obligation during the fiscal year in which the contract is executed;

(2) For quantities or total costs in excess of the planned requirements for 5 years set forth in, or in support of, the 5-Year Defense Program; or

(3) When any one of the criteria set forth in paragraph (a) of this section is not present.

§ 1.322–3 Evaluation.

(a) Evaluation of offers in a multiyear procurement involves not only determination of the lowest overall evaluated cost to the Government for both alternatives, the multiyear procurement and the first program year procurement; it also involves the comparison of the cost of buying the total requirement under a multiyear procurement with cost of buying the total requirement in successive independent procurements. All the factors to be considered for the various evaluations involved shall be set forth in the solicitation.

(b) In the event the Government determines prior to award (but see §§ 2.208 and 3.505 of this chapter) that only the first program year quantities are actually required, the procurement will no longer be evaluated on a multiyear basis:

(1) When the solicitation permits bids or offers on either the first program year requirements or the multiyear requirements or both, only bids or offers on the first program year requirements will be evaluated; and

(2) When the solicitation does not permit the submission of prices on a single-year basis, the single-year requirement will be resolicited.

(c) The cancellation ceiling shall not be a factor for evaluation. Unless Government administrative costs incident to annual procurement methods and contract administration can be reasonably established and supported, they shall not be used as a factor for evaluation. When administrative costs are to be used in evaluation, the dollar amount to be used shall be stated in the solicitation.

(d) Delivery destinations may be unknown for certain quantities due to the extended duration of contract performance. In such cases, destinations shall be developed on the basis of best estimates; a definite place or places shall be designated in the solicitation as the point to which transportation costs will be computed (but only for the purpose of evaluating bids or proposals); and the solicitation shall contain the notice required under § 2.201(b)(30) of this chapter.

(e) When Government production and research property is provided pursuant to Subpart C, Part 13 of this chapter, the use of such property may be on a rent-free basis under the policies contained in Subpart E, Part 13 of this chapter. In this event, the solicitation shall set forth a detailed description of the procedure to be followed and the factors to be considered in accordance with Subpart E, Part 13 of this chapter, for the elimination of competitive advantage. The amount added for evaluation to each offeror's unit price for the first program year requirement shall also be added to his unit price for the multiyear requirements.

(f) When the solicitation requires the submission of prices on the first program year requirements in accordance with § 1.322–2(c)(3)(i), bids or offers which submit prices on the multiyear requirements only shall be rejected as nonresponsive.

(g) When the solicitation provides for submission of prices only for the total multiyear quantity in accordance with § 1.322–2 (c)(2)(ii) and (c)(3)(ii)(a), submission of prices for the single-year quantity will be disregarded for any purpose but will not render the bid or offer nonresponsive as to any alternate multiyear submission by the same bidder or offeror.

(h) To determine the lowest evaluated unit price, compare the lowest evaluated bid or offer on the first program year alternative against the lowest evaluated bid or offer on the multiyear alternative as follows:

(1) Multiply the evaluated unit price for each item of the lowest evaluated bid or offer on the first program year alternative times the total number of units of that item required by the multiyear alternative, and then

(2) Take the sum of these products for all the items, plus the dollar amount of any administrative costs of the Government which are to be used in the evaluation, and finally

(3) Compare this result against the total evaluated price of the lowest bid or offer on the multiyear alternative.

§ 1.322–4 Award.

(a) Except as provided in paragraphs (b) and (c) of this section, award shall

be made on the basis of the lowest evaluated unit price determined in accordance with § 1.322–3, whether that price is on a single-year basis or a multiyear basis.

(b) If only one responsive bid or offer is received on the multiyear requirements from a responsible bidder or offeror, then award shall be made as follows:

(1) If the solicitation gave the bidder or offeror the choice of submitting prices on a single-year basis or multiyear basis or both, then award shall be made in accordance with paragraph (a) of this section;

(2) If the solicitation required the submission of prices on the first program year requirements in accordance with § 1.322–2(c)(3)(i), award shall be made to the lowest evaluated bidder or offeror on the single-year basis, even though the multiyear price submission may represent the lowest evaluated price submission, except that if the multiyear price offers distinct advantages to the Government a multiyear award may be made with the advance approval of the head of a procuring activity;

(3) If the solicitation restricted the submission of prices to the multiyear basis only, the solicitation shall be canceled and a new solicitation issued by whatever procedures are then appropriate, except that if the multiyear price offers distinct advantages to the Government a multiyear award may be made with the advance approval of the head of a procuring activity.

(c) In no event shall award be made at an unreasonable price (see §§ 2.404–1 and 3.801 of this chapter).

§ 1.322–5 Clauses.

* * * * *

(b) *Cancellation of items.*

CANCELLATION OF ITEMS (AUGUST 1968)

(a) This clause applies only in the event this contract is awarded on the alternative basis for award described in the Schedule as "Multi-Year Procurement".

(b) As used herein, the term "cancellation" means that the Government is canceling, pursuant to this clause, its Program Year requirements for items as set forth in the Schedule for all Program Years subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if, by the date or within the time period specified in the Schedule, or such further time as may be agreed to, the Contracting Officer (i) notifies the Contractor that funds will not be available for contract performance for any subsequent Program Year; or (ii) fails to notify the Contractor that funds have been made available for performance of the Program Year requirement for the succeeding Program Year.

(c) Except for cancellation pursuant to this clause or for termination pursuant to the "Default" clause, any reduction by the Contracting Officer in the quantities called for under this contract shall be considered a termination in accordance with the "Termination for Convenience of the Government" clause of this contract.

(d) In the event of cancellation pursuant to this clause, the Contractor will be paid, as consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in the Schedule as being applicable at the time of cancellation.

(e) The cancellation charge is intended to cover (i) only costs reasonably necessary for production which would have been equitably amortized in the unit prices for the entire multiyear contract period, but which, because of the cancellation, are not so amortized and (ii) a reasonable profit on such costs. The cancellation charge shall be computed and claim therefor made as would be applicable under the "Termination for Convenience of the Government" clause of this contract. The claim may include reasonable preproduction and other nonrecurring costs, incurred by the prime contractor or his subcontractor, applicable to and which normally would be amortized in all items to be furnished under the multiyear requirements, such as plant rearrangement, special tooling, preproduction engineering, initial rework, initial spoilage and pilot runs, as well as costs not amortized by the level contract unit price solely because the cancellation had precluded anticipated benefits of contractor or subcontractor learning. The claim shall not include any amount for:

(i) Labor, materials, or other expenses incurred by the Contractor or its subcontractors for production of the canceled items;

(ii) Any item or cost for which payment has already been made to the Contractor; or

(iii) Anticipated profit on the canceled items.

Where options are otherwise authorized, multiyear contracts may include an appropriate "Option to Increase Quantities" clause in which the period for exercise of the option is limited to the date set forth in the contract schedule for notifying the contractor that funds are available for the requirements of the next succeeding program year. If such an option is included, the following paragraph (f) should be added to the clause set forth above.

(f) The Contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature, which costs have been fully provided for in the unit prices of the firm quantities of the Program Years, and further agrees that the prices offered for option quantities will reflect only those recurring costs, and a reasonable profit thereon, which are necessary to furnish the additional option quantities. Therefore, any quantities added to the original contract quantities through exercise of the Government option in the "Option to Increase Quantities" clause of this contract shall not be subtracted from what would otherwise be considered the quantity canceled for the purpose of computing allowable cancellation charges.

§ 1.322–6 Multiyear procurement of services.

(a) *Description of procedure.* Multiyear procurement of services is a method for competitive contracting for known requirements for services and items of supply incidental to service contracts in quantities and total cost not in excess of planned requirements for 5 years, set forth in, or in support of, the 5-Year Defense Program, even though the total funds ultimately to be obligated by the contract are not available to the contracting officer at the time of entering into the contract. Under this method, requirements are budgeted for and financed in accordance with the program year for which each quantity is authorized. This procedure provides for solicitation of prices based either on award of the current 1-year requirements only, or, in the alternative, on total requirements representing the first and one or more succeeding years' requirements (multiyear). Award is made on whichever of these two alternative bases reflects the lowest prices to the Government. If award is made on the multiyear basis, funds are obligated only for the first year's quantity, with succeeding years' contract quantities funded annually thereafter. In the event funds are not made available to support one or more succeeding year's requirements, cancellation is effected. The contractor is protected against loss resulting from cancellation by contract provisions allowing reimbursement of unrecovered nonrecurring costs included in prices for canceled requirements.

(b) *Objectives.* The principal objectives of multiyear procurement of services are:

(1) Generation of realistic competition by increasing contractor interest in participating in procurements which involve substantial startup costs, investment in equipment or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force;

(2) Lower costs and prices because of continuity of performance over longer periods of time by eliminating duplication of startup costs, make ready expenses, and phaseout costs including employee severance pay associated with annual turnover of contractors;

(3) Higher quality of performance because of unrealized labor learning, stabilization of work forces and improved quality control techniques; and

(4) Reduction of administrative cost and burden to the Government in preparing and issuing annual procurement solicitations and in the annual evaluation and award process.

(c) *Limitations.* Multiyear contracts for services shall not be used:

(1) When funds covering the procurement are limited by statute for obligation during the fiscal year in which the contract is executed (1-year funds); except that multiyear procurement may be employed with 1-year funds in the case of contracts to be performed outside the 48 contiguous States and the District of Columbia for the following services:

(i) Operation, maintenance, and support of facilities and installations;

(ii) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(iii) Specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and

(iv) Base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal).

(2) To procure requirements which are in excess of the 5-Year Defense Program;

(3) Until a written determination has been made that there will be a continuing requirement for the services and incidental supplies consonant with current plans for the proposed contract period, and the furnishing of such services and incidental supplies will require a substantial initial investment in plant or equipment, the incurrence of substantial contingent liabilities for the assembly,

training, or transportation of a specialized work force, or other substantial startup costs, and the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies of operation. These determinations and findings shall be executed by:

(i) The Commanding Officer of the installation or activity, when the contract period will not exceed 2 years and the estimated annual expenditures thereunder do not exceed $350,000;

(ii) The head of the procuring activity when the contract period will exceed 2 years but not 3 years or when the contract period will not exceed 2 years but the estimated annual contract expenditure will exceed $350,000;

(iii) The Assistant Secretary for Installations and Logistics, of the respective Departments, or the Directors of Defense Agencies when the contract period will exceed 3 years regardless of dollar value.

§ 1.322–7 Procedures for service contracts.

(a) Formal advertising, including two-step formal advertising, is the preferred method for use in multiyear procurement.

(b) Solicitations shall include:

(1) A statement of the requirements, separately identified, for—

(i) The first program year; and

(ii) The multiyear procurement including the requirements for each program year thereunder;

(2) When previous procurements of the services have been made with competition—

(i) A provision that a price may be submitted for the total requirements of the first program year, or for the total multiyear requirements, or both, or

(ii) When competition in future procurements would be impracticable after award of a contract covering the first program year alone and the head of a procuring activity determines that, in order to eliminate the possibility of a first program year "buy-in," these provisions will be in the best interests of the Government—provisions that a price may be submitted only for the total multiyear requirements and that prices on a single-year basis will not be considered for any purpose;

(3) When there has been no previous competition for the services—

(i) (*a*) Provisions that a price must be submitted for the total requirements of the first program year, that a price may be submitted for the total multiyear requirements, and that a bid or offer on the multiyear requirements only will be considered nonresponsive; and

(*b*) A provision that if only one responsive bid or offer on the multiyear requirements is received from a responsible bidder or offeror, the Government reserves the right to disregard the bid or offer on the multiyear requirements and to make an award only for the first program year requirements; or

(ii) when competition in future procurements of the service would be impractical after award of a contract covering the first program year requirement alone and the head of a procuring activity determines that, in order to eliminate the possibility of a first program year "buy-in," these provisions will be in the best interests of the Government—

(*a*) Provisions that a price may be submitted only for the total multiyear requirement and that prices on a single-year basis will not be considered for any purpose; and

(*b*) A provision that if only one responsive bid or offer on the multiyear requirements is received from a responsible bidder or offeror, the Government reserves the right to cancel the solicitation and resolicit on a single-year basis by whatever procedures are then appropriate;

(4) A provision that the unit price of each item in the multiyear requirement shall be the same for all program years included therein;

(5) Criteria for comparing the lowest evaluated submission on the first program year's requirement against the lowest evaluated submission on the multiyear requirements;

(6) When the solicitation permits bids or offers on either the first program year requirements or the multiyear requirements or both, a provision that in the event the Government determines prior to award (but see §§ 2.208 and 3.505 of this chapter) that only the first program year services are actually required), the Government may evaluate bids or offers and make award solely on the basis of prices bid or offered on the first program year requirements;

(7) A provision setting forth a separate cancellation ceiling (on a percentage basis) and dates applicable to each program year subject to cancellation (see paragraph (c) of this section);

(8) A prominently placed provision directing attention to the multiyear features of the solicitation; and to—

(i) The Limitation of Price and Contractor Obligations clause (see § 1.322–5 (a)) which limits the payment obligation of the Government to the requirements of the first program year and to those of such succeeding program years as may be funded by the Government (see paragraph (m) of this section).

(ii) The Cancellation of Items-Service Contracts clause (paragraph (m) of this section) which allows the Government to cancel, by a specified date or within a specified period, all remaining program years; and

(iii) The cancellation ceiling set forth in the schedule; and

(9) A statement in the solicitation schedule that award will not be made on less than the service stated as the first program year requirements.

(c) The term "cancellation" as used in multiyear procurement refers only to the cancellation of the total requirements of all remaining program years. Such cancellation results from (1) notification from the contracting officer to the contractor of nonavailability of funds for contract performance for any subsequent program year, or (2) failure of the contracting officer to notify the contractor that funds have been made available for performance of the succeeding program year requirement. For each program year except the last, the contracting officer shall establish a cancellation ceiling applicable to the remaining program years which are subject to cancellation. Cancellation ceilings will be lower for each succeeding program year in that such ceilings must exclude all amounts allocable to items included in prior program years. Such ceilings shall be expressed in the Shcedule and shall apply alike to all bidders or offerors. The reduction in the cancellation ceiling percentage for each program year shall be in direct proportion to the reduction in the requirements remaining subject to cancellation. For example, consider that the total nonrecurring costs are estimated at 10 percent of the total multiyear price and the total multiyear requirements for 5 years are 30 percent in the first year, 30 percent in the second, 20 percent in the third, 10 percent in the fourth, and 10 percent in the fifth. The cancellation ceiling contained in the first through fourth program years should be 7 percent (100 percent less 30 percent times 10 percent), 4 percent, 2 percent, and 1 percent respectively. In determining cancellation ceilings, the contracting officer must estimate reasonable startup, labor learning, and other nonrecurring costs, to be incurred by an "average" prime or subcontractor which would be applicable to and which normally would be amortized in all services to be furnished under the multiyear requirements. They include such costs as the following, where applicable: plant or equipment relocation costs; the costs of special tooling and special equipment; allocable portions of the costs of facilities to be acquired or established for the conduct of the work; costs incurred for the assembly training and transportation of a specialized work force to and from the jobsite; and unrealized labor learning. They shall not include any costs of labor or materials, or other expenses (except as indicated above) which might be incurred or performance of subsequent program year requirements. The total estimate must then be compared with the best estimate of the procurement cost to arrive at a reasonable percentage figure. Cancellation dates for each program year's requirements shall be established, as appropriate, and shall always be prior to expiration of the preceding program year, giving due regard to phaseout time required by the contractor.

(d) Original cancellation ceilings and dates may be revised from information developed after issuance if a solicitation discloses that such ceilings and dates are not realistic. In the case of formal advertising, such changes shall be by amendment of the invitation for bids prior to bid opening. In two-step formal advertising, discussion conducted during the first step may indicate the need for revised ceilings and dates in step two. Negotiations with offerors in a negotiated procurement may provide information requiring a change in cancellation ceilings and dates for all offerors, prior to final negotiation and contract award. In order to assure that all interested sources of supply are thoroughly aware

of how multiyear procurement is accomplished, use of presolicitation or prebid conferences may be advisable.

(e) Escalation: When labor escalation provisions are considered appropriate, the clause in § 7.107(d) may be used. That clause may be modified in overseas contracts to allow escalation when laws, regulations, or international agreements require contractors to pay higher wage rates.

(f) For each program year requirement, funds shall be obligated to cover performance thereunder. Funds to cover cancellation charges will be committed in accordance with DoD Directive 7220.7 "Accounting for Commitments."

(g) In the event of a cancellation, the contractor is entitled to payment as consideration therefor in accordance with the terms of the Cancellation of Items—Service Contracts clause (see paragraph (m)(2) of this section) in an amount not to exceed the cancellation ceiling.

(h) The schedule shall contain a provision limiting the payment obligation of the Government to a monetary amount there described as being available for contract performance. Such amount for the first program year requirements shall be inserted by the contracting officer upon award of the contract and shall be modified for successive program years upon availability of funds for such years (see § 1.322–5(a)).

(i) In the event the contract is terminated for the convenience of the Government in whole, including items subject to cancellation, the Government's obligation shall not exceed the amounts set forth in the schedule as available for contract performance, plus the applicable amount established as the cancellation ceiling.

(j) Options: Consideration should be given to the desirability of obtaining an option to increase quantities and an option to renew the contract for a reasonable period at prices not to include (1) charges for plant and equipment already amortized, or (2) such other nonrecurring charges as startup costs, make ready expenses, and phaseout costs which were included in and already recovered under the basic contract price. Any such option provision shall not exceed a period equal to the basic contract period or 3 years, whichever is less. The exercise of an option to extend the contract period will require a determination and finding executed by that level of authority set forth in § 1.322–6(c)(3) as would have been required had the basic contract included the option period contemplated. (See also § 1.322–1(e).) Consideration shall be given to the inclusion of a provision which would allow the Government the option, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto.

(k) Evaluation:

(1) Evaluation of offers in a multiyear procurement involves not only the determination of the lowest evaluated cost to the Government for both alternatives, the multiyear procurement and the first program year procurement; it also involves the comparison of the cost of buying the total requirement under a multiyear procurement with cost of buying the total requirement in successive independent procurements. All the factors to be considered for the various evaluations involved shall be set forth in the solicitation.

(2) In the event the Government determines prior to award (but see §§ 2.208 and 3.505 of this chapter) that only the first program year services are actually required, the procurement will no longer be evaluated on a multiyear basis:

(i) When the solicitation permits bids or offers on either the first program year requirements or the multiyear requirements or both, only bids or offers on the first program year requirements will be evaluated; and

(ii) When the solicitation does not permit the submission of prices on a single-year basis, the single year requirement will be resolicited.

(3) The cancellation ceiling shall not be a factor for evaluation. Unless Government administrative costs incident to annual procurement methods and contract administration can be reasonably established and supported, they shall not be used as a factor for evaluation. When administrative costs are to be used in evaluation, the dollar amount to be used shall be stated in the solicitation.

(4) When Government production and research property is provided pursuant to Subpart C, Part 13 of this chapter, the use of such property may be on a rent-free basis under the policies contained in Subpart E, Part 13 of this chapter. In this event, the solicitation shall set forth a detailed description of the procedure to be followed and the factors to be considered in accordance with Subpart E, Part 13 of this chapter, for the elimination of competitive advantage. The amount added for evaluation to each offeror's unit price for the first program year requirement shall also be added to his unit price for the multiyear requirements.

(5) To determine the lowest evaluated unit price, compare the lowest evaluated bid or offer on the first program year alternative against the lowest evaluated bid or offer on the multiyear alternative as follows:

(i) Multiply the evaluated unit price for each item of the lowest evaluated bid or offer on the first program year alternative times the total number of units of that item required by the multiyear alternative, and then

(ii) Take the sum of these products for all the items, plus the dollar amount of any administrative costs of the Government which are to be used in the evaluation, and finally

(iii) Compare this result against the total evaluated price of the lowest bid or offer on the multiyear alternative.

(l) Award:

(1) Except as provided in subparagraphs (2) and (3) of this paragraph, award shall be made on the basis of the lowest evaluated unit price determined in accordance with paragraph (k) of this section, whether that price is on a single-year basis or a multiyear basis.

(2) If only one responsive bid or offer is received on the multiyear requirements from a responsible bidder or offeror, then award shall be made as follows:

(i) If the solicitation gave the bidder or offeror the choice of submitting prices on a single-year basis or multiyear basis or both, then award shall be made in accordance with subparagraph (1) of this paragraph;

(ii) If the solicitation required the submission of prices on the first program year requirements in accordance with paragraph (b)(3)(i) of this section, award shall be made to the lowest evaluated bidder or offeror on the single-year basis, even though the multiyear price submission may represent the lowest evaluated price submission, except that if the multiyear price offers distinct advantages to the Government, a multiyear award may be made with the advance approval of the head of a procuring activity;

(iii) If the solicitation restricted the submission of prices to the multiyear basis only, the solicitation shall be canceled and a new solicitation issued by whatever procedures are then appropriate, except that if the multiyear price offers distinct advantages to the Government, a multiyear award may be made with the advance approval of the head of a procuring activity.

(3) In no event shall award be made at an unreasonable price (see §§ 2.404–1 and 3.801 of this chapter).

(m) Clauses: The following clauses shall be included in all contracts for the procurement of services under the multiyear procurement method.

(1) *Limitation of price and contractor obligations.* Insert the clause at § 1.322–5(a).

(2) *Cancellation of items—service contracts.*

CANCELLATION OF ITEMS—SERVICE CONTRACTS (AUGUST 1968)

(a) This clause applies only in the event this contract is awarded on the alternative basis for award described in the Schedule as "Multi-Year Procurement."

(b) As used herein, the term "cancellation" means that the Government is canceling, pursuant to this clause, its Program Year requirements for items as set forth in the Schedule for all Program Years subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only if, by the date or within the time period specified in the Schedule, or such further time as may be agreed to, the Contracting Officer (i) notifies the Contractor that funds will not be available for contract performance for any subsequent Program Year; or (ii) fails to notify the Contractor that funds have been made available for performance of the Program Year requirement for the succeeding Program Year.

(c) Except for cancellation pursuant to this clause or for termination pursuant to the "Default" clause, any reduction by the Contracting Officer in the quantities called for under this contract shall be considered a termination in accordance with the "Termination for Convenience of the Government" clause of this contract.

(d) In the event of cancellation pursuant to this clause, the Contractor will be paid, as

consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in the Schedule as being applicable at the time of cancellation.

(e) The cancellation charge is intended to cover only expenses incurred by the Prime Contractor or his subcontractor which would have been equitably amortized in the unit prices for the entire multiyear contract period, but which, because of the cancellation are not so amortized. The cancellation charge shall be computed and the claim therefor made as would be applicable under the "Termination for Convenience of the Government" clause of this contract. The claim may include reasonable startup and other nonrecurring costs such as plant or equipment relocation costs; the costs of special tooling and special equipment; allocable portions of the costs of facilities acquired or established for the conduct of the work, provided such costs have not been charged to the contract through overhead, or otherwise depreciated, and to the extent that it is impracticable for the Contractor to utilize such facilities in the conduct of his commercial work; costs incurred for the assembly training and transportation of a specialized work force to and from the job site; and costs not amortized by the level contract unit price solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning. The claim shall not include any amount for:

(i) Labor, material, or other expenses incurred by the Contractor or its subcontractor for performance of the canceled work;

(ii) Any item of cost for which payment has already been made to the Contractor;

(iii) Anticipated profit on the canceled work;

(iv) The remaining useful commercial life of facilities. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

Where options are otherwise authorized, multiyear contracts may include an appropriate "Option to Increase Quantities" clause in which the period for exercise of the option is limited to the date set forth in the contract schedule for notifying the contractor that funds are available for the requirements of the next succeeding program year. If such an option is included, the following paragraph (f) should be added to the clause set forth above.

(f) The Contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature, which costs have been fully provided for in the unit prices of the firm quantities of the Program Years, and further agrees that the prices offered for option quantities will reflect only those recurring costs, and a reasonable profit thereon, which are necessary to furnish the additional option quantities. Therefore, any quantities added to the original contract quantities through exercise of the Government option in the "Option to Increase Quantities" clause of this contract shall not be subtracted from what would otherwise be considered the quantity canceled for the purpose of computing allowable cancellation charges.

2. Sections 1.324–2(b) and 1.324–3 (a) and (b) are revised; new § 1.324–11 is added; in § 1.701–1(a)(2), subdivision (i) is revised; and in § 1.703(b), the introductory text of subparagraph (1) and subparagraph (5) are revised, as follows:

§ 1.324–2 Policy.

* * * * *

(b) Except as authorized in § 1.324–11, a warranty clause shall not be included in cost-reimbursement type contracts, since the warranty aspects of the clause "Inspection of Supplies and Correction of Defects" in § 7.203–5 of this chapter are sufficient to protect the interests of the Government.

* * * * *

§ 1.324–3 Use of warranty.

(a) Except for technical data warranties under § 1.324–11, the commercial warranty clauses covered in § 1.324–4, and warranties contained in Federal, military, or construction guide specifications, the decision to use a warranty clause, or to include a warranty provision in a specification other than a Federal, military, or construction guide specification, shall be made by the head of a procuring activity or his designee. This decision may be made either for individual procurements or for classes of procurements.

(b) In deciding whether to use a warranty clause, at least the following factors shall be considered:

(1) Nature of the item and its end use;

(2) Cost of the warranty and degree of price competition as it may affect this cost;

(3) Criticality of meeting specifications;

(4) Damages to the Government that might be expected to arise in the event of defective performance;

(5) Cost of correction or replacement, either by the contractor or another source, in the absence of a warranty;

(6) Administrative cost and difficulty of enforcing the warranty;

(7) Ability to take advantage of the warranty, as conditioned by storage time, distance of the using agency from the source, or other factors;

(8) Operation of the warranty as a deterrent against deficiencies;

(9) The extent to which Government acceptance is to be based upon contractor inspection or quality control;

(10) Whether because of the nature of the items the Government inspection system would not be likely to provide adequate protection without a warranty;

(11) Whether the contractor's present quality program is reliable enough to provide adequate protection without a warranty, or, if not, whether a warranty would cause the contractor to institute an effective and reliable quality program;

(12) Reliance on "brand-name" integrity;

(13) Whether a warranty is regularly given for a commercial component of a more complex end item;

(14) Criticality of item for protection of personnel or property, e.g., for safety inflight;

(15) The stage of development of the item and the state of the art; and

(16) Customary trade practices.

* * * * *

§ 1.324–11 Technical data warranty and extended liability provisions.

(a) The clause set forth in § 7.105–8 (a) of this chapter is authorized for use in contracts in which the contractor is required to deliver technical data. The factors contained in § 1.324–3(b) shall be considered in deciding whether to use the clause.

(b) The factors of § 1.324–3(b) should also be considered in determining whether the Extended Liability clause set forth in § 7.105–8(b) of this chapter should be added to the § 7.105–8(a) Data Warranty clause. Particular emphasis should be placed on whether the extended liability is justified by (1) the likelihood that correction or replacement of the nonconforming data, or a price adjustment in lieu thereof, will not afford adequate protection to the Government and (2) the effectiveness of the additional remedy as a deterrent against furnishing nonconforming data.

§ 1.701–1 Small business concern.

(a) * * *

(2) Industry small business size standards. * * *

(i) *Construction industries.* For construction, alteration, or repair (including painting and decorating), of buildings, bridges, roads, or other real property, the average annual receipts of the concern and its affiliates for its preceding 3 fiscal years must not exceed $7,500,000. For dredging, the average annual receipts of the concern and its affiliates for its preceding 3 fiscal years must not exceed $5 million. Also, in order to be eligible for a small business set-aside award on dredging contracts, the firms must perform the dredging of at least 40 percent of the yardage advertised in the plans and specifications with dredging equipment owned by the bidder or obtained from another small business dredging concern.

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§ 1.703 Determination of status as small business concern.

* * * * *

(b) * * *

(1) *Protest of small business status.* Any bidder or offeror may, in connection with a contract involving a small business set-aside or otherwise involving small business preferential consideration, question the small business status of any apparently successful bidder or offeror by sending a written protest to the contracting officer responsible for the particular procurement. The protest shall contain the basis for the protest together with specific detailed evidence supporting the protestant's claim that such bidder or offeror is not a small business. Such protest must be received by the contracting officer prior to the close of business on the fifth working day exclusive of Saturday, Sunday, and Federal Legal Holidays (hereinafter referred to as working day) after bid opening date for formally advertised and small business restricted advertised procurements. In procurements requiring submission of proposals, the contracting officer shall,

except under the circumstances specified in § 3.508–2(b) of this chapter, notify the apparently unsuccessful offerors in writing of the name and location of the apparently successful offeror(s) and establish a deadline date (at least five working days plus a reasonable time for the notice to reach the unsuccessful offerors) by which any size protest on the instant procurement must be received. A protest received after the appropriate time indicated herein shall be considered timely, if in the case of (i) a mailed protest, it is sent by registered or certified mail and the postmark thereon indicates that it would have been delivered within the time limit except for delays beyond the control of the protestant, or (ii) a telegraphic protest, the telegram date and time line indicates that it would have been delivered within the time limit except for delays beyond the control of the protestant. The following procedures shall apply:

* * * * *

(5) *Award of set-aside procurements.* Except as provided in § 3.508–1 of this chapter or when the contracting officer determines in writing that award must be made without delay to protect the public interest, award will not be made prior to 5 working days after (i) the bid opening date for procurements placed through small business restricted advertising, or (ii) the deadline date for submitting a protest set forth in the notification to the apparently unsuccessful offeror(s) for small business set-aside procurements placed through conventional negotiation.

* * * * *

3. In § 1.1503, new paragraphs (b)(5) and (c) are added; and § 1.1504 is revised, as follows:

§ 1.1503 Applicability.

* * * * *

(b) * * *

(5) The option quantities represent known firm requirements for which procurement funds are available unless (i) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance and hence multiyear procurement is not appropriate, and (ii) realistic competition for the option quantity is impracticable once the initial contract is awarded.

(c) When options are to be evaluated pursuant to § 1.1504(d), the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirements for 5 years in the case of supplies.

§ 1.1504 Procedures.

(a) When a contract is to contain an option clause, the solicitation must contain an appropriate option provision. If the contract is to be negotiated, the determination and findings shall set forth the approximate quantity to be awarded and the extent of the increase to be permitted by the option. The contract shall limit the additional quantities of supplies or services which may be procured, or the duration of the period for which performance of the contract may be extended, under the option and will fix the period within which the option may be exercised. This period shall be set so as to afford the contractor adequate notice of the requirement for performance under the option but with respect to service contracts may extend beyond the contract completion date when exercise of the option would obligate funds not available in the fiscal year in which the contract would otherwise be completed. In fixing the period within which the option may be exercised, consideration shall be given to (1) necessary lead time in order to assure continuous production and (2) the time required for additional funding and other necessary approval action. The period specified for exercising the option shall in all cases be kept to a minimum. When a solicitation contains an option which requires the offering of additional quantities of supplies at unit prices no higher than those for the initial quantities, it shall provide that the option quantities shall not exceed 50 percent of the initial quantity. When unusual circumstances exist, however, the head of the procuring activity or his designee may approve a greater percentage of quantity. The quantities and the period under option and the period during which the option may be exercised shall be justified and documented by the contracting officer in the contract file.

(b) Except as provided in paragraphs (c), (d), and (e) of this section, solicitations containing option provisions shall state that evaluation will be on the basis of the quantity to be awarded exclusive of the option quantity.

(c) When it is anticipated that the Government may exercise the option at time of award, the solicitation shall include an Evaluation of Options provision substantially as follows:

EVALUATION OF OPTIONS

If the Government elects to exercise an option simultaneously with award, bids or proposals will be evaluated for purposes of award on the basis of the total price for the basic quantity and the option quantity exercised with award.

(d) In firm fixed price contracts, the option quantity may be considered in the evaluation for award if, before issuance of the solicitation, it has been determined at a level higher than the Contracting Officer that:

(1) There is a known requirement which exceeds the basic quantity to be awarded, but either (i) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance, and hence multiyear procurement (§ 1.322) is not appropriate, or (ii) due to the unavailability of funds, the option cannot be exercised at the time of award of the basic quantity: *Provided* That in this latter case there is reasonable certainty that funds will be available thereafter to permit exercise of the option; and

(2) Realistic competition for the option quantity is impracticable once the initial contract is awarded and hence it is in the best interests of the Government to evaluate options in order to eliminate the possibility of a "buy-in" (§ 1.311). This determination shall be based on factors such as, but not limited to, substantial startup or phase-in costs, superior technical ability resulting from performance of the initial contract, and long preproduction lead time for a new producer.

In such cases, the solicitation shall contain an Evaluation of Options provision substantially as follows:

EVALUATION OF OPTIONS

A. Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of options will not obligate the Government to exercise the option or options.

B. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as nonresponsive. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work and prices which are significantly overstated for other work.

(e) In fixed price incentive contracts, options may be evaluated for award only if the solicitation (1) specifies a cost-sharing arrangement applicable to all proposals, and (2) specifies that the ceiling price and target profit for the basic and option quantities are to be based on stated percentages of the offeror's target cost. These percentages shall be set forth in the solicitation and shall be applicable to all proposals. In such cases, the Evaluation of Options provision set forth in paragraph (d) of this section shall be inserted in the solicitation except that the following shall be inserted between the first and second sentences of paragraph A:

The offeror's target cost for the basic and option quantities will be deemed to be the price of the basic and option quantities for purposes of evaluation.

(f) Solicitations which allow the offer of option quantities at unit prices which differ from the unit prices for the basic contract quantities shall also state that varying prices may be offered for the option quantities depending on the quantities actually ordered and the date or dates when ordered. However, if the solicitation contains an Evaluation of Options provision pursuant to paragraphs (c) and (d) of this section, it shall also specify the price at which the options will be evaluated (e.g., highest option price offered or option price for specified quantities or dates).

(g) Where exercise of the option would result in increased quantities of supplies, the option may be expressed in terms of (1) percentage of specific contract line items, (2) a number of additional units of specific contract line items, or (3) additional numbered line items identified as the option quantity with the same nomenclature as line items initially included in the contract. Where exercise of the option would result in an increase in the performance of services

by the contractor, the option may similarly be expressed in terms of percentages, increase in specific line items, or additional numbered line items, expressed in terms of the units of work initially used in the contract such as man hours, man years, square feet, pounds or tons handled. Where exercise of the option would result in an extension of duration of the contract, the option may be expressed in terms of an extended terminal date or of an additional time period, such as days, weeks, or months.

PART 2—PROCUREMENT BY FORMAL ADVERTISING

4. New subparagraph (13) is added to § 2.201(c); §§ 2.303–2, 2.303–3, 2.303–4, and 2.303–6 are revised; and new § 2.306 is added, as follows:

§ 2.201 Preparation of invitation for bids.

(c) * * *

(xiii) The following notice shall be used in accordance with § 16.401–1 of this chapter:

LATE BIDS AND MODIFICATIONS OR WITHDRAWALS (DECEMBER 1968)

(a) Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless: (1) They are received before award is made; and either (2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails for which the bidder was not responsible; or (3) if submitted by mail (or by telegram if authorized), it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification which makes the terms of the otherwise successful bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) Bidders using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late bid was timely mailed.

(c) The time of mailing of late bids submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the bidder furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) Where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the bidder which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the bid shall not be considered.

§ 2.303–2 Consideration for award.

A late bid shall be considered for award only if it is received before award and, (a) if submitted by mail, the circumstances outlined in § 2.303–3 are applicable; or (b) if submitted by telegram (where authorized), the circumstances set forth in § 2.303–4 are applicable.

§ 2.303–3 Mailed bids.

(a) *Circumstances permitting consideration for award of a late mailed bid.* A late mailed bid received before award may be considered for award only if:

(1) It was sent by registered mail or by certified mail for which an official dated post office stamp (postmark) on the original receipt for certified mail has been obtained, and it is determined that the lateness was due solely to a delay in the mails (based on evidence obtained pursuant to paragraphs (b), (c), and (d) of this section) for which the bidder was not responsible; or

(2) It was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening and, except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated. The only evidence acceptable to establish timely receipt at the Government installation is that which can be established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

(b) *Registered mail.* The time of mailing of a late bid mailed by registered mail may be determined by the date in the postmark on the registered mail receipt or registered mail wrapper. The time of mailing shall be deemed to be the last minute of the date shown in such postmark unless the bidder furnishes evidence from the post office station of mailing which establishes an earlier time. Such evidence, if appropriately verified in writing by the post office station of mailing, may consist of an entry in ink on the registered mail receipt showing the time of mailing and the initials of the postal employee receiving the item and making the entry. If the postmark does not show a date, the bid shall be deemed to have been mailed too late unless the bidder furnishes evidence from the post office station of mailing which establishes timely mailing.

(c) *Certified mail.* The time of mailing of a late bid, mailed by certified mail for which a postmarked receipt for certified mail was obtained shall be deemed to be the last minute of the date shown in the postmark on such receipt, except where (1) the receipt for certified mail identifies the post office station of mailing and the bidder furnishes evidence from such station that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the receipt for certified mail, showing the time of mailing and the initials of the postal employee receiving the item and making the entry, is appropriately verified in writing by the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark does not show a date, the bid shall be deemed to have been mailed too late.

(d) *Delivery time.* Information concerning the normal time for mail delivery shall be obtained by the procuring activity from the postmaster, superintendent of mails, or a duly authorized representative for that purpose, of the post office serving that activity. When time permits, such information shall be obtained in writing.

§ 2.303–4 Telegraphic bids.

A late telegraphic bid received before award shall not be considered for award, regardless of the cause of the late receipt, including delays caused by the telegraph company, except for delays due to mishandling on the part of the Government in its transmittal to the office designated in the invitation for bids for the receipt of bids, as provided for bids submitted by mail (see § 2.303–3(a)(2)).

§ 2.303–6 Notification to late bidders.

(a) Where a late mailed bid is received and it is clear from available information that under § 2.303–2 such late bid cannot be considered, the contracting officer or his authorized representative shall promptly notify the bidder that his bid was received late and will not be considered (see also § 2.303–7). However, where a late bid is transmitted by registered mail and received before award but it is not clear from available information whether the bid can be considered, or in any case of a late bid transmitted by certified mail and received before award, the bidder shall be promptly notified substantially as follows:

Your bid in response to Invitation for Bids No. _____, dated _____, was received after the time for opening specified in the Invitation. Accordingly, your bid will not be considered for award unless (1) there is received from you by _____ (date) _____, clear and convincing evidence from the post office station of mailing which establishes the date (and time, if possible) that the bid was deposited with that station, and (2) it is determined by the Government that the late receipt was due solely to a delay in the mail for which you are not responsible. In the case of certified mail, the original postmarked Receipt for Certified Mail must be furnished and is the only evidence acceptable under (1) above, except that, where the Receipt for Certified Mail identifies the post office station of mailing, evidence from such station of its closing time or written verification by such station of an approved time entry on the receipt are also acceptable.

(b) Where a late telegraphic bid is received and it is clear from available

information that under § 2.303–2 such late bid cannot be considered, the contracting officer, or his authorized representative, shall promptly notify the bidder that his bid was received late and will not be considered (see also § 2.303–7).

§ 2.306 Late offers and modifications and withdrawals.

The following notice shall be used in accordance with § 16.101–1 of this chapter.

LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS (DECEMBER 1968)

(This paragraph applies to all advertised solicitations. In the case of Department of Defense negotiated solicitations, it shall also apply to late offers and modifications (other than the normal revisions of offers by selected offerors during the usual conduct of negotiations with such offerors) but not to withdrawal of offers. Unless otherwise provided, this paragraph does not apply to negotiated solicitations issued by civilian agencies.)

(a) Offers and modifications of offers (or withdrawals thereof, if this solicitation is advertised) received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) They are received before award is made; and either (2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails, for which the offeror was not responsible; or (3) if submitted by mail (or by telegram if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation: *Provided*, That timely receipt at such installation is established upon examination of an apropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification of an offer which makes the terms of an otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late offer was timely mailed.

(c) The time of mailing of late offers submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) Where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

PART 3—PROCUREMENT BY NEGOTIATION

5. New paragraph (c) is added to § 3.409; §§ 3.410–2(a)(1), 3.501(b)(48), 3.506 (b) and (c), 3.508–2 and the introductory text of § 3.508–3 are revised to read as follows:

§ 3.409 Indefinite delivery type contracts.

* * * * *

(c) When it is desired to authorize the use of the fast pay procedure for orders not in excess of $2,500, the special data required by § 3.606–3(b) shall be included in the contract. The clause in § 3.606–3(b)(4) shall be modified for this purpose to refer to delivery orders and to the appropriate contract clause of the indefinite delivery type contract for the preparation of invoices.

§ 3.410–2 Basic ordering agreement.

(a) *Description.* (1) A basic ordering agreement is not a contract (but see §§ 12.302, 12.602–1, and 12.1001 of this chapter). It is an agreement which is similar to a basic agreement (see § 3.410–1) except that it also includes a description, as specific as practicable, of the supplies to be furnished or services to be performed when ordered and a description of the method for determination of the prices to be paid to the contractor for the supplies or services. Such method shall be consistent with the contract types authorized by this subpart. Either the specific terms and conditions of delivery or a description of the method for their determination shall be set forth in the basic ordering agreement. The basic ordering agreement shall list one or more activities which are authorized to issue orders under the agreement. Any activity so named may issue orders specifying the supplies or services required. Orders shall be issued on DD Form 1155 or Standard Form 26 and shall incorporate by reference the provisions of the basic ordering agreement. When it is desired to use the fast pay procedure for orders not in excess of $2,500, the special data required by § 3.606–3(b) shall be included in the basic ordering agreement. The clause in § 3.606–3(b)(4) shall be modified for this purpose to refer to orders and to the appropriate clause of the basic ordering agreement for the preparation of invoices.

* * * * *

§ 3.501 Preparation of request for proposals or request for quotations.

* * * * *

(b) * * *

(48) If the contract is for multiyear procurement, the provisions required by § 1.322–2(c) of this chapter;

* * * * *

§ 3.506 Late proposals and modifications.

* * * * *

(b) Written requests for proposals using other than Standard Form 33A shall contain the following provisions.

LATE PROPOSALS (DECEMBER 1968)

(a) Proposals and modifications received at the office designated in the request for proposals after the close of business on the date set for receipt thereof (or after the time set for receipt if a particular time is specified) will not be considered unless:

(i) They are received before award is made; and either

(ii) They are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails, for which the offeror was not responsible; or

(iii) If submitted by mail (or by telegram, if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification of an offer which makes the terms of the otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late proposal was timely mailed.

(c) The time of mailing of late proposals submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (i) Where the Receipt for Certified Mail identifies the post office station of mailing evidence furnished by the offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (ii) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

(c) Telegraphic proposals shall not be considered late proposals if they meet the requirements of § 2.302 of this chapter. Proposals which are received in the office designated in the requests for proposals after the time specified for their submission are "Late Proposals." (Unless a specific time for receipt of proposals is stated in the request for proposals, the time for such receipt shall be deemed to be the time for close of business of the office designated for receipt of proposals on the date stated in the request for proposals.) Late proposals shall not be considered for award, except under the following circumstances:

(1) Where only one proposal is received;

(2) Where the Secretary concerned determines that consideration of a late proposal is of extreme importance to the Government, as for example where it offers some important technical or scientific breakthrough; or

(3) Under the circumstances set forth in § 2.303 permitting consideration of late bids if proven to have been timely mailed or timely filed with the telegraph company.

To determine whether subparagraph (2) of this paragraph applies, notwithstanding § 2.303–7 of this chapter, all late proposals shall be opened and evaluated.

* * * * *

§ 3.508–2 Preaward notice of unacceptable offers.

(a) In any procurement in excess of $10,000 in which it apears that the period of evaluation of proposals is likely to exceed 30 days or in which a limited number of suppliers have been selected for additional negotiation (see § 3.805–1), the contracting officer, upon determination that a proposal is unacceptable, shall provide prompt notice of that fact to the source submitting the proposal. Such notice need not be given where the proposed contract is to be awarded within a few days and notice pursuant to § 3.508–3 would suffice. In addition to stating that the proposal has been determined unacceptable, notice to the offeror shall indicate, in general terms, the basis for such determination and shall advise that, since further negotiation with him concerning this procurement is not contemplated, a revision of his proposal will not be considered.

(b) In any procurement involving a small business set-aside to be placed through conventional negotiation, upon final completion of negotiations and determinations of responsibility but prior to award, the contracting officer shall inform each unsuccessful offeror by written notice of the name and location of the apparently successful offeror(s). Each apparently unsuccessful offeror should be advised that any subsequent revisions of his proposal will not be considered, since no further negotiations are contemplated, and no further contact with the contracting officer need be made regarding the instant procurement unless the unsuccessful offeror has grounds to challenge the small business size status of the apparently successful offeror(s). This notification procedure shall not apply to procurements exempt by § 3.508–1 or to any urgent procurement action which the contracting officer determines in writing must be awarded without delay to protect the public interest. The contracting officer's determination shall be placed in the contract file.

§ 3.508–3 Postaward notice of offerors.

(a) Promptly after making all awards in any procurement in excess of $10,000, the contracting officer shall give written notice to the unsuccessful offerors that their proposals were not accepted, except that such notice need not be given where notice has been provided pursuant to § 3.508–2(a). Such notice shall include:

* * * * *

PART 4—SPECIAL TYPES AND METHODS OF PROCUREMENT

6. Section 4.503–3 is revised to read as follows:

§ 4.503–3 Step two—information to Commodity Credit Corporation.

(a) *General.* If the proposed procurement initially appears to be susceptible to barter, the information contained in the sample message in paragraph (b) of this section shall be cabled to the Commodity Credit Corporation prior to issuance of solicitations. Such cable and other communications to the Commodity Credit Corporation concerning barter, shall be addressed to:

Assistant Sales Manager, Barter, Export Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250.

The AUTODIN–ARS routing "RUEVDFL" should be used on all wire communications addressed to this office.

Telex number for the above is: 089–661. Answer back code is: AGREFAS.

(b) *Sample cable.*

Have requirements appearing susceptible to barter. 1. Description ..... 2. Proposals will be requested in the following countries ..... 3. Estimated total dollar value ..... 4. Performance period: (Date) to (date). 5. No requirement exists for restriction to U.S. end products, services or sources. Advise ASAP whether susceptible to barter.

PART 5—INTERDEPARTMENTAL AND COORDINATED PROCUREMENT

7. Section 5.102–3 is revised to read as follows:

§ 5.102–3 Applicability of listed Federal Supply Schedules.

Supplies and service covered by the Federal Supply Schedules listed herein are mandatory in whole or in part upon some element of the Department of Defense. Some of the Federal Supply Schedules listed include classes unrelated to the Federal Supply Group which identifies the Schedule. To aid in locating an item in the mandatory Schedules, the classes included in each Schedule have been listed. The Remarks column states exceptions to the mandatory provisions of the Schedule when applicable. The Schedules should be checked for complete detail concerning the exceptions.

(a) *Mandatory nationally.*

FSC Group	FSC Class	Title of schedule	Remarks
25		VEHICULAR EQUIPMENT AND COMPONENTS	No exceptions.
	2520	Clutch facings (metallic)	
	2530	Brake linings (metallic)	
	2540	Tire chains	
26		TIRES AND TUBES, PART II	
	2610	Pneumatic tires and tubes, except aircraft	Not mandatory for military tires.
	2640	Valves and valve cores	
26		TIRES AND TUBES, PART IV	No exceptions.
	2630	Tires, solid and cushion	
29		ENGINE ACCESSORIES	Not mandatory on spark plugs for diesel, semidiesel, aircraft, and marine engines; and oil filter elements, and engine preheaters.
	2920	Spark plugs, suppressed and non-suppressed	
	2940	Oil filters and oil filter elements	
	2990	Engine preheaters	
35		SERVICE AND TRADE EQUIPMENT	No exceptions.
	3590	Heat and cold process laminating presses	
36		SPECIAL INDUSTRY MACHINES, PART I	No exceptions.
	3610	Rubber offset blankets, lithographic printing plates and solutions.	
36		PRINTING, DUPLICATING AND BOOKBINDING EQUIPMENT, PART II, SECTIONS A, B, AND C	Not mandatory for the following items: 51-1 through 51-54, 51-125, 51-125-1, 51-126, and 51-127 in section A and all items in section C.
	3610	Machines: Printing, duplicating, folding, paper drilling, and bookbinding.	
36	3615	Machines: Pulp pulverizing and paper shredding	Not mandatory for rental, repair, and maintenance of machines in section B.
36	3695	SAWS, CHAIN, PORTABLE, POWER, PART III	No exceptions.
41	4120	AIR CONDITIONERS, WINDOW AND FLOOR MOUNTED, PART I	No exceptions.
41	4130	AIR FILTER MEDIA	No exceptions.
42		FIREFIGHTING EQUIPMENT, PART I	Not mandatory for items listed in paragraph 1, scope of contract, special provisions, Federal supply schedule.
45		MISCELLANEOUS PLUMBING, HEATING, AND SANITATION EQUIPMENT, PART II	No exceptions.
	4540	Incinerators security (document destruction)	
	6685	Replacement pyrometers	
51		HAND AND POWER TOOLS	No exceptions for items in FSCs 5120 and 5130.
	5120	Hand tools, nonpowered	
	5130	Hand tools, powered	
		NOTE: This schedule also includes certain items in FSCs 3220, 3416, 3615, 4910, 4940, 6140, 3413, 3433, 3750, 4930, and 6130.	

FSC Group	FSC Class	Title of schedule	Remarks
52	5210	MEASURING TAPES	No exceptions.
53		LEAD SEALS AND BINDER STRAPS, PART II	No exceptions.
	5340	Hardware.	
53		ABRASIVES, PART III	No exceptions.
	5345	Abrasive belts, disks, and stones.	
	5350	Abrasive cloth, grain and paper.	
58		SOUND RECORDING AND TRANSCRIPTION SERVICES, PART I	Not mandatory when satisfactory security arrangements of highly classified material cannot be made in accordance with requirements under paragraph 13 of the special provisions, Federal supply schedule and on instantaneous recording; recording of one tape only, or multiple duplication.
	5835	Studio rental, tape, recording, recording and editing; disc recording and pressing.	
58		COMMUNICATION EQUIPMENT, PART III, SECTION A (ADVERTISED ITEMS)	No exceptions, except not mandatory on DoD for language laboratory type intercommunications sets.
		NOTE: Also, includes items of foreign origin.	
	5830	Intercommunication sets (language laboratory type).	
	5835	Sound recording and reproducing equipment.	
58		COMMUNICATION EQUIPMENT, PART III, SECTION B, (NEGOTIATED ITEMS)	No exceptions, except not mandatory for rental repair, and maintenance.
	5835	Sound recording and reproducing equipment; purchase, rental, repair, and maintenance; recorder-reproducer sets, sound; and reproducers, sound, office type.	
58		COMMUNICATION EQUIPMENT, PART V	Mandatory only for sound recording tape.
	5820	Video tape.	
	5835	Tapes—Instrumentation, high resolution and sound recording.	
	7460	Electronic data processing tape (widths other than ½ inch).	
58		COMMUNICATION EQUIPMENT, PART V, SECTION A	No exceptions.
	7460	Tape, electronic data processing, ½ inch 800 BPI.	
58		COMMUNICATION EQUIPMENT, PART V, SECTION B	No exceptions.
	5835	Reels and hubs.	
61		DRY BATTERIES, PART III	No exceptions.
	6135	Batteries and dry cells for: Alarm systems, emergency lighting, flashlights and lanterns, telephone circuits and radio tubes.	
62		LIGHTING FIXTURES AND LAMPS, PART I	Not mandatory on Army or Air Force for items covered by Army or military specifications.
	6230	Household and quarters lamps.	
62		ELECTRIC LAMPS, PART II	Not mandatory for Type II light sets—Items 180-5 and 180-6.
	6230	Light sets, general illumination, emergency and auxiliary.	
62 & 67		ELECTRIC AND PHOTOGRAPHIC LAMPS	No exceptions.
	6240/6750	Fluorescent lamps, glow lamps, incandescent lamps, mercury vapor high-intensity lamps, photographic lamps.	
66		INSTRUMENTS AND LABORATORY EQUIPMENT, PART III	No exceptions.
	6645	Time measuring instruments and card racks.	
67		PHOTOGRAPHIC EQUIPMENT, PART II, SECTION A	Mandatory on DoD only for items for which GSA has assumed the responsibility for supply support. A list of such items is included in the schedule under paragraph 1(c) of special provisions entitled "Scope of Contract."
	6750	Photographic sensitized and chemical supplies (items for paper, photographic photo-copying machines).	
67		PHOTOGRAPHIC EQUIPMENT, PART III	Mandatory only for Item 20-70 (a), prompter projectors, professional television studio type.
	6710	Cameras, motion picture.	
	6720	Cameras, still picture, and accessories.	
	6730	Photographic projection equipment.	
	6740	Photographic developing and finishing equipment.	
	6750	Photographic supplies.	
	6760	Photographic equipment and accessories.	
	6780	Photographic sets, kits, and outfits.	
67		PHOTOGRAPHIC EQUIPMENT, PART IV, SECTION A (ADVERTISED ITEMS)	No exceptions.
	6780	Film, direct positive (Diazo type).	
67		PHOTOGRAPHIC EQUIPMENT, PART IV, SECTION B (NEGOTIATED ITEMS)	Mandatory except for Items 21-10; 21-11; 21-12; (microcatalog unit; renewal subscription to current Thomas register microcatalog film library and microfilmed library systems).
	6720	Microfilm cameras.	
	6730	Microfilm projectors, readers and viewers.	
	6740	Microfilm and paper processing machines; printers, rewinds; and film splicers.	
	6750	Microfilm and supplies; developing solution.	
	6760	Microfilm spools, reels and cartons.	
	7530	Microfilm print paper.	
	7670	Microfilmed library systems.	
68		CHEMICALS AND GASES, PART III, SECTIONS E AND F	No exceptions.
	6830	Refrigerant gases and sulphur hexafluoride.	
68		CHEMICALS AND GASES, PART III, SECTION G	No exceptions.
	6830	Helium.	
68		CHEMICALS AND GASES, PART III, SECTION H	No exceptions.
	6830	Dibromodifluoromethane.	
71		HOUSEHOLD FURNITURE, PART I	No exceptions.
	7105	Bed springs, Dolly, Danish style, Early American style, ranch style.	
71		HOUSEHOLD FURNITURE, PART II, SECTION A	No exceptions.
	7105	Upholstered living room furniture, contemporary, conventional, Lawson, Modern, Traditional; miscellaneous chairs.	
71		HOUSEHOLD FURNITURE, PART II, SECTION B	No exceptions.
	7105	Multiple seating units, modular, wood or metal.	
71		HOUSEHOLD FURNITURE, PART III, SECTIONS A AND B	No exceptions.
	7105	Modern, provincial and traditional bedroom, dining room and living room furniture and miscellaneous chairs and tables.	
71		HOUSEHOLD FURNITURE, PART IV	No exceptions.
	7105	Rattan furniture: bedroom, dining room, living room and recreation room. Squared stock rattan furniture: bedroom, dining room, living room and recreation room.	

FSC Group	Class	Title of schedule	Remarks
71		OFFICE FURNITURE (WOOD AND METAL), PART V	No exceptions.
	5340	Parts for folding chairs	
	7105	Ash receptacles, folding chairs, mirrors, wardrobes.	
	7110	Office furniture	
	7125	Drawer kits, storage, small parts	
	7195	Bulletin boards	
71		EXECUTIVE TYPE OFFICE FURNITURE, PART VI	No exceptions.
	7110	Bookcases; cabinets; chairs; credenzas; desks; telephone cabinets; typewriter stands.	
	7195	Costumers	
71		HOUSEHOLD FURNITURE, PART VII	No exceptions.
	7105/ 7110	Metal, indoor-outdoor, hospital and quarters, recreation room and lobby use.	
71		OFFICE FURNITURE, PART VIII	No exceptions.
	7110	Unitized wood office furniture and companion chairs.	
71		OFFICE FURNITURE, PART VIII, SUPPLEMENT 1, SECTIONS A AND B	No exceptions.
	7105/ 7110	Section A—Traditional office furniture	
		Section B—Modern office furniture	
71		OFFICE FURNITURE, PART IX	No exceptions.
	7110	Accessories for EAM and ADP systems, address plate cabinets, key punch cabinets.	
71		CLASSROOM FURNITURE, PART X	No exceptions.
	7110	Chairs; chair and desk units; desks; tables	
71		OFFICE FURNITURE, PART XI	No exceptions.
	7110	Security filing cabinets, insulated and noninsulated.	
71		OFFICE FURNITURE, PART XI, SUPPLEMENT 1	No exceptions.
	7110	Vault doors, security steel	
71		OFFICE FURNITURE, EXECUTIVE, WOOD AND METAL, PART XII	No exceptions.
	7110	Bookcases; telephone cabinets; chairs; credenzas; desks; desk attachments.	
71		LIBRARY FURNITURE, WOOD AND METAL, PART XIII	No exceptions.
	7195	Bookcases; bookstacks; book trucks; cabinets; chairs; desks; end panels; racks; settees and chairs; stands; stools; tables.	
71		MISCELLANEOUS FURNITURE AND FIXTURES	No exceptions.
	7195	Workbenches and shop desks	
72		HOUSEHOLD FURNISHINGS, PART I, SECTIONS A AND B	Not mandatory on DoD for deck covering, items required aboard vessels, and wall-to-wall carpeting.
	7220	Bituminous coverings; carpets and rugs; carpet cushions; desk covering; floor mats; linoleum; matting; special purpose carpeting; tile; vinyl sheets.	
72		HOUSEHOLD FURNISHINGS, PART I, SECTION C	No exceptions.
	7220	Special purpose carpet type floor matting	
72		HOUSEHOLD WINDOW FURNISHINGS, PART II	Mandatory for window shades only.
	7230	Window shades	
73		FOOD PREPARATION AND SERVING EQUIPMENT	Mandatory for glassware only.
	7350	Glassware: stemware and tumbler	
74		OFFICE MACHINES, PART I, SECTIONS A, B AND C	Mandatory for all items in section A; optional for items in sections B and C.
	7420	Section A—Office-type composing machines and typewriters (on July 1, 1968, portable typewriters were transferred from this schedule to stores stock). Section B—Rental, repair, and maintenance of composing machines and electric typewriters. Section C—Exchange allowance on typewriters and composing machines.	
74		OFFICE MACHINES OTHER THAN TYPEWRITERS, PARTS II AND III	Mandatory for all items in Part III only.
	7430	Accounting and calculating machines	
	7450	Office type sound recording and reproducing machines.	
	7490	Miscellaneous office machines—(on July 1, 1968, embossing machine identification tape, FSN 7490-835-0443 was transferred from this schedule to stores stock).	
74		OFFICE MACHINES, PART IV, SECTIONS A AND B	Mandatory for all items in section A only.
	7460	Visible record equipment—Files, frames, racks, and trays.	
74		DATA PROCESSING EQUIPMENT, PART VI, SECTIONS A THROUGH F	No exceptions.
	7410	Punched card machine equipment	
	7440	Automatic data processing equipment	
75		OFFICE SUPPLIES, PART I, SECTION A	No exceptions.
	7510	Office supplies	
	7690	Tape label markings	
75		OFFICE SUPPLIES, PART I, SECTION B	No exceptions.
	7520	Office devices and accessories	
	7530	Stencil, paper	
	8110	Tubes, mailing	
	8115	Boxes, set-up	
	8135	Tape, pressure sensitive, plastic back and tags, merchandise.	
	9810	Cardboard bristol	
75		OFFICE SUPPLIES, PART I, SECTION C	No exceptions.
	7530	Filing systems; stationery paper; graph, drawing and tracing; cross section, carbon, overlay and waterproof paper; paper board; binder indexes; pressboard folders; labels; plotting sheets; and plastic sheets.	
75		OFFICE SUPPLIES, PART IV	No exceptions.
	7530	Rubber stamps	
75		OFFICE SUPPLIES, PART V	No exceptions; however, plain envelopes for use in the District of Columbia shall be procured from GPO in accordance with title 44, U.S.C., section 225.
	7530	Envelopes, printed and plain	
76		BOOKS, DICTIONARIES AND OTHER PUBLICATIONS, PART I	No exceptions.
	7610	Books and pamphlets	
	7640	Maps, atlases, charts, and globes	
76		LAW BOOKS AND TAX AND OTHER REGULATORY REPORTING PERIODICALS, PART II	No exceptions.
	7610	Law books	
	7630	Tax and other regulatory reporting periodicals	
77	7740	PHONOGRAPH RECORDS	No exceptions.
78/94		RECREATION AND ATHLETIC EQUIPMENT, PART I/ ATHLETIC FOOTWEAR AND CLOTHING, PART I	Mandatory for items in Classes 7810 and 7820.
	7810		

FSC Group	FSC Class	Title of schedule	Remarks
78/84	7830 8415 8430		
79		CLEANING EQUIPMENT AND SUPPLIES	No exceptions.
	7010	Vacuum cleaners, parts and attachments; floor polishing and scrubbing machines, parts and attachments; steel wool floor polishing pads; floor polishing and scrubbing brushes.	
81	.....	PACKAGING AND PACKING BULK MATERIALS, PART II, SECTIONS I AND II	No exceptions.
	8135	Section I: Steel strapping flat; seals, steel strapping and edge protectors. Section II: Strapping, nonmetallic, flat, cord and synthetic plastic; seals for nonmetallic strapping; buckles for nonmetallic strapping.	
91	.....	SERVICE STATION DELIVERIES, GASOLINE AND RELATED PRODUCTS AND SERVICES, PART III	No exceptions.
	9130	Gasoline	
	9140	Fuel oil (diesel) and kerosene	
	9150	Oils and greases, cutting, lubricating and hydraulic.	

(b) *Mandatory in Washington, D.C., and Contiguous Area.*

FSC Group	FSC Class	Title of schedule	Remarks
42	.....	FIREFIGHTING EQUIPMENT, PART I	Not mandatory for those items indicated below; any items of fire hose or Items 55-1 through 55-6, 55-9, 55-10, 55-12, 4210-251-7904; 4210-395-1782; 4210-720-1815; 4210-780-1845; 4210-889-2200; 4210-973-1865.
	4210	Fire extinguishers, extinguishing agents (dry chemicals), extinguishing charges, and repair parts and accessories.	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION B	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6640	Laboratory equipment and supplies	
	8125	Prescription bottles	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION C	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6625	pH Meters	
	6640	Centrifuges, microtomes, stirrers and shakers	
	6650	Microscopes	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION D	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6635	Film, X-Ray, industrial, radiographic	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION E	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6670	Balances, analytical and scales, laboratory precision	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION F	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6625	Analyzers, spectrum; counters, electronic frequency; generators, electronic; voltmeters, digital; voltmeters, electronic.	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION G	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6625	Charts, recording; pens and styli; oscilloscopes; oscillographs; recorders, analog (graphic).	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION H	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6630	Chromatographs; clinical analyzers; pipetting dilutors; blood cell counters.	
	6640	Fermentation apparatus; bacteriological incubator; tissue processors; laboratory graphite and carbon products.	
	6650	Flame Photometers and Spectrophotometers.	
66	.....	INSTRUMENTS AND LABORATORY EQUIPMENT, PART II, SECTION I	Mandatory except for supplies procured through Defense Personnel Support Center and Repair Parts.
	6625	Bridges, laboratory and portable; multimeters; and potentiometers.	
67	.....	PHOTOGRAPHIC EQUIPMENT, PART II, SECTION B.	Mandatory for Items 19-1, 19-2, and 19-6 only.
	6750	Photographic sensitized and chemical supplies.	
68	.....	CHEMICAL AND CHEMICAL PRODUCTS, PART III, SECTIONS A, B, AND C	Items in section A mandatory except for supplies procured through Defense Personnel Support Center.
	6830	Gases: Compressed and liquefied (includes certain Items in FSC 6505)	
72	.....	HOUSEHOLD WINDOW FURNISHINGS, PART II	No exceptions.
	7220	Window shades	
87	.....	AGRICULTURE SUPPLIES, PART I	No exceptions.
	8710	Forage and Feed	
87	.....	AGRICULTURE SUPPLIES, PART II	No exceptions, including Department of Navy U.S. Naval Air Test Center, Patuxent, Md.
	8730	Seed	
89	.....	SUBSISTENCE, PART II	No exceptions.
	8920	Bread and Rolls	
	8940	Syrup	
	8950	Yeast	
89	.....	SUBSISTENCE, PART III	No exceptions.
	8960	Ice	
(1)	.....	SWEEPING CLOTH AND WIPING CLOTH SERVICE	No exceptions.
	7213	(Rentals) (Formerly Industrial Group 103, Part IV).	
68	.....	CHEMICALS AND CHEMICAL PRODUCTS, PART III, SECTIONS A, B, C, AND D	Mandatory on DoD activities located within the specified GSA Geographical Area other than Region 3 except for items procured through Defense Personnel Support Center.
	6505	Medical Gases	
	6830	Industrial gases: Compressed and liquefied	

[1] Industrial Group 721.

PART 6—FOREIGN PURCHASES

8. Section 6.103–2 (b) and (e) is revised; new § 6.103–7 and paragraph (h) in § 6.303 are added; the introductory text of § 6.306 is revised; and §§ 6.805–2 (a)(11), (b), (c), and (d)(3), and 6.806–1(b)(1) are revised, as follows:

§ 6.103–2 Nonavailability in the United States.

* * * * *

(b) Notwithstanding the foregoing, procurement of foreign end products on the basis of "nonavailability," whether or not listed in § 6.105, shall be made only if the procurement is approved by:

(1) The Secretary of the Department concerned if the procurement is estimated to exceed $100,000;

(2) The head of the procuring activity or his immediate deputy, if the amount is estimated not to exceed $100,000; or

(3) The principal staff officer responsible for procurement within the procuring activity (or, in the Air Force, within the major air command) concerned, if the amount involved is estimated not to exceed $10,000.

Before granting such approval, or making such determination, the feasibility of foregoing the requirement or providing a U.S. substitute shall be consdered.

* * * * *

(e) *Commissary resale.* See § 6.103–7.

§ 6.103–7 Commissary resale.

The provisions of the Buy American Act do not apply to supplies purchased specifically for commissary resale. Accordingly, notwithstanding § 6.103–2(b), approvals are not required for purchases for resale in domestic commissaries of brand-name subsistence items of foreign origin for which there are no substitutes of U.S. origin. All purchases of such brand-name subsistence items of foreign origin shall be made from domestic concerns. The commissary officer is responsible for the exercise of judgement as to whether domestic items which may be available on the U.S. market are acceptable substitutes for brand-name subsistence items of foreign origin. Non-brand-name subsistence items of foreign origin and nonsubsistence items of foreign origin purchased for resale in domestic commissaries, although not subject to the Buy American Act restrictions, are subject to approval in accordance with § 6.103–2(b) ("Gold Flow Procedures").

§ 6.303 Exceptions.

* * * * *

(h) Supplies purchased specifically for commissary resale (see § 6.103–7).

§ 6.306 Acquisition of foreign buses.

Section 404 of the Act of September 20, 1968 (Public Law 90–500), the Department of Defense Appropriation Authorization Act for Fiscal year 1969, provides that:

> No funds authorized for appropriation for the use of the Armed Forces of the United States under the provisions of this Act or the provisions of any other law shall be available for the purchase, lease, rental, or other acquisition of multipassenger motor vehicles (buses) other than multipassenger motor vehicles (buses) manufactured in the United States, except as may be authorized by regulations promulgated by the Secretary of Defense solely to insure that compliance with this prohibition will not result in either an uneconomical procurement action or one which would adversely affect the national interests of the United States.

The objective of this statutory provision is to assure that only buses manufactured in the United States shall be used to satisfy requirements of U.S. Armed Forces located throughout the world for bus transportation, where such buses are available and where their use would not be uneconomical or contrary to the national interests of the United States. It should be applied whether the buses are purchased, leased, rented, or made available under contracts for transportation services. The use of foreign manufactured buses is authorized where the head of the procuring activity determines that the use of U.S. manufactured buses would be uneconomical or would adversely effect the national interests of the United States. However, foreign buses may be acquired without such determination in the following circumstances:

* * * * *

§ 6.805–2 Procurement limitations.

(a) * * *

(11) Unreasonable cost—procurements, other than those covered in subparagraphs (1) through (10) of this paragraph, where United States end products or services are available, the domestic cost is not estimated to exceed $10,000, and the difference between the domestic cost and the foreign cost is determined to be so large as to make procurement of foreign end products and services clearly desirable. Such determinations shall be made by the individuals designated in paragraph (b) of this section. (Where the domestic cost is estimated to exceed $10,000, and the difference between the domestic cost and the foreign cost exceeds 50 percent of the foreign cost, the matter will be forwarded to the Secretary of the Department concerned for determination.)

* * * * *

(b) The individuals listed below, and the immediate deputies of those listed in subparagraph (1) of this paragraph, are designated to make the determinations required by paragraph (a) (5) and (11) of this section.

(1) Procurements estimated not to exceed $1 million in foreign cost, except that this authority may be redelegated to other individuals specifically designated for this purpose for procurements estimated not to exceed $10,000:

(i) Department of the Army—

(*a*) Commanding General, U.S. Theater Army Support Command, Europe;

(*b*) Commander in Chief, U.S. Army, Pacific, and ACofS, G–4, U.S. Army Pacific;

(*c*) Commanding General, U.S. Army Forces, Southern Command;

(*d*) Chief, U.S. Army Security Agency;

(*e*) Chief of Engineers;

(ii) Department of the Navy—

(*a*) Commander-in-Chief, U.S. Naval Forces, Europe;

(*b*) Commander, U.S. Naval Forces, Japan;

(*c*) Commander, U.S. Naval Forces, Philippines;

(*d*) Chief of Naval Material;

(*e*) Commander-in-Chief, U.S. Atlantic Fleet;

(*f*) Commander, Service Force, Pacific Fleet;

(*g*) Commander, Military Sea Transportation Service (MSTS);

(*h*) Commandant, U.S. Marine Corps;

(*i*) Commander, Naval Facilities Engineering Command;

(iii) Department of the Air Force—

(*a*) Commander, U.S. Air Forces in Europe;

(*b*) Commander, USAF Southern Command;

(*c*) Commander, Pacific Air Force;

(*d*) Commander, Military Airlift Command (MAC);

(*e*) Commander, Air Force Logistics Command;

(*f*) Commander, Air Force Systems Command;

(*g*) Commander, Strategic Air Command;

(*h*) Commander, Tactical Air Command;

(*i*) Commander, Aerospace Defense Command;

(iv) Defense Supply Agency—Executive Director, Procurement and Production;

(v) Defense Communications Agency—Director.

(2) Procurements estimated to exceed $1 million but not $3 million in foreign cost — Secretary of the Department concerned.

(3) Procurements estimated to exceed $3 million in foreign cost—Assistant Secretary of Defense (Installations and Logistics).

(c) Procurements of scientific and technical knowledge resulting in expenditures outside the United States and Canada shall be made only in the following cases:

(1) Those set forth in paragraphs (a) (1), (2), (3), and (9) of this section;

(2) When it is determined in advance, by the individuals designated in paragraph (d) of this section, that the requirement can only be filled by foreign end products or services and that it is not feasible to forego filling the requirement or to provide a U.S. substitute for it; and

(3) Procurements other than those covered in subparagraphs (1) and (2) of this paragraph when U.S. end products or services are available, the domestic cost is not estimated to exceed $10,000, and the difference between the domestic cost and the foreign cost is determined by the individuals designated in paragraph (d) of this section to be so large as to make procurement of foreign end products and services clearly desirable. (Where the domestic cost is estimated to exceed $10,000, and the difference between the domestic cost and the foreign

cost exceeds 50 percent of the foreign cost, the matter will be forwarded to the Director of Defense Research and Engineering for determination.)

Whenever practicable, such procurements shall be made on a cost sharing basis or other arrangement designed to limit any adverse effect on the balance of payments. Policy questions concerning such arrangements should be directed to the Principal Deputy of the Office of the Director of Defense Research and Engineering.

(d) * * *

(3) Procurements estimated to exceed $3 million in foreign cost—Director of Defense Research and Engineering.

* * * * *

§ 6.806–1 Restricted solicitation.

* * * * *

(b) * * *

(1) If the domestic cost is in excess of $10,000, forward the matter to the Secretary of the Department concerned for a determination; or

* * * * *

PART 7—CONTRACT CLAUSES

9. New paragraph (j) is added to § 7.104–9; new §§ 7.105–8, 7.204–19, and 7.205–7 are added; §§ 7.304–8 and 7.304–9 are revised; and new §§ 7.304–10 and 7.304–11 are added, as follows:

§ 7.104–9 Rights in data.

* * * * *

(j) *Identification of experimental, developmental or research work.* In accordance with § 9.203(f) of this chapter, to prevent any misinterpretation of the scope of the rights in data provisions of the contract, the following schedule provision may be included in contracts which, in whole or in part, call for experimental developmental or research work as an element of performance.

CONTRACT SCHEDULE ITEMS REQUIRING EXPERIMENTAL, DEVELOPMENTAL OR RESEARCH WORK (AUGUST 1969)

For purposes of defining, pursuant to Clause ------, entitled "Rights in Technical Data," the nature of the work and the scope of rights in data granted to the Government it is understood and agreed that items (list applicable schedule line items or subline items or data exhibit numbers) require the performance of experimental, developmental, or research work. This clause does not constitute a determination as to whether or not any data required to be delivered under this contract falls within the definition of limited rights data.

§ 7.105–8 Technical data warranty.

(a) In accordance with § 1.324–11(a) of this chapter, the following clause may be inserted.

WARRANTY OF TECHNICAL DATA (AUGUST 1969)

(a) Technical data, as used in this clause, refers to recorded information required to be delivered under this contract used to define a design and to produce, support, maintain, or operate items of defense materiel. These data may be recorded as graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design-type documents; in machine forms such as punched cards, magnetic tape, computer memory printouts; or may be retained in computer memory. Examples of recorded information include engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. For purposes of this clause, research and engineering data are included but financial and administrative data are excluded.

(b) Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract and notwithstanding any provision of this contract concerning the conclusiveness thereof, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for 3 years after completion of the delivery of the line item of data (as identified in DD Form 1423) of which the data forms a part; or any longer period specified in the contract.

(c) The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) The following remedies shall apply to all breaches of the above warranty provided that the Government notifies the Contractor of the breach in writing within the warranty period.

(1) Within a reasonable time after the Contracting Officer notifies the Contractor of a breach of warranty, he may:

(i) By written notice, direct the Contractor to correct or replace the nonconforming technical data promptly; or

(ii) If he determines that the Government no longer has a requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment in lieu of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under (1)(i) above, the Contracting Officer may, within a reasonable time of such refusal or failure:

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the Contractor the cost occasioned to the Government thereby; or

(ii) Elect a price or fee adjustment in lieu of correction or replacement.

(e) The remedies set forth in this clause represent the exclusive means by which the rights conferred on the Government by this clause may be enforced.

(f) The provisions of this clause apply anew to that portion of any technical data which is corrected or furnished in replacement under (d)(1)(i) above.

(b) In accordance with § 1.324–11(b) of this chapter, the following provision may be inserted in firm fixed-price contracts as paragraph (d)(3) of the Warranty of Technical Data clause set forth above.

(3) In addition to the remedies specified under (1) and (2) above, Contractor shall be liable to the Government for all damages sustained by the Government as a result of breach of the warranty specified in this clause; however, the additional liability under this subparagraph (3) shall not exceed 10 percent of the total contract price. If the breach of the warranty specified in (b) of this clause is with respect to data supplied by an equipment subcontractor, the limit of the prime contractor's liability shall be 10 percent of the total subcontract price in the case of a firm fixed-price subcontract, 75 percent of the total subcontract fee in the case of a cost-plus-fixed-fee or cost-plus-award-fee subcontract, or 75 percent of the total subcontract target profit or fee in the case of a fixed-price or cost-plus-incentive-type contract. The additional liability specified in this paragraph (3) shall not apply:

(i) With respect to the requirement under Category E or I of MIL–D–1000: *Provided*, That the data furnished by the Contractor was current, accurate at time of submission and did not involve a significant omission of data necessary to comply with such requirements; or

(ii) With respect to specific defects as to which the Contractor discovers and gives written notice to the Government before the error is discovered by the Government.

(c) In accordance with § 1.324–11(b) of this chapter, the following provision may be inserted in fixed-price-incentive contracts as paragraph (d)(3) of the Warranty of Technical Data clause set forth in paragraph (a) of this section.

(3) In addition to the remedies specified under (d) (1) and (2) above, Contractor shall be liable to the Government for all damages sustained by the Government as a result of breach of the warranty specified in this clause; however, the additional liability under this subparagraph (3) shall not exceed 75 percent of the target profit. If the breach of the warranty specified in (b) of this clause is with respect to data supplied by an equipment subcontractor, the limit of the prime contractor's liability shall be 10 percent of the total subcontract price in the case of a firm fixed-price subcontract, 75 percent of the total subcontract fee in the case of a cost-plus-fixed-fee or cost-plus-award-fee subcontract, or 75 percent of the total subcontract target profit or fee in the case of a fixed-price or cost-plus-incentive-type contract. Damages due the Government under the provisions of this warranty shall not be considered as an allowable cost. The additional liability specified in this paragraph (3) shall not apply:

(i) With respect to the requirement under Category E or I of MIL–D–1000: *Provided*, That the data furnished by the Contractor was current, accurate at time of submission and did not involve a significant omission of data necessary to comply with such requirements; or

(ii) With respect to specific defects as to which the Contractor discovers and gives written notice to the Government before the error is discovered by the Government.

§ 7.204–19 Management control systems requirements.

In accordance with § 16.827–1 of this chapter, insert the clause in § 7.104–50.

§ 7.205–7 Technical data warranty.

(a) In accordance with § 1.324–11(a) of this chapter, the clause set forth in § 7.105–8(a) may be inserted.

(b) Extended liability. In accordance with § 1.324–11(b) of this chapter, the following clause may be inserted as paragraph (d)(3) to the Warranty of Technical Data clause provided for in paragraph (a) of this section:

(3) In addition to the remedies specified under (d) (1) and (2) above, Contractor shall be liable to the Government for all damages sustained by the Government as a result of breach of the warranty specified in this clause; however, the additional liability under this subparagraph (3) shall not exceed 75 percent of the Contractor's fee in the case of cost-plus-fixed-fee contracts; 75 percent of the final fee (base plus award)

in the case of cost-plus-award-fee contracts; or 75 percent of the target fee in the case of cost-plus-incentive-fee contracts. If the breach of the warranty specified in (b) of this clause is with respect to data supplied by an equipment subcontractor, the limit of the prime contractor's liability shall be 10 percent of the total subcontract price in the case of a firm fixed-price subcontract, 75 percent of the total subcontract fee in the case of a cost-plus-fixed-fee or cost-plus-award-fee subcontract, or 75 percent of the total subcontract target profit or fee in the case of a fixed-price or cost-plus-incentive-type contract. Damages due the Government under the provisions of this warranty shall not be considered as an allowable cost. The additional liability specified in this paragraph (3) shall not apply:

(i) With respect to the requirement under Category E or I of MIL-D-1000: *Provided*, That the data furnished by the Contractor was current, accurate at time of submission and did not involve a significant omission of data necessary to comply with such requirements; or

(ii) With respect to specific defects as to which the Contractor discovers and gives written notice to the Government before the error is discovered by the Government.

§ 7.304–8 Technical data warranty.

In accordance with § 1.324–11(a) of this chapter, the clause set forth in § 7.105–8(a) may be inserted.

§ 7.304–9 Extended liability under technical data warranty.

In accordance with § 1.324–11(b) of this chapter, the applicable clause set forth in § 7.105–8(b) may be added as paragraph (g) to the Technical Data Warranty clause provided for in § 7.304–8.

§ 7.304–10 Other warranties.

In accordance with § 1.324 of this chapter, an appropriate warranty may be inserted.

§ 7.304–11 Stop work orders.

In accordance with § 7.105–3, the clause set forth therein may be inserted.

10. New §§ 7.403–32, 7.404–8, 7.404–9, and 7.504–11 are added; § 7.604–5 is redesignated as § 7.604–7, and § 7.604–6 is redesignated as § 7.604–8, and new §§ 7.604–5 and 7.604–6 are added; and new §§ 7.605–41, 7.606–19, and 7.606–20 are added, as follows:

§ 7.403–32 Management control systems requirements.

In accordance with § 16.827–1 of this chapter, insert the clause in § 7.104–50.

§ 7.404–8 Technical data warranty.

In accordance with § 1.324–11(a) of this chapter, the clause set forth in § 7.105–8(a) may be inserted.

§ 7.404–9 Extended liability under technical data warranty.

In accordance with § 1.324–11(b) of this chapter, the clause set forth in § 7.105–8(b) may be added as paragraph (g) to the Technical Data Warranty clause provided for in § 7.404–8.

§ 7.504–11 Management control systems requirements.

In accordance with § 16.827–1 of this chapter, insert the clause in § 7.104–50.

§ 7.604–5 Technical data warranty.

In accordance with § 1.324–11(a) of this chapter, the clause set forth in § 7.105–8(a) may be inserted.

§ 7.604–6 Extended liability under technical data warranty.

In accordance with § 1.324–11(b) of this chapter, the applicable clause set forth in § 7.105–8(b) may be added as paragraph (g) to the Technical Data Warranty clause provided for in § 7.604–5.

§ 7.604–7 Contractor-prepared network analysis system. [Redesignated]

§ 7.604–8 Government-prepared network analysis system. [Redesignated]

§ 7.605–41 Management control systems requirements.

In accordance with § 16.827–1 of this chapter, insert the clause in § 7.104–50.

§ 7.606–19 Technical data warranty.

In accordance with § 1.324–11(a) of this chapter, the clause set forth in § 7.105–8(a) may be inserted.

§ 7.606–20 Extended liability under technical data warranty.

In accordance with § 1.324–11(b) of this chapter, the clause set forth in § 7.105–8(b) may be added as paragraph (g) to the Technical Data Warranty clause provided for in § 7.606–19.

PART 8—TERMINATION OF CONTRACTS

11. Sections 8.303 (a) and (b) (3) and (8), and 8.406 are revised; in § 8.702(a), the clause heading and clause paragraph (e) (I) (D) (I) are revised; and in § 8.707, the clause heading is revised and new clause paragraph (g) is added, as follows:

§ 8.303 Allowance for profit.

(a) *General.* Profit shall be allowed on preparations made and work done by the contractor for the terminated portion of the contract. Although the contractor's settlement efforts will be considered, profit will not be based on the dollar amount of the contractor's settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see § 8.209–5). Any reasonable method may be used to arrive at a fair profit, separately or as a part of the whole settlement.

(b) *Factors to be considered.* * * *

(3) Efficiency of the contractor, with particular regard to—

(i) Attainment of quantity and quality production,

(ii) Reduction of costs,

(iii) Economy in the use of materials, facilities, and manpower, and

(iv) Disposition of termination inventory;

* * * * *

(8) Character and difficulty of subcontracting including selection, placement, and management of subcontracts; engineering, technical assistance, and other services rendered; and effort in negotiating settlement of terminated subcontracts. The profit allowed for the contractor's efforts shall not be measured by the amount of the contractor's payment to subcontractors for settlement of their termination claims. The termination of a contract removes risks and responsibilities with respect to material or services which have not been delivered or furnished by the subcontractor. Therefore, no allowance to the prime contractor for profit may be made for such material or services which, as of the effective date of termination, have not been delivered by the subcontractor, regardless of the percentage of completion; and

* * * * *

§ 8.406 Adjustment of fee.

The adjusted fee to be paid, if any, shall be determined in the manner provided by the contract, generally based on percentage of completion of the contract or of the terminated portion thereof. Where this basis is used, factors such as the extent and difficulty of the work performed by the contractor (including but not limited to planning, scheduling technical study, engineering work production and supervision, placing and supervising subcontracts to the extent reasonably required, and work performed by the contractor in (a) stopping performance, (b) settling claims of subcontractors, and (c) disposing of termination inventory) shall be compared with the total work required by the contract or by the terminated portion thereof. The prime contractor's adjusted fee shall not include an allowance for fee for subcontract effort included in subcontractors' termination claims. The ratio of costs incurred to the total estimated cost of performing the contract or the terminated portion thereof is only one factor in computing the percentage of completion. This percentage may be either greater or less than that indicated by the ratio of costs incurred, depending upon the evaluation by the TCO of the above factors and other relevant considerations.

§ 8.702 Determination clause for cost-reimbursement type contracts.

(a) * * *

TERMINATION (AUGUST 1969)

* * * * *

(e) * * *

(I) * * *

(D) * * *

(I) in the event of the termination of this contract for the convenience of the Government and not for the default of the Contractor, there shall be paid a percentage of the fee equivalent to the percentage of the completion of work contemplated by the contract, but exclusive of subcontract effort included in subcontractors' termination claims, less fee payments previously made hereunder; or

* * * * *

§ 8.707 Default clause for fixed-price supply contracts.

* * * * *

DEFAULT (AUGUST 1969)

* * * * *

(g) As used in paragraph (c) of this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.

12. In § 8.708(a), the clause is revised; in § 8.709(a), the clause heading is revised and new clause paragraph (g) is added; and in § 8.710(a), the clause heading is revised and new clause paragraph (g) is added, as follows:

§ 8.708 Excusable delays clause for cost-reimbursement type contracts.

(a) *General.* * * *

EXCUSABLE DELAYS (AUGUST 1969)

Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to: Acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform or make progress, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to be in default, unless (i) the supplies or services to be furnished by the subcontractor were obtainable from other sources, (ii) the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (iii) the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the clause hereof entitled "Termination". (As used in this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.)

* * * * *

§ 8.709 Default clause for fixed-price construction contracts.

(a) * * *

TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS (AUGUST 1969)

* * * * *

(g) As used in paragraph (d)(1) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

* * * * *

§ 8.710 Default clause for fixed-price research and development contracts.

(a) * * *

DEFAULT (AUGUST 1969)

* * * * *

(g) As used in paragraph (c) of this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.

* * * * *

PART 9—PATENTS, DATA, AND COPYRIGHTS

13. Section 9.201(b) is revised; in § 9.202–2, paragraph (d) is revised and new paragraph (h) is added; and in § 9.203, paragraphs (b) and (c) are revised, and new paragraph (f) is added, as follows:

§ 9.201 Definitions.

* * * * *

(b) "Limited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data, be released or disclosed in whole or in part outside the Government, used in whole or in part by the Government for manufacture, or used by a party other than the Government, except for:

(1) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work: *Provided*, That the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(2) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of subparagraph (1) of this paragraph.

* * * * *

§ 9.202–2 Policy.

* * * * *

(d) *Predetermination of rights in data.* (1)(i) When the Government needs data with unlimited rights, any data which the offeror intends to deliver with limited rights pursuant to paragraph (c) of this section should be identified prior to contract award, if feasible, and an agreement with respect thereto shall be incorporated in the contract. This procedure is called predetermination of rights in data.

(ii) The procedure may be initiated by the contracting officer or an offeror during the negotiation of a negotiated contract. In order to be productive, the procedure should apply only to that data for which rights may practicably be identified. Although the agreement may also cover data to be delivered with unlimited rights, in no case shall the procedure be used to require the contractor to furnish, with unlimited rights, data which he is entitled to furnish with limited rights under the policy in paragraph (c) of this section. The contracting officer shall consult his counsel as fully as possible in determining whether to use the procedure and in connection with the various steps of the procedure.

(2) Any agreements reached shall be incorporated in the Schedule of the contract directly or by reference and shall describe specifically the data which may be furnished with limited rights pursuant to paragraph (c) of this section. The contracting officer may, however, review the data asserted to be limited rights data to determine whether to invoke the procedures of paragraph (g) of this section to negotiate to purchase unlimited rights in any of the data, or adopt some alternative such as to:

(i) Delete or modify the requirement for the data in which the Government would need unlimited rights if it were ordered, or

(ii) Modify the specifications so as not to require or permit the use of the item, component or process covered by the limited rights data, or

(iii) Include a contractual option to acquire unlimited rights.

(3) When the predetermination of rights in data procedure is to be used, include the following provision in the Request for Proposals.

PREDETERMINATION OF RIGHTS IN DATA (AUGUST 1969)

(a) The offeror is requested to identify in his proposal which of the below listed data (including those to be furnished in whole or in part by a subcontractor) when delivered, may be marked with a restrictive legend of the kind quoted in paragraph (b) of the "Rights in Technical Data" clause of this Solicitation. This identification need not be made as to data which relate to standard commercial items which are manufactured by more than one source of supply.

(The Solicitation should list here that data or portions thereof with respect to which the Government proposes use of the predetermination procedure. Data which clearly comes within paragraph (b)(1) of the "Rights in Technical Data" clause and would therefore be acquired with unlimited rights should not be listed.)

(b) Limited rights data may be identified as such, pursuant to (a) above only if it pertains to items, components or processes developed at private expense. Nevertheless, it cannot be so identified if it comes within paragraph (b)(1) of the "Rights in Technical Data" clause, for example, if it has previously been furnished to the Government without restriction by the offeror or his proposed subcontractor. At the request of the Contracting Officer or his representative, the offeror agrees to furnish evidence to support his view that the data which will be so marked comes within the definition of limited rights data.

(c) The listing of a data item in paragraph (a) above does not mean that the Government considers such item to come within the definition of limited rights data.

(4) If completion of predetermination proves impracticable before award, or if contractual requirements relating to design or data items are changed during the course of a contract, an appropriate provision shall be included in the contract, requiring the contractor to complete the identification of limited rights with respect to that data listed in the solicitation for which predetermination was proposed, or to identify limited rights data relating to the changed requirements.

* * * * *

(h) *Notice of certain limited rights.* (1) Whether or not the procedure of paragraph (d) of this section for predetermination of rights in data is used, if continuing information is desired under a contract about a contractor's intention to use in the performance of the contract any item, component, or process for which data suitable for competitive procurement could be furnished by the contractor or a subcontractor with limited rights in accordance with the policy of paragraph (c) of this section, the contractor may be required to advise the contracting officer of this fact promptly (see § 9.203(c)). If possible, the schedule should indicate the specific areas pertaining to which limited rights data is of concern and the notice requirement should be restricted to those areas of concern.

(2) No such advice shall be required as to items, components, or processes for which notice was previously given pursuant to the predetermination procedure in the same contract, or with respect to standard commercial items which are manufactured by more than one source of supply. No contracting officer approval under this clause is necessary for the contractor to use any item, component, or process, identified pursuant to this requirement, in the performance of the contract.

(3) If the contracting officer agrees that under the policy stated in paragraph (c) of this section such contractor or subcontractor data could be furnished with limited rights, he may then determine whether to invoke the procedure of paragraph (g) of this section to negotiate for the purchase of unlimited rights in such data or to adopt other suitable alternatives. The contract shall be amended to reflect any changes required by these procedures.

§ 9.203 Contract clauses.

* * * * *

(b) *Basic data clause.*

RIGHTS IN TECHNICAL DATA (AUGUST 1969)

(a) *Definitions.* (1) Technical data, as used in this clause, means technical writing, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) Limited rights means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data, be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or (c) used by a party other than the Government, except for:

(i) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work: *Provided*, That the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(ii) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above.

(3) Unlimited rights means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Government rights.* (1) The Government shall have unlimited rights in:

(i) Technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) Technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see (2)(ii) below);

(iii) Technical data constituting corrections or changes to Government-furnished data;

(iv) Technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit, and function" data, *e.g.*, specification control drawings, catalog sheets, envelope drawings, etc.);

(v) Manuals or instructional materials prepared for installation, operation, maintenance or training purposes;

(vi) Other technical data which has been, or is normally furnished without restriction by the Contractor or subcontractor; and

(vii) Technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined, on the basis of subparagraphs (i) through (vi) above, and agreed will be furnished with unlimited rights.

(2) The Government shall have limited rights in:

(i) Technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) Technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in (b)(1)(i), (iii), (iv), (v), and (vi);

Provided that each piece of data to which limited rights are to be asserted pursuant to (2)(i) and (ii) above is marked with the following legend in which is inserted the number of the prime contract under which the technical data is to be delivered and the name of the Contractor or subcontractor by whom the technical data was generated:

This technical data, furnished under U.S. Government Contract No. ----------, shall not, without the written permission of ----------, be either (a) used, released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture or (c) used by a party other than the Government, except for: (i) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work: *Provided*, That the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release, or disclosure; or (ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above. This legend shall be marked on any reproduction hereof in whole or in part.

No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Contractor has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

(c) *Material covered by copyright.* (1) Notwithstanding the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

(2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described above.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.

(d) *Removal of unauthorized markings.* Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if—

(i) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or

(ii) The Contractor's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to the Contractor.

(e) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) *Limitation on charges for data.* The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the U.S. Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the U.S. Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply

to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(g) *Acquisition of data from subcontractors.* (1) Whenever any technical data is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier Contractor. However, when there is a requirement in the prime contract, or in the deferred order, for data which may be supplied with limited rights pursuant to (b)(2) above, a subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in data from their subcontractors for themselves.

(c) *Notice of certain limited rights.* The paragraph (h) set forth below may be added to the clause in paragraph (b) of this section in any contract in which the contracting officer desires notification of limited rights data (see § 9.202–2(h)).

(h) (1) Unless the Schedule provides otherwise, and subject to (2) below, the Contractor will promptly notify the Contracting Officer in writing of the intended use by the Contractor or a subcontractor in performance of this contract of any item, component or process for which data [called for by this contract,] [1] [whether or not called for by this contract,] [2] suitable for competitive procurement, would fall within paragraph (b)(2) above (i.e., if and when furnished, might be furnished with limited rights).

(2) Such notification is not required with respect to:

(i) Standard commercial items which are manufactured by more than one source of supply; or

(ii) Items, components or processes for which such notice was given pursuant to predetermination of rights in data in connection with this contract.

(3) Contracting Officer approval is not necessary under this clause for the Contractor to use the item, component or process in the performance of the contract. (August 1969)

* * * * *

(f) *Identification of experimental, developmental or research work.* To prevent any misinterpretation of the scope of the rights in data provisions of the contract, the following schedule provision may be included in contracts which, in whole or in part, call for experimental, developmental or research work as an element of performance.

CONTRACT SCHEDULE ITEMS REQUIRING EXPERIMENTAL, DEVELOPMENTAL OR RESEARCH WORK (AUGUST 1969)

For purposes of defining, pursuant to Clause ....., entitled "Rights in Technical Data," the nature of the work and the scope of rights in data granted to the Government it is understood and agreed that items (list applicable schedule line items or subline items or data exhibit numbers) require the performance of experimental, developmental, or research work. This clause does not constitute a determination as to whether or not any data required to be delivered under this contract falls within the definition of limited rights data.

PART 12—LABOR

14. New §§ 12.107 and 12.307 are added, and Subpart J is revised, as follows:

§ 12.107 Labor standards enforcement report.

(a) A semiannual report is required on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and Contract Work Hours Standards Act. The reporting periods are January 1 through June 30 and July 1 through December 31. The reports shall be prepared by the contract administration office and will be submitted through channels so as to reach the labor relations advisor of the Headquarters concerned not later than 25 days after the close of the reporting period. Within the next 5 days a report thereafter will be submitted by the Headquarters to the Director for Industrial Relations, Office of the Assistant Secretary of Defense (Manpower and Reserve Affairs).

(b) The report shall contain the following information which shall be stated separately, as applicable, in two columns—one column for construction work subject to the Davis-Bacon Act and Contract Work Hours Standards Act and the other column for nonconstruction work subject to the Contract Work Hours Standards Act, except subparagraphs (2) and (3) will not be reported for nonconstruction work:

(1) Period covered;

(2) Number of construction prime contracts awarded;

(3) Total dollar amount of construction prime contracts awarded;

(4) Number of contractors/subcontractors against whom complaints were received—

(i) Prime,

(ii) Subcontractors;

(5) Number of investigations—

(i) Undertaken,

(ii) Completed;

(6) Number of contractors/subcontractors found in violation—

(i) Prime,

(ii) Subcontractors;

(7) Amount of wage restitution found due—

(i) Davis-Bacon Act,

(ii) Contract Work Hours Standards Act;

(8) Number of employees due wage restitution under—

(i) Davis-Bacon Act,

(ii) Contract Work Hours Standards Act;

(9) Amount of liquidated damages assessed under the Contract Work Hours Standards Act—

(i) Number of contracts involved;

(10) Number of complaints received from—

(i) Labor unions,

(ii) Individual employees,

(iii) Department of Labor, and

(iv) Others, including Congressional;

(11) Number of employees and the total amount paid or withheld under—

(i) Davis-Bacon Act,

(ii) Contract Work Hours Standards Act,

(iii) Copeland Act;

(12) Preconstruction activities—

(i) Number of conferences held,

(ii) Letters sent;

(13) Number of compliance checks performed;

(14) Number of employees interviewed.

§ 12.307 Labor standards enforcement report.

See § 12.107.

Subpart J—Service Contract Act of 1965

Sec.	
12.1001	Statutory requirements.
12.1002	Applicability.
12.1002–1	General.
12.1002–2	Geographical coverage of the Act.
12.1002–3	Service employee.
12.1003	Department of Labor regulations.
12.1004	Contract clauses.
12.1005	Administration and enforcement.
12.1005–1	Responsibilities of Department of Labor.
12.1005–2	Notice of intention to make a service contract.
12.1005–3	Contract minimum wage determinations and fringe benefit specification.
12.1005–4	Additional classifications (conformable rates).
12.1005–5	Notice of award.
12.1005–6	Department of Labor Form SC–1.
12.1005–7	Inquiries concerning the Act.
12.1005–8	Contract modifications.
12.1005–9	Withholding of contract payments and contract termination.
12.1005–10	Cooperation with the Department of Labor.
12.1005–11	Role of the Comptroller General.
12.1006	Labor Standards Enforcement Report.

AUTHORITY: The provisions of this Subpart J issued under secs. 2202, 2301–2314, 70A Stat. 120, 127–133; 10 U.S.C. 2202, 2301–2314.

§ 12.1001 Statutory requirements.

The McNamara-O'Hara Service Contract Act of 1965, U.S.C. 351, referred to in this Part as the "Act", embraces two general requirements with respect to service contracts entered into by Federal agencies.

(a) No contractor or subcontractor holding a Federal service contract shall pay any of his employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.); and

[1] Use this language, without brackets, unless the language at [2] is used.

[2] Use this language, without brackets, when the data is not called for under the present contract, but the Contracting Officer is reasonably sure that data suitable for competitive procurment will be called for in follow-on contracts.

(b) Federal service contracts in excess of $2,500 shall contain the provisions required by the Act with respect to such matters as minimum wages, including fringe benefits, to be paid the various classes of service employees engaged in the performance of the contract, safe and sanitary working conditions, and notification to employees of the compensation required under the Act.

§ 12.1002 Applicability.

§ 12.1002–1 General.

Subject to statutory exemptions or administrative exemptions by the Secretary of Labor under section 4(b) of the Act:

(a) The requirement set forth in §12.1001(a) applies to any contract with the Federal Government, the principal purpose of which is to furnish services through the use of service employees (as defined in § 12.1002–3); and

(b) The requirement set forth in § 12.1001(b) applies to every contract (and any bid specification therefor) entered into by the Federal Government in excess of $2,500 whether negotiated or advertised, the principal purpose of which is to furnish services through the use of service employees (as defined in § 12.1002–3).

§ 12.1002–2 Geographical coverage of the Act.

The Act applies to work performed in any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnson Island, but does not apply to work performed in any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

§ 12.1002–3 Service employee.

(a) *Definition of service employees.* As defined in the Act, the term "service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(b) *Types of covered service contracts illustrated.* Types of contracts, the principal purpose of which is to furnish services through the use of service employees, are too numerous and varied to permit an exhaustive listing. The following list is illustrative, however, of the types of services called for by such contracts that have been found to come within the coverage of the Act.

(1) Aerial spraying.
(2) Aerial reconnaissance for fire detection.
(3) Ambulance service.
(4) Cafeteria and food service.
(5) Chemical testing and analysis.
(6) Clothing alteration and repair.
(7) Custodial and janitorial services.
(8) Electronic equipment maintenance and operation.
(9) Flight training.
(10) Forest firefighting.
(11) Geological field surveys.
(12) Grounds maintenance.
(13) Guard or watchman service.
(14) Landscaping (other than part of construction).
(15) Laundry and dry cleaning.
(16) Linen supply service.
(17) Lodging and meals.
(18) Mail hauling.
(19) Maintenance and repair of motor equipment.
(20) Maintenance and repair of office equipment.
(21) Miscellaneous housekeeping.
(22) Motor pool operation.
(23) Packing and crating.
(24) Parking services.
(25) Snow removal.
(26) Stenographic reporting.
(27) Support services at military installations.
(28) Taxicab services.
(29) Tire and tube repairs.
(30) Transporting property or personnel.
(31) Trash and garbage removal.
(32) Warehouse or storage.
(33) Drafting and illustrating.
(34) Mortuary services.

§ 12.1003 Department of Labor regulations.

Pursuant to the Service Contract Act of 1965, the Department of Labor has issued Parts 4 and 1516, Title 29, Code of Federal Regulations, providing for the administration and enforcement of the Act. The regulations include coverage of the following matters relating to the requirements of the Act:

(a) Service contract labor standards provisions and procedures (Subpart A, Part 4 (29 CFR));

(b) Equivalents of determined fringe benefits (Subpart B, Part 4 (29 CFR));

(c) Application of the Service Contract Act of 1965 (rulings and interpretations) (Subpart C, Part 4 (29 CFR)); and

(d) Safe and sanitary working conditions (Part 1516 of Title 29 CFR).

§ 12.1004 Contract clauses.

(a) *Clause for Federal service contracts in excess of $2,500.* The Act provides for inclusion of an appropriate clause in every contract entered into by Federal agencies in excess of $2,500 the principal purpose of which is to furnish services in the United States through the use of service employees, except contracts identified in section 7 of the Act or those exempted by the Secretary of Labor under section 4(b) of the Act. Accordingly every invitation for bids, request for proposals, or other form of solicitation to which this paragraph is applicable shall provide for inclusion of, and every contract shall contain, the following clause:

SERVICE CONTRACT ACT OF 1965
(SEPTEMBER 1968)

This contract, to the extent that it is of the character to which the Service Contract Act of 1965 (Public Law 89–286) applies, is subject to the following provisions and to all other applicable provisions of the Act and the regulations of the Secretary of Labor thereunder (29 CFR Parts 4 and 1516).

(a) *Compensation.* Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid not less than the minimum monetary wage and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or his authorized representative, as specified in any attachment to this contract. If there is such an attachment, any class of service employees which is not listed therein, but which is to be employed under this contract, shall be classified by the Contractor so as to provide a reasonable relationship between such classifications and those listed in the attachment, and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the Contractor, and the employees who will perform on the contract or their representatives. If the interested parties do not agree on a classification or reclassification which is, in fact, conformable, the Contracting Officer shall submit the question, together with his recommendation, to the Administrator of the Wage and Hour and Public Contracts Divisions, Department of Labor, or his authorized representative for final determination. Failure to pay such employees the compensation agreed upon by the interested parties or finally determined by the Administrator or his authorized representative shall be a violation of this contract. No employee engaged in performing work on this contract shall in any event be paid less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended ($1.60 per hour).

(b) *Obligation to furnish fringe benefits.* The Contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined conformably thereto by furnishing any equivalent combinations of fringe benefits, or by making equivalent or differential payments in cash, pursuant to applicable rules of the Administrator of the Wage and Hour and Public Contracts Divisions, Department of Labor (Subpart B of Part 4 (29 CFR)).

(c) *Minimum wage.* In the absence of a minimum wage attachment for this contract, neither the Contractor nor any subcontractor under this contract shall pay any of his employees performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938 ($1.60 per hour). However, in cases where section 6(e)(2) of the Fair Labor Standards Act of 1938 is applicable, the rates specified therein will apply. Nothing in this provision shall relieve the Contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(d) *Notification to employees.* The Contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post a notice of such wages and benefits in a prominent and accessible place at the worksite, using such poster as may be provided by the Department of Labor.

(e) *Safe and sanitary working conditions.* The Contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the Contractor or subcontractor which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish these services. Except insofar as a noncompliance can be justified as provided in section 1516.1 (c) of Title 29 CFR, this will require compliance with the applicable standards, specifications, and codes developed and published by the U.S. Department of Labor, any other agency of the United States, and any nationally recognized professional organization such as, without limitation, the following:

National Bureau of Standards, U.S. Department of Commerce.
Public Health Service, U.S. Department of Health, Education, and Welfare.
Bureau of Mines, U.S. Department of the Interior.
United States of America Standards Institute (American Standards Association).
National Fire Protection Association.
American Society of Mechanical Engineers.
American Society for Testing and Materials.
American Conference of Governmental Industrial Hygienists.

Information as to the latest standards, specifications, and codes applicable to the contract is available at the office of the Director of the Bureau of Labor Standards, U.S. Department of Labor, Railway Labor Building, 400 First Street NW., Washington, D.C. 20212, or at any of the regional offices of the Bureau of Labor Standards as follows:

(1) North Atlantic Region, 341 Ninth Avenue, Room 920, New York, N.Y. 10001 (Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, New Jersey, and Puerto Rico).

(2) Middle Atlantic Region, 1110–B Federal Building, Charles Center, 31 Hopkins Plaza, Baltimore, Md. 21201 (Delaware, District of Columbia, Maryland, North Carolina, Pennsylvania, Virginia, and West Virginia).

(3) South Atlantic Region, 1371 Peachtree Street NE., Suite 723, Atlanta, Ga. 30309 (Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee).

(4) Great Lake Region, 848 Federal Office Building, 219 South Dearborn Street, Chicago, Ill. 60604 (Illinois, Indiana, Kentucky, Michigan, Minnesota, Ohio, and Wisconsin).

(5) Mid-Western Region, 2100 Federal Office Building, 911 Walnut Street, Kansas City, Mo. 64106 (Colorado, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming).

(6) Western Gulf Region, 411 North Akard Street, Room 601, Dallas, Tex. 75201 (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas).

(7) Pacific Region, 10353 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, Calif. 94102 (Alaska, Arizona, California, Hawaii, Nevada, Oregon, Washington, and Guam).

(f) *Records.* The Contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified below for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Administrator of the Wage and Hour and Public Contracts Divisions, U.S. Department of Labor.

(1) His name and address.

(2) His work classification or classifications, rate or rates of monetary wages and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation.

(3) His daily and weekly hours so worked.

(4) Any deductions, rebates, or refunds from his total daily or weekly compensation.

(5) A list of monetary wages and fringe benefits for those classes of service employees not included in the minimum wage attachment to this contract, but for which such wage rates or fringe benefits have been determined by the interested parties or by the Administrator of the Wage and Hour and Public Contracts Divisions, Department of Labor, or his authorized representative pursuant to the labor standards in paragraph (a) of this clause. A copy of the report required by paragraph (j) of this clause shall be deemed to be such a list.

(g) *Withholding of payments and termination of contract.* The Contracting Officer shall withhold or cause to be withheld from the Government Prime Contractor under this or any other Government contract with the Prime Contractor such sums as he, or an appropriate officer of the Labor Department, decides may be necessary to pay underpaid employees. Additionally, any failure to comply with the requirements of this clause relating to the Service Contract Act of 1965 may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the Contractor in default with any additional cost.

(h) *Subcontractors.* The Contractor agrees to insert the paragraphs of this clause relating to the Service Contract Act of 1965 in all subcontracts. The term "Contractor" as used in these paragraphs in any subcontract, shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

(i) *Service employee.* As used in this clause relating to the Service Contract Act of 1965, the term "service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman, or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

(j) *Contractor's report.* If there is a wage determination attachment to this contract and one or more classes of service employees which are not listed thereon are to be employed under the contract, the Contractor shall report to the Contracting Officer the monetary wages to be paid and the fringe benefits to be provided each such class of service employee. Such report shall be made promptly as soon as such compensation has been determined as provided in paragraph (a) of this clause.

(k) *Regulations incorporated by reference.* All interpretations of the Service Contract Act of 1965 expressed in Subpart C of Part 4 (29 CFR) are hereby incorporated by reference in this contract.

(l) These clauses relating to the Service Contract Act of 1965 shall not apply to the following:

(1) Any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect, or where such carriage is subject to rates covered by section 22 of the Interstate Commerce Act;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals;

(7) Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations;

(8) Any services to be furnished outside the United States. For geographic purposes, the "United States" is defined in section 8(d) of the Service Contract Act to include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island. It does not include any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

(9) Any of the following contracts exempted from all provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor hereby finds necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business: Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(m) Notwithstanding any of the provisions in paragraphs (a) through (k) of this clause, relating to the Service Contract Act of 1965, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor hereby finds pursuant to section 4(b) of the Act to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) (i) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical, or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Service Contract Act of 1965, without diminishing any fringe benefits or case payments in lieu thereof required under section 2(a)(2) of that Act, in accordance with the procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor (Parts 520, 521, 524, and 525 of 29 CFR).

(ii) The Administrator will issue certificates under the Service Contract Act of 1965 for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe

benefits or supplementary case payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (Parts 520, 521, 524, and 525 of 29 CFR).

(iii) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in Parts 525 and 528 of Title 29 of the Code of Federal Regulations.

(2) An employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips may have the amount of his tips credited by his employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act, in accordance with the regulations in Part 531 of 29 CFR: *Provided, however,* That the amount of such credit may not exceed 80 cents per hour.

(b) *Clause for Federal service contracts not in excess of $2,500.* Federal agencies are required to include the following clause in every contract not in excess of $2,500 which has as its principal purpose the furnishing of services through the use of service employees, except:

(1) Those transactions identified in paragraph (1) of the clause in paragraph (a) of this section;

(2) A contract for services to be furnished outside the United States (see § 12.1002–2), or

(3) A contract exempted by the Secretary of Labor under section 4(b) of the Act (see paragraph (m) of the clause in paragraph (a) of this section).

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Except to the extent that an exemption, variation, or tolerance would apply pursuant to 29 CFR 4.6 if this were a contract in excess of $2,500, the Contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended ($1.60 per hour). However, in cases where section 6(e)(2) of the Fair Labor Standards Act of 1938 is applicable, the rates specified therein will apply. All regulations and interpretations of the Service Contract Act of 1965 expressed in 29 CFR Part 4 are hereby incorporated by reference in this contract.

(c) *Basic ordering agreements and blanket purchase agreements.* In the case of the basic ordering agreement or blanket purchase agreement, the amount thereof for purposes of paragraphs (a) and (b) of this section shall be the aggregate amount of all orders estimated to be placed thereunder for 1 year after the effective date of the agreement. If a basic ordering agreement continues or is extended, such estimate shall be made annually for each year after the first and the agreement modified accordingly.

(d) *Linen supply service clauses.* (1) In contracts for linen supply services containing the clause in paragraph (a) of this section (i.e., contracts in excess of $2,500) insert the Linen Supply Services clause set forth in § 7.104–22 of this chapter.

(2) In contracts for linen supply services containing the clause in paragraph (b) of this section (i.e., contracts for $2,500 or less), insert the following:

LINEN SUPPLY SERVICE CONTRACTS (SEPTEMBER 1968)

The special minimum wage provisions of section 6(c)(2) of the Fair Labor Standards Act for linen supply service contracts entered into with the U.S. Government on or after February 1, 1967, shall apply to all employees (except those qualifying for the minimum wage and overtime exemption under section 13(a)(1) of the Fair Labor Standards Act) in an establishment providing such linen supply services. Such employees must be paid not less than $1.15 per hour as of February 1, 1968, with annual increments of 15 cents per hour, as of February 1 each year, increasing to a minimum rate of $1.60 per hour as of February 1, 1971. However, if more than 50 per centum of the gross annual dollar volume of sales made or business done by an establishment is derived from providing linen supply services under contracts or subcontracts with the United States, all employees in the establishment (other than employees qualifying for the minimum wage and overtime exemption under section 13(a)(1) of the Fair Labor Standards Act) must be paid at least $1.60 per hour as of February 1, 1968.

(e) *Price adjustment clause.* In a service contract with an option to renew which contains the clause in paragraph (a) of this section, insert the Fair Labor Standards Act and Service Contract Act—Price Adjustment clause set forth in § 7.107(d) of this chapter.

§ 12.1005 Administration and enforcement.

§ 12.1005–1 Responsibilities of Department of Labor.

The Secretary of Labor is authorized and directed to administer and enforce the provisions of the Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act.

§ 12.1005–2 Notice of intention to make a service contract.

(a) Not less than 30 days prior to any invitation for bids or the commencement of negotiations for any contract exceeding $2,500 which may be subject to the Act (or for any contract of an indefinite amount, unless the contracting officer has definite knowledge that it will not exceed $2,500 in any event), the contracting officer shall file Standard Form 98, Notice of Intention to Make a Service Contract and Response to Notice, with the Administrator, Wage and Hour and Public Contracts Divisions, Department of Labor, and include all available payroll data. The back of the form contains instructions for its completion (notwithstanding the instructions on the form, only the original and three copies shall be forwarded). Whenever detailed information which is requested is not readily available, such pertinent general information as is available should be provided. For example, if meaningful estimates of the number of service employees in various classes to be used on the contract cannot be made, estimates of the total number of employees or of the numbers falling within the categories enumerated in § 12.1002–3(a) should be supplied, if practical. The "Response" portion of the original of the form will be completed by the Wage and Hour and Public Contracts Divisions and returned to the contracting agency, advising the agency of any determination of minimum monetary wages and fringe benefits applicable to the contract. Supplies of Standard Form 98 are available in all GSA supply depots under stock number 7540–926–8972.

(b) If exceptional circumstances prevent the filing of the notice of intention required by this section on or before a date 30 days prior to any invitation for bids or the commencement of negotiations, the notice shall be submitted to the Administrator, Wage and Hour and Public Contracts Divisions, Department of Labor, as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission.

§ 12.1005–3 Contract minimum wage determinations and fringe benefit specification.

(a) *Prior to award.* The invitation for bids or request for proposals actually issued, as well as any contract entered into, in excess of $2,500, shall contain an attachment setting forth the minimum wages and fringe benefits specified in any applicable currently effective determination, including any expressed in any document referred to in subparagraphs (1) or (2) of this paragraph:

(1) Any written communication from the Administrator, responsive to the notice required by § 12.1005–2(a); however, such communications received by the Federal agency later than 10 days before the opening of bids or the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify bidders or offerors thereof;

(2) Any revision of the wage determination prior to the award of the contract or contracts; however, revisions received by the Federal agency later than 10 days before the opening of bids or the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify bidders or offerors of the revision.

(b) *Subsequent to award.* If a required wage determination is not included in the solicitation or contract (either because the notice required by § 12.1005–2 is not filed or is not filed in the time provided by § 12.1005–2(a)), and if the contracting officer receives a wage determination from the Department of Labor within 30 days of the late filing of the notice or the discovery by the Department of Labor of the failure to include a wage determination required by this subpart—

(1) The contracting officer shall attempt to negotiate a bilateral modification to:

(i) Incorporate the Service Contract Act Clause in § 12.1004(a), if not previously included;

(ii) Incorporate the wage determination which shall be effective as of the date of issuance unless otherwise specified; and

(iii) Equitably adjust the contract price to compensate for any increased cost of performance under the contract caused by the wage determination.

(2) If the contracting officer is unable to negotiate a contract modification incorporating the wage determination, he shall document the contract file to show the efforts made.

(3) In the event the contracting officer questions the applicability of the Service Contract Act to the contract, he shall forward the matter for resolution as follows:

For the Army: Assistant Secretary of the Army (I&L), Attention: Labor Advisor.
For the Navy: Chief of Naval Material, Attention: MAT 02L.
For the Air Force: Deputy Chief of Staff Systems and Logistics, Attention: AFSP PDA.
For DSA: Executive Director for Procurement and Production, Attention: DSAH-PL.
For DCA: Defense Communications Agency Headquarters, Attention: Counsel.

If the appropriate foregoing office determines that the Service Contract Act is not applicable to the contract, it shall advise the Department of Labor of the basis for the determination of inapplicability. No further action need be taken on the wage determination by the contracting officer in the absence of a determination by the Secretary of Labor that the contract is subject to the Act.

§ 12.1005–4 Additional classifications (conformable rates).

(a) *Prior to award.* If, as a result of submission of a Notice of Intention (Standard Form 98), and prior to issuance of an invitation for bids or request for proposals, the Department of Labor issues a wage determination containing some, but not all, of the classifications and rates requested, the contracting officer shall delete from the attachment those classifications for which no wage determinations were received. The contracting officer then shall proceed with the procurement (but see paragraph (b) of this section).

(b) *Subsequent to award.* Where a classification was deleted from the attachment to the solicitation because no wage determination for that classification was received from the Department of Labor or where additional classifications not previously contemplated are found necessary after award, the procedure set forth in paragraph (a) of the contract clause set forth in § 12.1004 (a) shall be followed.

§ 12.1005–5 Notice of award.

(a) *Standard Form 99.* Two copies of Standard Form 99 shall be prepared for contracts of $2,500 or more but less than $10,000 containing the clause required by § 12.1004(a), the initial order (if less than $10,000) under an indefinite delivery type contract or basic order agreement containing the clause required by § 12.1004(a), and the initial call under a blanket purchase agreement containing the clause required by § 12.1004(a). Standard Form 99 shall be forwarded to the Department of Labor, Attention: Administrator, Wage and Hour and Public Contracts Divisions, Washington, D.C. 20210. The form shall be completed as follows:

(1) Items 1 through 7 and 12 and 13: Self-explanatory;

(2) Item 8: Enter the notation "Service Contract Act of 1965";

(3) Item 9: Leave blank;

(4) Item 10: (i) Enter the notation "Major Category," and indicate beside this entry the general service area into which the contract falls (e.g., food services, custodial-janitorial service, garbage collection, insect and rodent control, laundry and dry cleaning services), and

(ii) Enter the heading "Detailed Description," and following this entry set forth a detailed description of the services to be performed; and

(5) Item 11: Enter the dollar amount of the contract, or the estimated dollar value with a notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "Indefinte," or "Not to exceed $_____."

Supplies of Standard Form 99 are available in all GSA supply depots under stock number 7540–634–4049.

(b) *DD Form 350.* Awards of service contracts of $10,000 or more and orders of $10,000 or more under indefinite delivery type contracts and basic ordering agreements are reported to the Department of Labor by the Office of the Secretary of Defense from information contained in the Individual Procurement Action Report (DD Form 350). Therefore, the contracting officer need not report such awards directly to the Department of Labor.

§ 12.1005–6 Department of Labor Form SC–1.

The contracting officer shall furnish the contractor with Department of Labor Form SC–1 (combination letter and poster) at the time of contract award and shall ensure that the form is in the possession of the contractor for appropriate posting prior to performance of the contract. The form advises employees of their benefits under the Act and satisfies the notice requirements in paragraph (d) of the contract clause prescribed in § 12.1004(a). Contractors are required to post the form at a prominent and accessible place at the worksite. Supplies of the form may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington, D.C. 20210.

§ 12.1005–7 Inquiries concerning the Act.

Contractors or contractor employees who inquire concerning the Act shall be advised that rulings regarding such matters fall within the jurisdiction of the Department of Labor and shall be given the address of the appropriate Regional Director of the Wage and Hour and Public Contracts Divisions of the Department of Labor (see § 12.607).

§ 12.1005–8 Contract modifications.

(a) *Bilateral contract modifications.* Generally, a bilateral contract modification affecting the scope of the work is regarded as a new contract for purposes of the Act and the regulations thereunder. Therefore, prior to entering into such modification, the contracting officer shall forward Standard Form 98 to the Administrator, in accordance with the procedure set forth in § 12.1005–2(a), except that:

(1) In the "Estimated Solicitation Date" block, enter the date the information is needed; and

(2) In Block 4, enter "Modification of Existing Contract for_____ (Describe type of services) _____Services."

Bilateral contract modifications that are unrelated to the labor requirements of a contract shall not be deemed to create a new contract for purposes of the Act, nor shall insignificant changes related to labor requirements.

(b) *Extension of contract through exercise of option or otherwise.* A new contract shall be deemed entered into for purposes of the Act when the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time rather than being granted extra time to fulfill his original commitment. Prior to extending the term of the contract, the Contracting Officer shall forward Standard Form 98 as provided in § 12.1005–2 (a) in paragraph (a) of this section, inserting appropriate wording in Block 4.

§ 12.1005–9 Withholding of contract payments and contract termination.

(a) *Withholding.* (1) As provided by the Act, any violation of the contract stipulations required under paragraphs (a) and (c) of the contract clause set forth in § 12.1004(a) or under the contract clause set forth in § 12.1004(b) renders the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. Upon the written request of the Department of Labor at a level no lower than a District Director, so much of the accrued payment due on the contract or any other contract between the Government prime contractor and the Federal Government, provided such other contract is not assigned pursuant to 31 U.S.C. 203 or 41 U.S.C. 15, shall be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Administrator, any compensation which the head of Federal agency or the Administrator of the Wage and Hour and Public Contracts Divisions has found to be due pursuant to the Act shall be paid directly from any accrued payments withheld under the Act.

(2) If the accrued payments withheld are insufficient to reimburse all underpaid service employees, the Government may bring an action against the contractor, subcontractor, or any contract sureties to recover the remaining amount of underpayments. Any sums thus recovered shall be held in the deposit fund

and shall be paid, on order of the Secretary of Labor, directly to such underpaid employees. Instances of insufficient funds withheld shall be reported to: The General Accounting Office for possible setoff as may be appropriate; to the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor for any of his purposes; and to the Department of Justice for any other necessary action.

(b) *Termination.* In addition, as provided by the Act, any failure to comply with the requirements of any of the provisions of the contract clauses set forth under § 12.1004 may be grounds for termination, by written notice, of the contractor's right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor with any additional cost.

§ 12.1005–10 Cooperation with the Department of Labor.

The contracting officer shall cooperate with representatives of the Department of Labor in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department of Labor. When requested, agencies shall furnish to the Administrator any available information with respect to contractors, subcontractors, their contracts and the nature of the contract services. Violations apparent to the contracting agency and complaints received shall be promptly referred to the Department of Labor. In no event, however, shall complaints by employees be disclosed to the employer.

§ 12.1005–11 Role of the Comptroller General.

The Act provides that the Comptroller General shall distribute a list to all Federal agencies giving the names of persons of firms which have been found to be in violation of the Act. Unless the Secretary of Labor otherwise recommends, no Government contract shall be awarded to any violator so listed or to any firm, corporation, partnership, or association in which such violator has a substantial interest until three years have elapsed from the date of publication of the list containing the name of the violator.

§ 12.1006 Labor standards enforcement report.

See § 12.107.

PART 15—CONTRACT COST PRINCIPLES AND PROCEDURES

15. The introductory text of § 15.102 is revised; § 15.104(a) is revised; new § 15.108 is added; and §§ 15.205–9, 15.205–23, 15.205–32, 15.205–33, 15.205–41, and 15.205–47(a) are revised, as follows:

§ 15.102 Cost-reimbursement supply and research contracts with concerns other than educational institutions.

This category includes all cost-reimbursement type contracts (§ 3.405 of this chapter) for supplies, services, or experimental, developmental, or research work (other than with educational institutions as to which § 15.103 applies, and other than with State and local governments as to which § 15.108 applies), except that it does not include facilities contracts (see § 15.105) or construction contracts (see § 15.104). The cost principles and procedures set forth in Subpart B of this part shall be incorporated by reference in cost-reimbursement supply and research contracts with other than educational institutions as the basis—

* * * * *

§ 15.104 Construction contracts.

(a) Subpart D of this part contains principles and procedures for the evaluation and determination of costs in connection with contracts and subcontracts for construction, and other than with State and local governments as to which § 15.108 applies. This category includes all contracts for the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property. It also includes contracts for architect-engineer services related to such construction. It does not include contracts for vessels, aircraft, or other kinds of personal property.

* * * * *

§ 15.108 Grants and contracts with State and local governments.

Subpart G of this part provides principles and standards for determining costs applicable to grants and contracts with State and local governments. They are designed to provide the basis for a uniform approach to the problem of determining costs and to promote efficiency and better relationships between grantees and the Government. These cost principles apply to all programs that involve grants and contracts with State and local governments. They do not apply to grants and contracts with:

(a) Publicly financed educational institutions subject to Subpart C of this part; or

(b) Publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Government agencies. Any other exceptions will be approved by the Bureau of the Budget in particular cases when adequate justification is presented.

§ 15.205–9 Depreciation (CWAS–NA).

(a) Depreciation is a charge to current operations which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life has reference to the prospective period of economic usefulness in the particular contractor's operations as distinguished from physical life and shall be evidenced by the actual or estimated retirement and replacement practice of the contractor.

(b) Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable element of contract cost *provided* the contractor is able to demonstrate that such costs are reasonable and properly allocable to the contract. Subject to paragraphs (e) and (f) of this section:

(1) Depreciation will ordinarily be considered reasonable if the contractor follows depreciation policies and procedures which:

(i) Are consistent with the policies and procedures he follows in the same cost center in connection with his business other than Government business;

(ii) Are reflected in his books of accounts and financial statements; and

(iii) Are used by him for Federal income tax purposes, and are acceptable for such purposes;

(2) Where the depreciation reflected on a contractor's books of account and financial statements differs from that used and acceptable for Federal income tax purposes, reimbursement shall be based upon the cost of the asset to the contractor amortized over the estimated useful life of the property using depreciation methods (straight line, sum of the years' digits, etc.) acceptable for income tax purposes. Allowable depreciation shall not exceed the amounts used for book and statement purposes and shall be determined in a manner consistent with the depreciation policies and procedures followed in the same cost center in connection with his business other than Government business.

(3) Depreciation for reimbursement purposes in the case of tax-exempt organizations shall be determined on the basis outlined in subparagraph (2) of this paragraph.

(c) Special considerations are required for assets acquired prior to the effective date of this principle where, on the effective date of this principle, the undepreciated balance of such assets resulting from depreciation policies and procedures used previously for Government contracts and subcontracts is different from the undepreciated balance of such assets on the books and financial statements. Generally, the undepreciated balance for contract cost purposes shall be depreciated over the remaining life using the methods and lives followed for book purposes. The aggregate depreciation on any asset allowable after the effective date of this section shall not exceed the cost basis of the asset less any depreciation allowed or allowable under prior procurement regulations.

(d) Depreciation should usually be allocated to the contract and other work as an indirect cost. The amount of depreciation allowed in any accounting period may, consistent with the basic objectives set forth in paragraph (a) of this section, vary with volume of production or use of multishift operations.

(e) In the case of emergency facilities covered by certificates of necessity, a contractor may elect to use normal depreciation without requesting a determination of "true depreciation" or may elect to use either normal or "true depreciation" after a determination of "true depreciation" has been made by an Emergency Facilities Depreciation Board. The method elected must be followed consistently throughout the life of the emergency facility. When an election is made

to use normal depreciation, the criteria in paragraph (b) of this section shall apply for both the emergency period and the post-emergency period. When an election is made to use "true depreciation", the amount allowable as depreciation—

(1) With respect to the emergency period (5 years), shall be computed in accordance with the determination of the Emergency Facilities Depreciation Board and allocated rateably over the full 5-year emergency period; provided no other allowance is made which would duplicate the factors, such as extraordinary obsolescence, covered by the Board's determination; and

(2) After the end of the emergency period, shall be computed by distributing the remaining undepreciated portion of the cost of the emergency facility over the balance of its useful life provided the remaining undepreciated portion of such cost shall not include any amount of unrecovered "true depreciation."

(f) No depreciation, rental, or use charge shall be allowed on property acquired at no cost from the Government by the contractor or by any division, subsidiary or affiliate of the contractor under a common control.

(g) The depreciation on any item which meets the criteria for allownace at a "price" in accordance with § 15.205–22 (e) may be based on such price, provided the same depreciation policies and procedures are used for costing purposes for all business of the using division, subsidiary, or organization under common control.

(h) No depreciation or rental shall be allowed on property fully depreciated by the contractor or by any division, subsidiary, or affiliate of the contractor under a common control; however, a reasonable charge for the use of fully depreciated property may be agreed upon and allowed (but see § 15.107). In determining this charge, consideration should be given to cost, total estimated useful life at time of negotiation, effect of any increased maintenance charges or decreased efficiency due to age and the amount of depreciation, if any, previously charged to Government contracts or subcontracts.

§ 15.205–23 Organization costs (CWAS–NA).

Expenditures in connection with (a) planning or executing the organization or reorganization in the corporate structure of a business, including mergers and acquisitions, or (b) raising capital, are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counsellors, whether or not employees of the contractor.

§ 15.205–32 Gains and losses on disposition of depreciable property or other capital assets (CWAS–NA).

(a) Gains and losses from the sale, retirement or other disposition (but see § 15.205–16) of depreciable property, for purposes of computing contract costs, shall be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to such assets was included (but see paragraph (e) of this section).

(b) Two methods of computing gains and losses are provided in paragraphs (c) and (d) of this section. Contractors have the option to use either of the methods except that once the method in paragraph (d) of this section is elected for use, that method shall be used thereafter.

(c) This paragraph provides for a reasonably precise computation of gains and losses and in certain situations may yield more equitable results than paragraph (d) of this section:

(1) The gain on depreciable personal property shall be limited to the total depreciation or amortization charges included in the cost grouping(s) during those years in which Government contracts participated in such charges.

(2) The gain on depreciable real property held for less than 10 years shall be included depending upon the length of time the property was held. The amount of the gain to be included is the applicable percentage of the lesser of (i) the total depreciation charges included in the cost grouping(s) during those years in which Government contracts participated in such charges which are in excess of straight line depreciation, or (ii) the excess of the amount realized over the cost of the property less the total depreciation charges included in the cost group(s) during those years in which Government contracts participated in such charges. The applicable percentage for property held 20 months or less shall be 100 percent; for property held more than 20 months the applicable percentage shall be 100 percent minus 1 percent for each full month the property was held over 20 months.

(3) The loss to be included shall be the difference between the amount realized for the asset and its undepreciated basis resulting from the depreciation method used for Government contract cost purposes.

(d) This paragraph facilitates the computations of gains and losses by recognizing certain data used by the contractor and acceptable for Federal Income Tax purposes.

(1) The gains on depreciable personal and real property shall be limited to the amount representing ordinary income recognized for Federal Income Tax purposes. (See sections 1238, 1254, and 1250 of the 1954 Internal Revenue Code, as amended.)

(2) Subject to § 15.205–16, the losses on depreciable personal and real property shall consist of the gross capital losses recognized for Federal Income Tax purposes. (See section 1231 of the 1954 Internal Revenue Code, as amended.)

(e) Gains and losses on the disposition of depreciable property shall not be recognized as a separate charge or credit where:

(1) Such gains and losses are processed through the depreciation reserve account and reflected in the depreciation allowable under § 15.205–9, or

(2) The property is given in exchange as part of the purchase price of a similar item and the gain or loss is taken into consideration in the depreciation cost basis of the new item.

(f) Gains and losses arising from mass or extraordinary sales, retirements or other dispositions shall be considered on a case-by-case basis.

(g) Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property, shall be excluded in computing contract costs.

§ 15.205–33 Recruitment costs (CWAS).

(a) Subject to paragraph (b), (c), and (d) of this section: *And provided*, That the size of the staff recruited and maintained is in keeping with workload requirements, costs of help-wanted advertising, operating costs of an employment office necessary to secure and maintain an adequate labor force, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocations costs incurred incident to recruitment of new employees are allowable to the extent that such costs are incurred pursuant to a well managed recruitment program. Where the contractor uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

(b) Cost of help-wanted advertising is unallowable if the advertising:

(1) Is for other than for personnel required for the performance of obligations under a defense contract (see § 15.205–1);

(2) Does not describe specific positions or classes of positions;

(3) Is excessive in relation to the number and importance of the positions, or in relation to the practices of the industry;

(4) Includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities;

(5) Is designed to "pirate" personnel from another defense contractor; or

(6) Includes color (in publications).

(c) Costs of excessive salaries, fringe benefits and special emoluments that have been offered to prospective employees, designed to "pirate" personnel from another defense contractor, or in excess of the standard practices in the industry, are unallowable.

(d) Relocation costs incurred incident to recruitment of new employees are subject to § 15.205–25. Where such costs have been allowed either as an allocable direct or indirect cost and the newly hired employee resigns for reasons within his control within 12 months after hire, the contractor shall be required to refund or credit such relocation costs to the Government.

§ 15.205–41 Taxes.

(a) (CWAS) Taxes are charges levied by Federal, State, or local governments. They do not include fines and penalties except as otherwise provided herein. In general, taxes (including State and local income taxes, except as provided in paragraph (b) of this section) which the contractor is required to pay and which are paid or accrued in accordance with generally accepted accounting principles are allowable, except for—

(1) Federal income and excess profits taxes; (CWAS–NA)

(2) Taxes in connection with financing, refinancing, or refunding operations (see § 15.205–17); (CWAS–NA)

(3) Taxes from which exemptions are available to the contractor directly or available to the contractor based on an exemption afforded the Government except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government; (CWAS–NA)

(4) Special assessments on land which represent capital improvements; (CWAS–NA) and

(5) Taxes on any category of property which is used solely in connection with work other than on Government contracts. (Taxes on property used solely in connection with either non-Government or Government work should be considered directly applicable the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained; e.g., taxes on contractor-owned work-in-process which is used solely in connection with non-Government work should be allocated to such work; taxes on contractor owned work-in-process inventory (and Government-owned work-in-progress inventory when taxed), used solely in connection with Government work should be charged to such work.) (CWAS).

(b) (CWAS–NA) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the books of account and financial statements are unallowable.

(c) (CWAS) Taxes otherwise allowable under paragraph (a) of this section, but upon which a claim of illegality or erroneous assessment exists, are allowable: *Provided*, That the contractor prior to payment of such taxes—

(1) Promptly requests instructions from the contracting officer concerning such taxes; and

(2) Takes all action directed by the contracting officer arising out of subparagraph (1) of this paragraph or an independent decision of the Government as to the existence of a claim of illegality or erroneous assessment, including coopertion with and for the benefit of the ment to (i) determine the legality of such assessment, or, (ii) secure a refund of such taxes.

Reasonable costs of any such action undertaken by the contractor at the direction or with the concurrence of the contracting officer are allowable. Interest and penalties incurred by a contractor by reason of the nonpayment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to assure timely direction after prompt request therefor, are also available.

(d) (CWAS) Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government, provided any interest actually paid or credited to a contractor incident to a refund tax, interest or penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest or penalties.

§ 15.205–47 Economic planning costs.

(a) (CWAS) This category includes costs of generalized long-range management planning which is concerned with the future overall development of the contractor's business and which may take into account the eventual possibility of economic dislocations or fundamental alterations in those markets in which the contractor currently does business. Economic planning costs do not include organization or reorganization costs covered by § 15.205–23.

* * * * *

16. In § 15.205–48, subparagraphs (3) and (4) of paragraph (b) are revised and new subparagraph (5) is added, and subparagraph (2) of paragraph (c) is revised; and a new Subpart G is added, as follows:

§ 15.205–48 Automatic data processing equipment (ADPE) leasing costs (CWAS).

* * * * *

(b) * * *

(3) Rental costs under a sale and leaseback arrangement shall be allowable only up to the amount the contractor would be allowed had he retained title to the ADPE, except that rental costs may be allowed in accordance with subparagraphs (1) and (2) of this paragraph (i) where the sale and leaseback immediately followed purchase of the ADPE, or (ii) where the sale and leaseback is otherwise in the best interest of the Government.

(4) Rental costs of ADPE which is leased from any division, subsidiary, or organization under a common control shall be limited to the cost of ownership (excluding interest or other unallowable costs pursuant to this subpart) except as provided in subparagraph (5) of this paragraph.

(5) Rental costs of ADPE which is leased from any division, subsidiary or organization under a common control which has an established practice of leasing the same or similar equipment to unaffiliated lessees shall be allowed in accordance with subparagraphs (1) and (2) of this paragraph, except the purchase price for the purposes of subparagraph (1) of this paragraph and costs of ownership for the purpose of paragraph (c)(2) of this section shall be determined in accordance with § 15.205–22(e).

(c) * * *

(2) In estimating the least cost to the Government for such useful life, the cumulative costs that would be allowed if the contractor owned the property should be compared with cumulative costs that would be allowed under any of the various types of leasing arrangements available. For the purposes of this comparison, the costs of ADPE exclude interest or other unallowable costs pursuant to this subpart; they include but are not limited to the costs of operation, maintenance, insurance, depreciation, and rental, and the cost of machine services, as applicable.

* * * * *

Subpart G—Principles for Determining Costs Applicable to Grants and Contracts With State and Local Governments

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AUTHORITY: The provisions of this Subpart G issued under secs. 2202, 2301–2314, 70A Stat. 120, 127–133; 10 U.S.C. 2202, 2301–2314.

§ 15.701 Purpose and scope.

§ 15.701–1 Objectives.

This subpart sets forth principles for determining the allowable costs of programs administered by State and local governments under grants from and contracts with the Federal Government. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of a particular grant. They are designed to provide that federally assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

§ 15.701–2 Policy guides.

The application of these principles is based on the fundamental premises that:

(a) State and local governments are responsible for the efficient and effective administration of grant and contract programs through the application of sound management practices.

(b) The grantee or contractor assumes the responsibility for seeing that federally assisted program funds have been expended and accounted for consistent with underlying agreements and program objectives.

(c) Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration.

§ 15.701–3 Application.

These principles will be applied by all Federal agencies in determining costs incurred by State and local governments under Federal grants and cost reimbursement type contracts (including subgrants and subcontracts) except those with (a) publicly financed educational institutions subject to Subpart C of this part, and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

§ 15.702 Definitions.

§ 15.702–1 Approval or authorization of the grantor Federal agency.

This term means documentation evidencing consent prior to incurring specific cost.

§ 15.702–2 Cost allocation plan.

This term means the documentation identifying, accumulating, and distributing allowable costs under grants and contracts together with the allocation methods used.

§ 15.702–3 Cost.

Cost, as used herein, means cost as determined on a cash, accrual, or other basis acceptable to the Federal grantor agency as a discharge of the grantee's accountability for Federal funds.

§ 15.702–4 Cost objective.

This term means a pool, center, or area established for the accumulation of cost. Such areas include organizational units, functions, objects or items of expense, as well as ultimate cost objectives including specific grants, projects, contracts, and other activities.

§ 15.702–5 Federal agency.

This term means any department, agency, commission, or instrumentality in the executive branch of the Federal Government which makes grants to or contracts with State or local governments.

§ 15.702–6 Grant.

This term means an agreement between the Federal Government and a State or local government whereby the Federal Government provides funds or aid in kind to carry out specified programs, services, or activities. The principles and policies stated in this subpart as applicable to grants in general also apply to any federally sponsored cost reimbursement type of agreement performed by a State or local government, including contracts, subcontracts and subgrants.

§ 15.702–7 Grant program.

This term means those activities and operations of the grantee which are necessary to carry out the purposes of the grant, including any portion of the program financed by the grantee.

§ 15.702–8 Grantee.

This term means the department or agency of State or local government which is responsible for administration of the grant.

§ 15.702–9 Local unit.

This term means any political subdivision of government below the State level.

§ 15.702–10 Other State or local agencies.

This term means departments or agencies of the State or local unit which provide goods, facilities, and services to a grantee.

§ 15.702–11 Services.

This term, as used herein, means goods and facilities, as well as services.

§ 15.702–12 Supporting services.

This term means auxiliary functions necessary to sustain the direct effort involved in administering a grant program or an activity providing services to the grant program. These services may be centralized in the grantee department or in some other agency, and include procurement, payroll, personnel functions, maintenance and operation of space, data processing, accounting, budgeting, auditing, mail and messenger service, and the like.

§ 15.703 Basic guidelines.

§ 15.703–1 Factors affecting allowability of costs.

To be allowable under a grant program, costs must meet the following general criteria:

(a) Be necessary and reasonable for proper and efficient administration of the grant program, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State or local governments.

(b) Be authorized or not prohibited under State or local laws or regulations.

(c) Conform to any limitations or exclusions set forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items.

(d) Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the grantee is a part.

(e) Be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances.

(f) Not be allocable to or included as a cost of any other federally financed program in either the current or a prior period.

(g) Be net of all applicable credits.

§ 15.703–2 Allocable costs.

(a) A cost is allocable to a particular cost objective to the extent of benefits received by such objective.

(b) Any cost allocable to a particular grant or cost objective under the principles provided for in this subpart may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

(c) Where an allocation of joint cost will ultimately result in charges to a grant program, an allocation plan will be required as prescribed in § 15.709.

§ 15.703–3 Applicable credits.

(a) Applicable credits refer to those receipts or reduction of expenditure-type transactions which offset or reduce expense items allocable to grants as direct or indirect costs. Examples of such transactions are: Purchase discounts, rebates or allowances, recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges.

(b) Applicable credits may also arise when Federal funds are received or are available from sources other than the grant program involved to finance operations or capital items of the grantee. This includes costs arising from the use or depreciation of items donated or financed by the Federal Government to fulfill matching requirements under another grant program. These types of credits should likewise be used to reduce related expenditures in determining the rates or amounts applicable to a given grant.

§ 15.704 Composition of cost.

§ 15.704–1 Total cost.

The total cost of a grant program is comprised of the allowable direct cost incident to its performance, plus its allocable portion of allowable indirect costs, less applicable credits.

§ 15.704–2 Classification of costs.

There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the grant or other ultimate cost objective. It is essential therefore that each item of cost be treated consistently either as a direct or an indirect cost. Specific guides for determining direct and indirect costs allocable under grant programs are provided in §§ 15.705 through 15.709.

§ 15.705 Direct costs.

§ 15.705–1 General.

Direct costs are those that can be identified specifically with a particular cost objective. These costs may be charged directly to grants, contracts, or to other programs against which costs are finally lodged. Direct costs may also be charged to cost objectives used for the accumulation of costs pending distribution in due course to grants and other ultimate cost objectives.

§ 15.705–2 Application.

Typical direct costs chargeable to grant programs are:

(a) Compensation of employees for the time and effort devoted specifically to the execution of grant programs.

(b) Cost of materials acquired, consumed, or expended specifically for the purpose of the grant.

(c) Equipment and other approved capital expenditures.

(d) Other items of expense incurred specifically to carry out the grant agreement.

(e) Services furnished specifically for the grant program by other agencies, provided such charges are consistent with criteria outlined in § 15.707 of these principles.

§ 15.706 Indirect costs.

§ 15.706–1 General.

Indirect costs are those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, without effort disproportionate to the results achieved. The term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other department in supplying goods, services, and facilities, to the grantee department. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect cost within a grantee department or in other agencies providing services to a grantee department. Indirect cost pools should be distributed to benefiting cost objectives on bases which will produce an equitable result in consideration of relative benefits derived.

§ 15.706–2 Grantee departmental indirect costs.

All grantee departmental indirect costs, including the various levels of supervision, are eligible for allocation to grant programs provided they meet the conditions set forth in this subpart. In lieu of determining the actual amount of grantee departmental indirect costs allocable to a grant program, the following methods may be used:

(a) *Predetermined fixed rates for indirect costs.* A predetermined fixed rate for computing indirect costs applicable to a grant may be negotiated annually in situations where the cost experience and other pertinent facts available are deemed sufficient to enable the contracting parties to reach an informed judgment (1) as to the probable level of indirect costs in the grantee department during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect cost.

(b) *Negotiated lump sum for overhead.* A negotiated fixed amount in lieu of indirect costs may be appropriate under circumstances where the benefits derived from a grantee department's indirect services cannot be readily determined as in the case of small, self-contained or isolated activity. When this method is used, a determination should be made that the amount negotiated will be approximately the same as the actual indirect cost that may be incurred. Such amounts negotiated in lieu of indirect costs will be treated as an offset to total indirect expenses of the grantee department before allocation to remaining activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

§ 15.706–3 Limitation on indirect costs.

(a) Federal grants may be subject to laws that limit the amount of indirect costs that may be allowed. Agencies that sponsor grants of this type will establish procedures which will assure that the amount actually allowed for indirect costs under each such grant does not exceed the maximum allowable under the statutory limitation or the amount otherwise allowable under this subpart, whichever is the smaller.

(b) When the amount allowable under a statutory limitation is less than the amount otherwise allocable as indirect costs under this subpart, the amount not recoverable as indirect costs under a grant may not be shifted to another federally sponsored grant program or contract.

§ 15.707 Cost incurred by agencies other that the grantee.

§ 15.707–1 General.

The cost of service provided by other agencies may only include allowable direct costs of the service plus a pro rata share of allowable supporting costs (§ 15.702–12) and supervision directly required in performing the service, but not supervision of a general nature such as that provided by the head of a department and his staff assistants not directly involved in operations. However, supervision by the head of a department or agency whose sole functions is providing the service furnished would be an eligible cost. Supporting costs include those furnished by other units of the supplying department or by other agencies.

§ 15.707–2 Alternative methods of determining indirect cost.

In lieu of determining actual indirect cost related to a particular service furnished by another agency, either of the following alternative methods may be used provided only one method is used for a specific service during the fiscal year involved.

(a) *Standard indirect rate.* An amount equal to 10 percent of direct labor cost in providing the service performed by another State agency (excluding overtime, shift, or holiday premiums and fringe benefits) may be allowed in lieu of actual allowable indirect cost for that service.

(b) *Predetermined fixed rate.* A predetermined fixed rate for indirect cost of the unit or activity providing service may be negotiated as set forth in § 15.706–2(a).

§ 15.708 Cost incurred by grantee department for others.

§ 15.708–1 General.

The principles provided in § 15.707 will also be used in determining the cost of services provided by the grantee department to another agency.

§ 15.709 Cost allocation plan.

§ 15.709–1 General.

A plan for allocation of costs will be required to support the distribution of any joint costs related to the grant program. All costs included in the plan will be supported by formal accounting records which will substantiate the propriety of eventual charges.

§ 15.709–2 Requirements.

The allocation plan of the grantee department should cover all joint costs of the department as well as costs to be allocated under plans of other agencies or organizational units which are to be included in the costs of federally sponsored programs. The cost allocation plans of all the agencies rendering services to the grantee department, to the extent feasible, should be presented in a single document. The allocation plan should contain, but not necessarily be limited to, the following:

(a) The nature and extent of services provided and their relevance to the federally sponsored programs.

(b) The items of expense to be included.

(c) The methods to be used in distributing cost.

§ 15.709–3 Approval of cost allocation plan.

The allocation plan for a given cost area or objective will serve all the Federal agencies involved.

(a) At the State level, the Department of Health, Education, and Welfare will be responsible for the negotiation and approval of the cost allocation plans for central support services to grant programs. The approved plans will be accepted by other Federal agencies, unless an agency determines that the approved plan would result in significant inequitable or improper charges to programs for which it is responsible. The Department of Health, Education, and Welfare will collaborate with the other Federal agencies concerned in the development of guidance material concerning the cost allocation plan and in the negotiation and approval of the plan. It will also collaborate with the States concerning procedures for the administration of the cost allocation plan. The Department of Health, Education, and Welfare will be responsible for the audit of costs resulting from the cost allocation plan, the results of which will be accepted by other Federal agencies.

(b) At the grantee department level in a State, and for local governments, Federal agencies will work towards the objective of designating a single Federal agency, the one with predominant interest, which will have responsibility similar to that set forth in paragraph (a) of this section for the negotiation and approval of the cost allocation plan and for the audit of costs.

§ 15.710 Standards for selected items of cost.

Sections 15.711, 15.712, and 15.713 provide standards for determining the allowability of elected items of cost. These standards will apply irrespective of whether a particular item of cost is treated as direct or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable, rather determination of allowability in each case should be based on the treatment of standards provided for similar or related items of cost. The allowability of the selected items of cost is subject to the general policies and principles stated in §§ 15.701 through 15.709.

§ 15.711 Allowable costs.

§ 15.711–1 Accounting.

The cost of establishing and maintaining accounting and other information systems required for the management of grant programs is allowable. This includes cost incurred by central service agencies for these purposes. The cost of maintaining central accounting records required for overall State or local government purposes, such as appropriation and fund accounts by the Treasurer, Comptroller, or similar officials, is considered to be a general expense of Government and is not allowable.

§ 15.711–2 Advertising.

Advertising media includes newspapers, magazines, radio and television programs, direct mail, trade papers, and the like. The advertising costs allowable are those which are solely for:

(a) Recruitment of personnel required for the grant program.

(b) Solicitation of bids for the procurement of goods and services required.

(c) Disposal of scrap or surplus materials acquired in the performance of the grant agreement.

(d) Other purposes specifically provided for in the grant agreement.

§ 15.711–3 Advisory councils.

Costs incurred by State advisory councils or committees established pursuant to Federal requirements to carry out grant programs are allowable. The cost of like organizations is allowable when provided for in the grant agreement.

§ 15.711–4 Audit service.

The costs of audit necessary for the administration and management of functions related to grant programs is allowable.

§ 15.711–5 Bonding.

Costs of premiums on bonds covering employees who handle grantee agency funds are allowable.

§ 15.711–6 Budgeting.

Costs incurred for the development, preparation, presentation, and execution of budgets are allowable. Costs for services of a central budget office are generally not allowable since these are costs of general government. However, where employees of the central budget office actively participate in the grantee agency's budget process, the cost of identifiable services is allowable.

§ 15.711–7 Building lease management.

The administrative cost for lease management which includes review of lease proposals, maintenance of a list of available property for lease, and related activities is allowable.

§ 15.711–8 Central stores.

The cost of maintaining and operating a central stores organization for supplies, equipment, and materials used either directly or indirectly for grant programs is allowable.

§ 15.711–9 Communications.

Communication costs incurred for telephone calls or service, telegraph, teletype service, wide area telephone service (WATS), centrex, telpak (tie lines), postage, messenger service and similar expenses are allowable.

§ 15.711–10 Compensation for personal services.

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under the grant agreement, including but not necessarily limited to wages, salaries, and supplementary compensation and benefits (§ 15.711–13). The costs of such compensation are allowable to the extent that total compensation for individual employees: (1) Is reasonable for the services rendered, (2) follows an appointment made in accordance with State or local government laws and rules and which meets Federal merit system or other requirements, where applicable; and (3) is determined and supported as provided in paragraph (b) of this section. Compensation for employees engaged in federally assisted activities will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the State or local government. In cases where the kinds of employees required for the federally assisted activities are not found in the other activities of the State or local government, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

(b) *Payroll and distribution of time.* Amounts charged to grant programs for personal services, regardless of whether treated as direct or indirect costs, will be based on payrolls documented and approved in accordance with generally accepted practice of the State or local agency. Payrolls must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

§ 15.711–11 Depreciation and use allowances.

(a) Grantees may be compensated for the use of buildings, capital improvements, and equipment through use allowances or depreciation. Use allowances are the means of providing compensation in lieu of depreciation or other equivalent costs. However, a combination of the two methods may not be used in connection with a single class of fixed assets.

(b) The computation of depreciation or use allowance will be based on acquisition cost. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used in the computation. The computation will exclude the cost or any portion of the cost of buildings and equipment donated or borne directly or indirectly by the Federal Government through charges to Federal grant programs or otherwise, irrespective of where title was originally vested or where it presently resides. In addition, the computation will also exclude the cost of land. Depreciation or a use allowance on idle or excess facilities is not allowable, except when specifically authorized by the grantor Federal agency.

(c) Where the depreciation method is followed, adequate property records must be maintained, and any generally accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific asset or class of assets for all affected federally sponsored programs and must result in equitable charges considering the extent of the use of the assets for the benefit of such programs.

(d) In lieu of depreciation, a use allowance for buildings and improvements may be computed at an annual rate not exceeding 2 percent of acquisition cost. The use allowance for equipment (excluding items properly capitalized as building cost) will be computed at an annual rate not exceeding 6⅔ percent of acquisition cost of usable equipment.

(e) No depreciation or use charge may be allowed on any assets that would be considered as fully depreciated: *Provided, however,* That reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

§ 15.711–12 Disbursing service.

The cost of disbursing grant program funds by the Treasurer or other designated officer is allowable. Disbursing services cover the processing of checks or warrants, from preparation to redemption, including the necessary records of accountability and reconciliation of such records with related cash accounts.

§ 15.711–13 Employee fringe benefits.

Costs identified under pargaraphs (a) and (b) of this section are allowable to the extent that total compensation for employees is reasonable as defined in § 15.711–10.

(a) Employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, court leave, military leave, and the like, if they are: (1) Provided pursuant to an approved leave system, and (2) the cost thereof is equitably allocated to all related activities, including grant programs.

(b) Employee benefits in the form of employer's contribution or expenses for social security, employees' life and health insurance plans, unemployment insurance coverage, workmen's compensation insurance, pension plans, severance pay, and the like, provided such benefits are granted under approved plans and are distributed equitably to grant programs and to other activities.

§ 15.711–14 Employee morale, health and welfare costs.

The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employees' counseling services, employee information publications, and any related expenses incurred in accordance with general State or local policy, are allowable. Income generated from any of these activities will be offset against expenses.

§ 15.711–15 Exhibits.

Costs of exhibits relating specifically to the grant programs are allowable.

§ 15.711–16 Legal expenses.

The cost of legal expenses required in the administration of grant programs is allowable. Legal services furnished by the chief legal officer of a State or local government or his staff solely for the purpose of discharging his general responsibilities as legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government are unallowable.

§ 15.711–17 Maintenance and repair.

Costs incurred for necessary maintenance, repair, or upkeep of property which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable.

§ 15.711–18 Materials and supplies.

The cost of materials and supplies necessary to carry out the grant programs is allowable. Purchases made specifically for the grant program should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the grantee. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing consistently applied. Incoming transportation charges are a proper part of material cost.

§ 15.711–19 Memberships, subscriptions and professional activities.

(a) *Memberships.* The cost of membership in civic, business, technical and professional organizations is allowable provided: (1) The benefit from the membership is related to the grant program, (2) the expenditure is for agency membership, (3) the cost of the membership is reasonably related to the value of the services or benefits received, and (4) the expenditure is not for membership in an organization which devotes a substantial part of its activities to influencing legislation.

(b) *Reference material.* The cost of books and subscriptions to civic, business, professional, and technical periodicals is allowable when related to the grant program.

(c) *Meetings and conferences.* Costs are allowable when the primary purpose of the meeting is the dissemination of technical information relating to the grant program and they are consistent with regular practices followed for other activities of the grantee.

§ 15.711–20 Motor pools.

The costs of a service organization which provides automobiles to user grantee agencies at a mileage or fixed rate and/or provides vehicle maintenance, inspection and repair services are allowable.

§ 15.711–21 Payroll preparation.

The cost of preparing payrolls and maintaining necessary related wage records is allowable.

§ 15.711–22 Personnel administration.

Costs for the recruitment, examination, certification, classification, training, establishment of pay standards, and relatde activities for grant programs are allowable.

§ 15.711–23 Printing and reproduction.

Cost for printing and reproduction services necessary for grant administration, including but not limited to forms, reports, manuals, and informational literature, are allowable. Publication costs of reports or other media relating to grant program accomplishments or results are allowable when provided for in the grant agreement.

§ 15.711–24 Procurement service.

The cost of procurement service, including solicitation of bids, preparation and award of contracts, and all phases of contract administration in providing goods, facilities and services for grant programs, is allowable.

§ 15.711–25 Taxes.

In general, taxes or payments in lieu of taxes which the grantee agency is legally required to pay are allowable.

§ 15.711–26 Training and education.

The cost of in-service training, customarily provided for employee development which directly or indirectly benefits grant programs is allowable. Out-of-service training involving extended

periods of time is allowable only when specifically authorized by the grantor agency.

§ 15.711–27 Transportation.

Costs incurred for freight, cartage, express, postage, and other transportation costs relating either to goods purchased, delivered, or moved from one location to another are allowable.

§ 15.711–28 Travel.

Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business incident to a grant program. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in nonfederally sponsored activities. The difference in cost between first-class air accommodations and less-than-first-class air accommodations is unallowable except when less-than-first-class air accommodations are not reasonably available.

§ 15.712 Costs allowable with approval of grantor agency.

§ 15.712–1 Automatic data processing.

The cost of data processing services to grant programs is allowable. This cost may include rental of equipment or depreciation on grantee-owned equipment. The acquisition of equipment, whether by outright purchase, rental-purchase agreement or other method of purchase, is allowable only when specific prior approval of the grantor Federal agency is provided under the selected item for capital expenditures.

§ 15.712–2 Building space and related facilities.

The cost of space in privately or publicly owned buildings used for the benefit of the grant program is allowable subject to the conditions stated below. The total cost of space, whether in a privately or publicly owned building, may not exceed the rental cost of comparable space and facilities in a privately owned building in the same locality. The cost of space procured for grant program usage may not be charged to the program for periods of nonoccupancy, without authorization of the grantor Federal agency.

(a) *Rental cost.* The rental cost of space in a privately owned building is allowable.

(b) *Maintenance and operation.* The cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, normal repairs and alterations and the like, are allowable to the extent they are not otherwise included in rental or other charges for space.

(c) *Rearrangements and alterations.* Cost incurred for rearrangement and alteration of facilities required specifically for the grant program or those that materially increase the value of useful life of the facilities (§ 15.712–3) are allowable when specifically approved by the grantor agency.

(d) *Depreciation and use allowances on publicly owned buildings.* These costs are allowable as provided in § 15.711–11.

(e) *Occupancy of space under rental-purchase or a lease with option-to-purchase agreement.* The cost of space procured under such arrangements is allowable when specifically approved by the Federal grantor agency.

§ 15.712–3 Capital expenditures.

The cost of facilities, equipment, other capital assets, and repairs which materially increase the value or useful life of capital assets is allowable when such procurement is specifically approved by the Federal grantor agency. When assets acquired with Federal grant funds are (a) sold, (b) no longer available for use in a federally sponsored program, or (c) used for purposes not authorized by the grantor agency, the Federal grantor agency's equity in the asset will be refunded in the same proportion as Federal participation in its cost. In case any assets are traded on new items, only the net cost of the newly acquired assets is allowable.

§ 15.712–4 Insurance and indemnification.

(a) Costs of insurance required, or approved and maintained pursuant to the grant agreement, are allowable.

(b) Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage will be in accordance with general State or local government policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the grantor agency has specifically required or approved such costs.

(c) Contributions to a reserve for a self-insurance program approved by the Federal grantor agency are allowable to the extent that the type of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks.

(d) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the grant agreement. However, costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools which occur in the ordinary course of operations, are allowable.

(e) Indemnification includes securing the grantee against liabilities to third persons and other losses not compensated by insurance or otherwise. The Government is obligated to indemnify the grantee only to the extent expressly provided for in the grant agreement, except as provided in paragraph (d) of this section.

§ 15.712–5 Management studies.

The cost of management studies to improve the effectiveness and efficiency of grant management for on-going programs is allowable except that the cost of studies performed by agencies other than the grantee department or outside consultants is allowable only when authorized by the Federal grantor agency.

§ 15.712–6 Preagreement costs.

Costs incurred prior to the effective date of the grant or contract, whether or not they would have been allowable thereunder if incurred after such date, are allowable when specifically provided for in the grant agreement.

§ 15.712–7 Professional services.

Cost of professional services rendered by individuals or organizations not a part of the grantee department is allowable subject to such prior authorization as may be required by the Federal grantor agency.

§ 15.712–8 Proposal costs.

Costs of preparing proposals on potential Federal Government grant agreements are allowable when specifically provided for in the grant agreement.

§ 15.713 Unallowable costs.

§ 15.713–1 Bad debts.

Any losses arising from uncollectible accounts and other claims, and related costs, are unallowable.

§ 15.713–2 Contingencies.

Contributions to a contingency reserve or any similar provision for unforseen events are unallowable.

§ 15.713–3 Contributions and donations.

Unallowable.

§ 15.713–4 Entertainment.

Costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodgings, rentals, transportation, and gratuities, are unallowable.

§ 15.713–5 Fines and penalties.

Costs resulting from violations of, or failure to comply with Federal, State, and local laws and regulations are unallowable.

§ 15.713–6 Governor's expenses.

The salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision are considered a cost of general State or local government and are unallowable.

§ 15.713–7 Interest and other financial costs.

Interest on borrowings (however represented), bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in connection

therewith, are unallowable except when authorized by Federal legislation.

§ 15.713–8 Legislative expenses.

Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction, are unallowable.

§ 15.713–9 Underrecovery of costs under grant agreements.

Any excess of cost over the Federal contribution under one grant agreement is unallowable under other grant agreements.

PART 18—PROCUREMENT OF CONSTRUCTION AND CONTRACTING FOR ARCHITECT-ENGINEER SERVICES

17. Section 18.705 is revised to read as follows:

§ 18.705 Labor standards enforcement report.

See § 12.107 of this chapter.

PART 19—TRANSPORTATION

18. Section 19.402(a) is revised to read as follows:

§ 19.402 Volume movements within the continental United States.

(a) Volume movement means the aggregate of one or more freight shipments to move during the contract period, amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, from one point of origin for delivery to one destination point or area.

* * * * *

PART 24—DISPOSITION OF PERSONAL PROPERTY IN THE POSSESSION OF CONTRACTORS

19. Section 24.302–5 is revised to read as follows:

§ 24.302–5 Instructions for assigning plant clearance case number.

(a) The plant case number shall consist of a three-part, 11-digit number constructed as follows:

(1) The first part shall be a six digit (Alphanumeric combination), as shown in the DoD Activity Address Directory (see DSAH 4140.1, AR 725–50–1, MCOP 4420.2C, CG 364, AFM 75–6) assigned to the contract administering activity.

(2) The second part, digits 7 through 10 shall consist of the following:

7th through 9th digits.	Consecutively numbered serial number, locally assigned, using Alpha and numeric characters commencing with 001 at the beginning of each calendar year, and continuing as necessary through ZZZ.
10th digit	The last digit of the calendar year.

(3) The third part, 11th digit, will be a single Alpha code to identify the Military Department:

C—Army.
Q—Navy.
E—Air Force.
L—Marine Corps.
U—Defense Supply Agency.

(b) Combined, the plant clearance case number assigned by the plant clearance officer will be in accordance with the following examples:

"S2302A–0010–Q" and "S2302A–ZZZ2–Q"

(1) "S2302A" indicates that the Detroit Defense Contract Administration Services Region is designated as the office to which the plant clearance officer is assigned.

(2) "0010" indicates that this is the first case established by the Detroit Defense Contract Administration Services Region in calendar year 1970 and "ZZZ2" the 8199th case in calendar year 1972.

(3) "Q" indicates that the Navy is the owning military service.

(c) The plant clearance case number assigned will be recorded on DD Form 1635, Plant Clearance Case Register, which will provide a permanent numerical listing of plant clearance cases.

PART 30—APPENDIXES TO ARMED SERVICES PROCUREMENT REGULATIONS

20. In § 30.6, item H–204(i) is revised; in item H–302.2, so much of the table as pertains to "Block 16" is revised; in item H–303.1(b), so much of the table as pertains to "51—Signal" is revised; new item H–308 is added; items H–404.2 and H–405 are revised; in item H–602.2, a new entry in the table following "AF2 Followup" is made; item H–603.5(iv) is revised; in item H–604.3(d), "Code L", in the table, is revised and new "Code U" is added; item H–605.2 (a)(iv) and (b)(iv) are revised; items H–607.2(a), H–607.3, and H–610 are revised; in item H–611, so much of the table as pertains to "Estimated availability" is revised, as follows:

§ 30.6 Appendix H—Manual for Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors.

H–204 *Time-frames.* Time-frames have been established for furnishing supply status and for delivery of material as follows:

(i) Supply status—

Priority designator	*Dispatched after receipt of requisition or followup*
1 through 08	Within 2 days.
09 through 20	Within 5 days.

* * * * *

H–302.2 *Use of DD Form 1348 as a requisition.* * * *

Item	*Explanation and instructions*
* * * * * * *	
Block 16—Signal	Enter one of the following codes which indicate the "ship to" or "bill to" activity when applicable:
	Ship to requisitioner — *Bill to*
	A — Blocks 9 and 10.
	B — Blocks 14 and 15.
	C — Bill to activity designated by block 17. However, if the third digit of the document identifier is "5" or "E," the Remarks block may indicate other billing information. See H–606.
	D — No billing required (free issue). Not to be used on requisitions submitted to General Services Administration.
	Ship to supplementary address — *Bill to*
	J — Blocks 9 and 10.
	K — Blocks 14 and 15.
	L — Bill to activity designated by block 17. However, if the third digit of the document identifier is "5" or "E," the Remarks block may indicate other billing information. See H–606.
	M — No billing required (free issue). Not to be used on requisitions submitted to General Services Administration.
	See H–605.

NOTE: Codes A, B, C, J, K, and L will be provided by the contract or otherwise furnished by the Military Department to the contractor.

* * * * * * *

H–303.1 *Use of DD Form 1348m as a requisition.* * * *

(b) * * *

Card columns	Field/Legend	Explanation and instructions
• • •	• • •	• • •
51	Signal	Enter one of the following codes which indicate the "ship to" and "bill to" activity:

Ship to requisitioner	Bill to
A	Requisitioner.
B	Supplementary address.
C	Bill to activity designated by column 52. However, if the third digit of the identifier is "3" or "E", the Remarks block may indicate other billing information. See H-606.
D	No billing required. Not to be used on requisitions submitted to General Services Administration.

Ship to supplementary address	Bill to
J	Requisitioner.
K	Supplementary address.
L	Bill to activity designated by column 52. However, if the third digit of the document identifier is "3" or "E", the Remarks block may indicate other billing information. See H-606.
M	No billing required. See H-605. Not to be used on requisitions submitted to General Services Administration.

NOTE: Codes A, B, C, J, K, and L will be provided by the contract or otherwise furnished by the Military Department to the contractor.

• •	• • •	• • •

H-308 *Submission and use of follow-up (Request for improved EAD/ESD).* (a) A follow-up requesting improvement of Estimated Availability Dates/Estimated Shipping Dates (EADs/ESDs) contained in previously furnished supply status documents may be initiated by prime contractors. These followup inquiries will contain Document Identifier Code AFC in card columns 1–3 and the data from the previously received supply status document in card columns 4–66. The AFC documents will be prepared only for transactions applicable to Priority Designators 01–08. The necessity for such inquiries will generally result from such conditions which necessitate receipt of materiel prior to expiration of certain dates

(b) When determination is made that improvement in EADs/ESDs can be accomplished, supply status documents, containing the revised EAD/ESD in columns 62–64, will be transmitted to status recipients designated in the original requisitions. When actions taken by management do not result in improved EADs/ESDs, status recipients designated in the original requisitions will be provided the latest status applicable to the requisitions concerned with the requests for EAD/ESD improvement.

H-404.2 *Other data.* In order to accommodate the various distribution systems and equipment, DD Form 1348-1 provides blocks for entry of other data. The use of these blocks with the exception of block 5 is optional; but, when used, they shall contain the following:

Block	Data which may be entered
A	The shipping point identified by name and/or code.
B	The consignee by name and address and/or code listed in DoD Activity Address Directory.
C	Repeat of data entered in the supplementary address field (columns 45–50).
D	The project and/or code, if any.
E	The extended value of the transaction.
F	The location from which materiel is to be selected.
G	Coded cargo data.
H	The number of issue units in a package.
I	The unit weight applicable to the unit of issue.
J	The unit cube applicable to the unit of issue.
K	Uniform freight classification.
L	National motor freight classification.
M	Percentage of first class.
N	For internal use.
O	Date of document preparation.
P	Materiel condition code.
Q	For service use.
R	For internal use.
S	For internal use.
T	Stock or part number of item originally requested, if other than item released.
U	Freight classification nomenclature.
V	For internal use.
W	For internal use.
X	Item nomenclature.
Y	For internal use.
1–4	Shipper and receivers use.
5	Block 5 of DD Forms 1348-1 will reflect the shipping container number and the total number of containers in a shipment under the rules contained in paragraph 5.3.4 of MIL-STD 129D. The shipping container number(s) will indicate the specific container(s) in which the item reflected on a DD Form 1348-1 is packed. EXAMPLE: 7/12; container number 7 of a 12-container shipment. When an item is shipped in more than one container of a shipment, the container numbers and number of containers will be entered in block 5 as: 3, 5, 7/12; container 3, 5, and 7 of a 12-container shipment.
6–10	Shipper and receivers use.
AA–PP	Provided for any special notes or instructions deemed appropriate.
QQ	Provided for any special notes or instructions deemed appropriate. For Air Force Government-furnished material, the Expendability-Recoverability-Repair Code (ERRC) shall be entered in block GG by the shipping activity.
11–15	Self-explanatory.

H-405 *Document distribution.* Distribution of the individual copies of DoD Single Line Item Release/Receipt Document (DD Form 1348-1) shall be as follows:

(i) Copy 1 is retained by the distribution point (shipper);

(ii) Copies 2 and 3—to consignee with material;

(iii) Copy 4—to consignee attached to outside of No. 1 shipping container after use for picking, packing and item identification;

(iv) Copy 5*—to consignee with advance copy of the bill of lading;

(v) Copy 6—transportation copy retained by the distribution point (shipper).

H-602.2 *Entry.* • • •

*When shipment is accomplished by a method not requiring backup documentation to a movement document (i.e., parcel post, Government truck, etc.), this copy will be destroyed by the shipping point.

Columns 1, 2, 3		
• • •	• • •	• • •
AF2	Followup	By supplementary addressee (cols 45-50).
AFC	Followup (Request for Improved EAD/ESD).	Furnished by prime contractors as requests to supply sources to initiate actions which will improve estimated availability dates provided in supply status transactions.
• • •	• • •	• • •

• • • • • • •

H-603.5 *Additional rules.* • • •

(iv) Any requisition containing a Production Equipment Code (PEC), DoD Ammunition Number, or locally assigned number, etc., must contain a "4" or "D" unless additional data is entered in the "Remarks" space.

When additional data is entered in the "Remarks" space, regardless of the content of any columns of the requisition (including columns 8 through 22), column 3 must contain a "3" or "E" and the requisition must not be transceived. When these requisitions are mailed, the envelopes will be conspicuously marked "MILSTRIP Exception Data Requisitions."

H-604.3 *Entries.*

• • • • • •

(d) • • •

Code	Explanation
•	• • • • •
L	To identify requisitions and other Redistribution Documents resulting from screening DLSC excess listings, flyers, brochures, contractor excess inventory listings, Property Disposal Officer and GSA excess bulletins and other special offers of DoD potential excess and declared excess personal property. Code "L" will be entered in column 40 of requisitions and other redistribution documents prepared by ICPs, Research and Development Activities, schools, bases, posts,

Code	Explanation
	camps, and stations for materiel requirements determined to be available from screening DLSC excess listings, flyers, brochures, contractor excess inventory listings, PDO and GSA excess bulletins and other special offers of DoD potential excess and declared excess personal property.
* * * * *	
U ----------	To identify shelf-life items which are invoiced to Property Disposal Officers for utilization screening and/or disposal in accordance with DoD 4140.34-M (Defense Utilization Manual) and DoD 4160.21-M (Defense Disposal Manual).
* * * * *	

H-605.2 *Coding structure and meaning.*

(a) * * *

(iv) Code "D"—No billing required (free issue). Not to be used on requisitions submitted to General Services Administration.

(b) * * *

(iv) Code "M"—No billing required (free issue). Not to be used on requisitions submitted to General Services Administration.

H-607.2 *Advice codes—numeric/alphabetic (from requisitioner to initial processing point).*

(a) *General Codes.*

Columns 65	Columns 66	
2	A	Item is not locally obtainable through manufacture, fabrication, or procurement.
2	B	Requested item only will suffice. Do not substitute.
2	C	Do not back order. Reject unfilled quantity not available to meet Priority Delivery Date/Required Delivery Date. Suitable substitute acceptable.
2	D	Furnish exact quantity requested (i.e., do not adjust to unit pack quantity).
2	J	Do not substitute or back order any unfilled quantities.
2[1]	L	Quantity reflected in quantity field exceeds normal demands; however, this is a confirmed valid requirement.

[1] Requisitioners desiring to advise the supply source that the quantity requested exceeds the requisitioner's normal demand, will enter Advice Code 2L in block 22 or columns 65 and 66 of requisitions.

* * * * *

H-607.3 *Status codes—alphabetic/alphabetic and alphabetic/numeric (from processing point to authorized activity).*

(a) *Supply status.* Supply status (except "rejection" status, code "C") predicts shipment on time as specified by the priority delivery date or the required delivery date unless specific supply status is received advising of an anticipated delay or an estimated availability date. Latest status can be determined by "transactions dates" entered in columns 71 through 73. Supply status codes are as follows:

Columns 65	Columns 66	
B	A	Item being processed for release and shipment.
B	B	Item back-ordered. The estimated shipping date is entered in columns 62 through 64.
B	C	Item on original requisition containing this document number has been backordered. Long delay is anticipated and estimated shipping date is in columns 62-64. Item in stock number field (or "Remarks" field if stock number field cannot accommodate the item number) can be furnished as a substitute. The price for the substitute item is in columns 74-80. If desired, submit cancellation of original requisition and requisition the offered substitute.
B	D	Item delayed. Supply action being continued. The estimated date of release is entered in columns 62 through 64.
B	F	No record of your document for which your Document Identifier AF followup or cancellation request submitted. For requisitioners, if appropriate, deobligate funds and if item is still required, submit requisition using new document number.
B	G	Stock number changed or stock number now assigned to part number submitted. Examine also unit of issue and quantity field for possible changes. Adjust all records accordingly.
B	H	Substitute/interchangeable item being supplied. See substitute/interchanged stock or part number in stock number field. Examine unit of issue and quantity fields for possible changes. Adjust records if applicable.
B	J	Unit of issue and/or quantity changed. Adjust all records accordingly.
B	K	Your document erroneously addressed and has been rerouted. Forward subsequent followups or cancellation requests to activity indicated in Columns 67-69.
B	M	Requisition referred to activity indicated in columns 67 through 69. Forward all future transactions to that activity.
B	N	Requisition being processed as free issue. Signal and fund code fields corrected as noted. Adjust local fund obligation records.
B	P	Item is on back order or procurement for direct delivery. Shipping action will be delayed. Revised estimated shipping date is CC 62-64.
B	Q	Canceled. Results from receipt of cancellation request from requisitioner, consignee, manager, or other authorized activity.
B	T	Requisition in process of technical edit and identification. Additional status will be furnished upon completion of the review and item identification.
B	V	Item being procured for direct shipment to consignee. The estimated shipping date is entered in columns 62 through 64.
B	7	Unit price change. The latest unit price for the item, identified by the stock or part number in Columns 8-22, is reflected in Columns 74-80.

(b) *Rejection codes.* All interservice rejections shall contain "C" in column 65 followed by an alphabetic or numeric character in column 66 which shall furnish the appropriate "reason for rejection". Items rejected, if still required, shall be rerequisitioned using new document numbers. To preclude similar rejection, the requisitioner shall consider the reason for the previous rejection and correct or adequately elaborate on the new requisition. Rejection codes are as follows:

Columns 65	Columns 66	
C	A	Rejected. (1) Explanation for rejection is stated in the remarks field (continued on reverse side of card as necessary). In this case, the status card will be mailed, not transceived. This code will not be used when other status codes have been established to convey a specific condition. (2) When due to security reasons, or space limitation, explanation for rejection will be furnished by separate media referring to pertinent document numbers. In this case, the remarks block will be left blank and CA status cards may be transceived.
C	B	Rejected. Initial requisition requested rejection of that quantity not available for immediate release. Quantity field indicates quantity not being filled.
C	F	Rejected. This requisition is an exact duplicate of a previously received requisition presently in process.
C	G	Rejected. Unable to identify requested item. Rerequisition and furnish correct Federal Stock Number or part number (including reference to appropriate publication or drawing), or end-item identification and item manager, if known.
C	H	Rejected. Requisition submitted to incorrect single-manager/inventory manager/technical service/distribution depot/or GSA. Research for correct source and submit new requisition.
C	J	Rejected. Item coded (or being coded) "obsolete" in latest stock lists/catalogs and not available for issue.
C	K	Rejected. Item not available. Returned for supply by local issue of next higher assembly, component or kit, or submit requisition for next higher assembly.
C	L	Rejected. Item not available. Requisition component parts if practicable.
C	M	Rejected. Fund obligation not cited and/or item is not or no longer free issue. Furnish new requisition and fund code.
C	N	Rejected. Source of supply is local manufacturer or fabrication.
C	P	Rejected. Source of supply is local procurement. If not available locally, submit a new requisition with Advice Code 2A citing appropriate funds.
C	Q	Rejected. Item requested is command or Department regulated or controlled. Requisition through appropriate channels.
C	S	Rejected. Quantity requisitioned is suspect of error or indicates excessive quantity. Partial quantity being supplied. Quantity field in this transaction reflects quantity rejected. If requirement still exists, submit a new requisition for the required quantity using Advice Code 2L.
C	T	Rejected. Make, model, series, serial number, and/or end item usage or publication reference as applicable, is necessary in order to determine item required. Submit new requisition (by mail or message if necessary) and furnish required information.
C	U	Rejected. Item requested is procured only in a repair kit. Requisition appropriate kit.
C	V	Rejected. Item prematurely requisitioned. The effective date for requisitioning is contained in Card Columns 62-64.
C	W	Rejected. Item not available. Local procurement is authorized for this requisition only. If item cannot be locally procured, submit new requisition using Advice Code 2A.
C	X	Rejected. Unable to identify the "bill to" and/or "ship to" address as designated by the signal code.
C	Z	Rejected. Item not available for resale. Reserved for troop issue only.
C	1	Rejected. (1) Item requisitioned on MILSTRIP is excluded from provisions of the MILSTRIP Manual. Rerequisition using prescribed format. (2) MILSTRIP followup submitted for item excluded from provisions of the MILSTRIP Manual.

H-610. *Mode of shipment codes.*

Code	Description
A	Motor, truckload.
B	Motor, less truckload.
C	Van (unpacked, uncrated personal and/or Government property).
D	Driveaway, truckaway, towaway.
E	Busline.
F	Military Airlift Command (MAC).
G	Surface, parcel post.
H	Air, parcel post.
I	Government truck, including common service.
J	REA express.
K	Rail, carload.
L	Rail, less carload.
M	Freight forwarder.
N	LOGAIR.
O	Organic military air.
P	Through bill of lading.
Q	Air freight.
R	Air express.
S	Air charter.
T	Air freight forwarder.
U	QUICKTRANS.
V	Sea-van service.
W	Water, river, lake, coastal (commercial).
X	SEA-lift Express Service (SEA-EX).
Y	Intratheater airlift system.
Z	MSTS (controlled/contract/arranged space).
2	Government Watercraft, Barge/Lighter.
3	Roll on/Roll off service.
4	Armed Forces Courier Service (ARFCOS).
5	United Parcel Service.
6	Military Ordinary Mail (MOM).
7	Weapons System Pouch Service.
8	Pipeline.
9	Local delivery, including deliveries between air or water terminals and adjacent activities.

H-611 *Supply status card entries.* * * *

Field/Legend	Columns	Explanation of entries
* * *	* * *	* * *
Estimated shipping date	62-64	The estimated shipping date (ESD) when materiel shipments will be received by intended consignees later than the priority delivery or required delivery date. When the ESD extends beyond the current calendar year, the date will be expressed in terms of months. In this instance, column 62 will contain an "X" and the number of months will be entered in columns 63 and 64. When columns 62-64 are blank, it will be assumed the materiel will be received within the prescribed priority designator time frame or by the required delivery date.

* * * * * * * *

[Rev. 4, ASPR, Aug. 29, 1969, and DPC 72] (Secs. 2202, 2301-2314, 70A Stat. 120, 127-133; 10 U.S.C. 2202, 2301-2314)

For the Adjutant General.

F. A. Moss,
Major, AGC, Acting Chief, Management Division, TAGO.

[F.R. Doc. 69-13134; Filed, Nov. 4, 1969; 8:45 a.m.]

Title 50—WILDLIFE AND FISHERIES

Chapter I—Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior

PART 32—HUNTING

Mark Twain National Wildlife Refuge, Ill.

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER.

§ 32.22 Special regulations; upland game; for individual wildlife refuge areas.

ILLINOIS

MARK TWAIN NATIONAL WILDLIFE REFUGE

Public hunting of raccoons on the Mark Twain National Wildlife Refuge, Ill., is permitted only on the area of the Batchtown Division designated by signs as open to hunting. This open area, comprising 2,249 acres, is delineated on a map available at the refuge headquarters and from the Regional Director, Bureau of Sport Fisheries and Wildlife, Federal Building, Fort Snelling, Twin Cities, Minn. 55111. Hunting shall be in accordance with all applicable State regulations concerning the hunting of raccoons and subject to the following conditions:

(1) The open season for hunting raccoons on the refuge is from December 1, 1969, through January 31, 1970 (12:00 noon) inclusive.

The provisions of this special regulation supplement the regulations which govern hunting on wildlife refuges generally, which are set forth in title 50, Code of Federal Regulations, part 32, and are effective through January 31, 1970.

JAMES F. GILLETT,
Refuge Manager, Mark Twain National Wildlife Refuge, Quincy, Ill.

OCTOBER 27, 1969.

[F.R. Doc. 69-13161; Filed, Nov. 4, 1969; 8:47 a.m.]

PART 32—HUNTING

Mark Twain National Wildlife Refuge, Ill.

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER.

§ 32.22 Special regulations; upland game for individual wildlife refuge areas.

ILLINOIS

MARK TWAIN NATIONAL WILDLIFE REFUGE

Public hunting of raccoons on the Mark Twain National Wildlife Refuge, Ill., is permitted only on the area of the Calhoun Division designated by signs as open to hunting. This open area, comprising 5,050 acres, is delineated on a map available at the refuge headquarters and from the Regional Director, Bureau of Sport Fisheries and Wildlife, Federal Building, Fort Snelling, Twin Cities, Minn. 55111. Hunting shall be in accordance with all applicable State regulations concerning the hunting of raccoons and subject to the following conditions:

(1) The open season for hunting raccoons on the refuge is from December 1, 1969, through January 31, 1970 (12 noon), inclusive.

The provisions of this special regulation supplement the regulations which govern hunting on wildlife refuges generally, which are set forth in title 50, Code of Federal Regulations, Part 32, and are effective through January 31, 1970.

JAMES F. GILLETT,
Refuge Manager, Mark Twain National Wildlife Refuge, Quincy, Ill.

OCTOBER 27, 1969.

[F.R. Doc. 69-13162; Filed, Nov. 4, 1969; 8:47 a.m.]

Proposed Rule Making

DEPARTMENT OF TRANSPORTATION

Hazardous Materials Regulations Board

[49 CFR Part 195]

[Docket No. HM-6]

TRANSPORTATION OF LIQUIDS BY PIPELINE

Notice of Extension of Public Hearing Date

On October 4, 1969 the Hazardous Materials Regulations Board published a Notice of Public Hearing (34 F.R. 15489) (Docket No. HM-6; Notice 69-27), to be held November 18, 1969 at 10 o'clock, in the Department of Transportation Building (Federal Office Building 10A) 800 Independence Avenue SW., Washington, D.C.

The American Petroleum Institute, by letter dated October 13, 1969, requested the Board to extend the date of Hearing for 60 days. Upon consideration of the reasons stated in petitioner's request, it has been determined that it is in the public interest to grant the requested extension. Therefore, the Hearing will be held at 10 o'clock on January 20, 1970, at the same address.

Any person wishing to make oral statements at the Hearing should notify the Secretary of the Hazardous Materials Regulations Board by January 14, 1970.

Issued in Washington, D.C., on October 31, 1969.

CARL V. LYON,
Deputy Administrator,
Federal Railroad Administration.

[F.R. Doc. 69-13172; Filed, Nov. 4, 1969; 8:48 a.m.]

FEDERAL COMMUNICATIONS COMMISSION

[47 CFR Parts 2, 81, 83, 85]

[Docket No. 18632]

MARITIME SERVICES AND PUBLIC FIXED STATIONS IN ALASKA

Use of Radiotelephony, Radiotelegraphy, and Single Sideband Emissions on Certain Frequencies; Order Extending Time for Filing Comments

In the matter of amendment of Parts 2, 81, and 83 and the deletion of Part 85 to establish for the State of Alaska a schedule of dates, technical standards, frequencies, and other requirements for the use of radiotelephony, radiotelegraphy, and single sideband emissions on frequencies below 4,000 kc/s, for the maritime services in Alaska, and below 12,000 kc/s, for Alaska public fixed stations, and to make other incidental rule changes; Docket No. 18632.

1. The above-captioned notice of proposed rule making (FCC 69-873), which was released on August 25, 1969, provided for the filing of comments by September 29, 1969, and reply comments by October 10, 1969. Subsequently, by order released September 26, 1969, the time for filing comments and reply comments in this proceeding was extended to October 29, 1969, and November 10, 1969, respectively. The Central Committee on Communication Facilities of the American Petroleum Institute and the National Marine Electronic Association, Inc. (NMEA) have filed additional requests for extension of time in which to file comments.

2. The Central Committee requests a 15-day extension on the grounds that as a result of the earlier extension of time they have now held three separate meetings to further study the proposed amendments and to formulate the petroleum industry's comments thereon. They submit that the pending sale of Alaskan Communications System (ACS) and the recent oil discoveries on the Alaska North Slope have created communications requirements which must be considered in reviewing the broad amendments proposed by the Commission. Accordingly, the Committee feels that 15 days additional time is necessary to further analyze the complex questions raised by the overall proposal and to finalize the comments received from their members. NMEA requests a 30-day extension, if possible, or the maximum amount of time which the Commission may be in a position to grant, on the grounds that it has been necessary to obtain clarification of various aspects of the proposed rules from the Commission's staff, that their Telecommunications Committee has met to review the Commission's proposal in light of this new information, but will be unable to complete its evaluation of the proposed rules and to submit comments thereon by the extended date of October 29, 1969.

3. The Commission is not unmindful of the problems associated with preparing comments where, as in this case, the notice covers complex technical proposals requiring detailed examination by the affected maritime industry and remote telecommunication users in the State of Alaska. A 30-day extension of time would unduly delay the proceeding; however, some additional time appears warranted and it will not have an adverse effect on these proceedings. In view of the foregoing: *It is ordered*, That the time for filing comments and reply comments in this proceeding is extended to November 13, 1969, and November 24, 1969, respectively. *It is further ordered*, That the requests for extension of time for filing comments set forth in this order are granted to the extent indicated herein and are otherwise denied.

4. This action is taken pursuant to authority contained in sections 4(i) and 5(d)(1) of the Communications Act of 1934, as amended, and § 0.331(b)(4) of the Commission's rules.

Adopted: October 29, 1969.

Released: October 30, 1969.

[SEAL] JAMES E. BARR,
Chief, Safety and Special Radio Services Bureau.

[F.R. Doc. 69-13131; Filed, Nov. 4, 1969; 8:45 a.m.]

[47 CFR Part 73]

[Docket No. 18713; FCC 69-1175]

EQUIPMENT PERFORMANCE MEASUREMENTS BY EDUCATIONAL FM STATIONS

Notice of Proposed Rule Making

1. Equipment performance measurements, of the station's transmitter and related equipment, are now required at least annually in the standard broadcast (AM) service and for FM stations operating on unreserved or "commercial" channels (§§ 73.47 and 73.254).[1] They are not now required for for non-commercial educational FM stations on the 20 reserved FM channels (201-220). In this this notice we propose to extend the equipment-performance measurement requirement for commercial stations, contained in § 73.254 of the rules, to educational FM stations on reserved channels other than 10-watt Class D stations.

2. Annual equipment performance measurements are, we believe, in general necessary to insure proper station operation and a good quality of broadcast output. Educational stations on reserved channels have not up to now been required to make such measurements, since it was thought that the expense involved would be a substantial handicap to the development of this service. Moreover, a very substantial number of these stations—roughly half—are low-power 10-watt (Class D) stations, and a large number of the rest operate with rather small facilities. Therefore the effects of

[1] In another action today, we are amending Subpart C of the rules, concerning noncommercial educational FM stations, to make it clear that such stations operating on unreserved or "commercial" channels are required to make the equipment performance measurements required by § 73.254 of commercial stations.

operation with improper or poorly functioning equipment are usually significant only in a relatively small area as compared to the stations on the 80 "commercial" FM channels.

3. However, in both respects the situation appears to be changing. Interest in educational radio is growing, and is expected to result in both more stations and higher levels of facilities in the near future, particularly with the resources which appear likely to be available from the Department of Health, Education, and Welfare and the Corporation for Public Broadcasting. Therefore the results of operation with improper or malfunctioning equipment may be more serious than has hitherto been the case. Moreover, the increased economic support means that the relatively small expense entailed in annual equipment performance measurements is less of a burden, and we do not believe it will substantially hamper the development of this service.

4. We therefore conclude that educational FM stations other than 10-watt stations should be subject to the same requirement as commercial FM stations. Accordingly, we propose to amend § 73.554, which pertains to the transmitters of educational FM stations, to read the same as § 73.254, the corresponding rule for commercial FM stations. Briefly, this rule now provides that equipment performance measurements shall be made at least once each calendar year, including all circuits between the main microphone terminals and the antenna circuit, and measuring audiofrequency response, audiofrequency harmonic distortion, and output noise level (frequency modulation and amplitude modulation), at various frequencies and for various modulation levels specified in the rules. The results of such measurements are required to be kept for at least 2 years.

5. It is not proposed to apply this requirement to 10-watt educational (Class D) FM stations, even though it would be desirable from the standpoint of improved operation. These stations are designed to be very inexpensive operations, and, in view of the low power involved, it appears that continuing exemption from this requirement should be granted for them.

6. In view of the foregoing, and pursuant to authority contained in sections 4(i) and 303 (f), (g) and (r) of the Communications Act of 1934, as amended, it is proposed to amend § 73.554 of the Commission's rules to read as set forth below, i.e., by adding provisions concerning annual equipment performance measurements (for other than 10-watt stations) identical with those in § 73.254(b).

7. Pursuant to applicable procedures set out in § 1.415 of the Commission's rules, interested persons may file comments on or before December 8, 1969, and reply comments on or before December 18, 1969. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this notice.

8. In accordance with the provisions of § 1.419 of the rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission.

Adopted: October 29, 1969.

Released: October 31, 1969.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

It is proposed to amend § 73.554 of the Commission's rules and regulations by the addition of new paragraphs (c) and (d), as follows:

§ 73.554 Transmitter performance.

* * * * *

(c) The licensee of each noncommercial educational FM broadcast station with transmitter output power above 10 watts shall make equipment performance measurements at least once each calendar year: *Provided, however,* That the dates of completion of successive sets of measurements shall be no more than 14 months apart. One set of measurements shall be made during the 4-month period preceding the filing date of the application for renewal of station license. Equipment performance measurements shall be made with equipment adjusted for normal program operation and shall include all circuits between the main studio microphone terminals and the antenna circuit, including telephone lines, preemphasis circuits and any equalizers employed, except for microphones, and without compression if a compression amplifier is installed. The measurement program shall yield the following information:

(1) Audiofrequency response from 50 to 15,000 cycles per second (c/s) for approximately 25, 50, and 100 percent modulation. Measurements shall be made on at least the following audiofrequencies: 50, 100, 400, 1,000, 5,000, 10,000 and 15,000 c/s. The frequency response measurements should normally be made without deemphasis; however, standard 75 microsecond deemphasis may be employed in the measuring equipment or system provided the accuracy of the deemphasis circuit is sufficient to insure that the measured response is within the prescribed limits.

(2) Audio frequency harmonic distortion for 25, 50, and 100 percent modulation for the fundamental frequencies of 50, 100, 400, 1,000, and 5,000 c/s. Audio frequency harmonics for 100 percent modulation for fundamental frequencies of 10,000 and 15,000 c/s. Measurements shall normally include harmonics to 30,000 c/s. The distortion measurements shall be made employing 75 microsecond deemphasis in the measuring equipment or system.

(3) Output noise level (frequency modulation) in the band of 50 to 15,000 c/s in decibels (db) below the audiofrequency level representing a frequency swing of 75 kc/s. The noise measurements shall be made employing 75 microsecond deemphasis in the measuring equipment or system.

(4) Output noise level (amplitude modulation) in the band of 50 to 15,000 c/s in db below the level representing 100 percent amplitude modulation. The noise measurements shall be made employing 75 microsecond deemphasis in the measuring equipment or system.

(d) The data required by paragraph (b) of this section, together with a description of instruments and procedure signed by the engineer making the measurements, shall be kept on file at the transmitter and retained for a period of 2 years, and shall be made available during that time upon request to any duly authorized representative of the Federal Communications Commission.

[F.R. Doc. 69-13132; Filed, Nov. 4, 1969; 8:45 a.m.]

[47 CFR Part 83]

[Docket No. 18715; FCC 69-1187]

SHIP RADIOTELEPHONE TEST PROCEDURES

Notice of Proposed Rule Making

1. Notice is hereby given of proposed rule making in the above entitled matter.

2. The U.S. Coast Guard has advised the Commission that their shore stations are receiving so many calls from ship stations on the radiotelephone distress frequency 2182 kc/s solely for the purpose of verifying the proper functioning of the ship's radio equipment, that it is seriously impairing the Coast Guard station's more important functions including handling of distress traffic. The Commission now proposes to amend Part 83 to prohibit calls to U.S. Coast Guard stations on 2182 kc/s for test purposes except under very limited conditions and to permit general calls by ship radiotelephone stations for test purposes.

3. The rules presently require tests of compulsory ship radiotelephone stations to be made on the calling and distress frequency 2182 kc/s or in the case of VHF stations on the distress safety and calling frequency 156.8 Mc/s. It is believed that this could be extended profitably to permit tests on working frequencies.

4. The Commission proposes to amend §§ 83.178, 83.365, 83.502, 83.531, and 83.548 to:

(a) Permit general calls by ship radiotelephone stations for test purposes;

(b) Prohibit calls on 2182 kc/s to U.S. Coast Guard stations for test purposes except during inspections by Commission representatives or when qualified technicians are installing equipment or correcting deficiencies; and

(c) Permit required testing of compulsorily installed radiotelephone stations on other than distress frequencies.

5. The proposed amendments, as set forth below, are issued pursuant to the authority contained in sections 4(i), and 303 (f) and (r) of the Communications Act of 1934, as amended.

6. Pursuant to the applicable procedures set forth in § 1.415 of the Commission's rules, interested parties may file comments on or before December 8, 1969, and reply comments on or before December 18, 1969. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into consideration other relevant information before it, in addition to the specific comments invited by this notice.

7. In accordance with the provisions set forth in § 1.419 of the Commission's rules, an original and 14 copies of all statements, briefs or comments shall be furnished the Commission.

Adopted: October 29, 1969.

Released: October 31, 1969.

FEDERAL COMMUNICATIONS COMMISSION,[1]
[SEAL] BEN F. WAPLE,
Secretary.

1. In § 83.178, paragraph (c) is amended as follows:

§ 83.178 Unauthorized transmissions.

Stations subject to this part shall not:

* * * * *

(c) When using telephony, transmit a general call or transmit signals or communications not addressed to a particular station or stations: *Provided*, That this provision is not applicable to the transmission of distress, alarm, urgency, or safety signals, or to messages preceded by one of these signals, or to transmissions solely for test purposes.

* * * * *

2. In § 83.365, paragraph (a) is amended to read as follows:

§ 83.365 Procedure in testing.

(a) Ship stations must use every precaution to insure that, when conducting operational transmitter tests, the emissions of the station will not cause harmful interference. Radiation must be reduced to the lowest practicable value and if feasible shall be entirely suppressed. When radiation is necessary or unavoidable, the testing procedure described below shall be followed:

(1) The licensed radio operator or other person responsible for operation of the transmitting apparatus shall ascertain by careful listening that the test emissions will not be likely to interfere with transmissions in progress; if they are likely to interfere with the working of a coast or aeronautical station in the vicinity of the ship station, the consent of the former station(s) must be obtained before the test emissions occur;

(2) The applicable identification of the testing station, followed by the word "test," shall be announced on the radio channel being used for the test, as a warning that test emissions are about to be made on that frequency;

(3) If, as a result of the announcement prescribed in subparagraph (2) of this paragraph, any station transmits by voice the word "wait," testing shall be suspended. When, after an appropriate interval of time, such announcement is repeated and no response is observed, and careful listening indicates that harmful interference should not be caused, the operator shall, if further testing is necessary, proceed as set forth in subparagraphs (4) and (5) of this paragraph;

(4) Testing of transmitters shall, in so far as practicable be confined to working frequencies without two-way communications, however, 2182 kc/s and 156.8 Mc/s may be used to contact other ship or coast stations when signal reports are necessary. U.S. Coast Guard stations may be contacted on 2182 kc/s for test purposes only when tests are being conducted during inspections by Commission representatives or when qualified radio technicians are installing equipment or correcting deficiencies in the station radiotelephone equipment. In these cases the test shall be identified as "FCC" or "technical" and logged accordingly.

(5) When further testing is necessary beyond the two "test" announcements specified in subparagraphs (2) and (3) of this paragraph, the operator shall announce the word "testing" followed in the case of a voice transmission test by the count "1, 2, 3, 4, * * * etc." or by test phrases or sentences not in conflict with normal operating signals. The test signals in either case shall have a duration not exceeding 10 seconds. At the conclusion of the test, there shall be voice announcement of the official call sign of the testing station, the name of the ship on which the station is located, and the general location of the ship at the time the test is being made. This test transmission shall not be repeated until a period of at least 1 minute has elapsed; on the frequency 2182 kc/s or 156.8 Mc/s a period of at least 5 minutes shall elapse before the test transmission is repeated.

* * * * *

3. Section 83.502 is amended to read as follows:

§ 83.502 Test of radiotelephone station.

Unless the normal use of the required radiotelephone station demonstrates that the equipment is in proper operating condition, a test communication for this purpose on a required frequency shall be made by a qualified operator each day the vessel is navigated. When this test is performed by a person other than the master and the equipment is found not to be in proper operating condition, the master shall be promptly notified thereof.

4. Section 83.531 is amended to read as follows:

§ 83.531 Test of radiotelephone installation.

Unless the normal use of the required radiotelephone installation demonstrates that the equipment is in proper operating condition, a test communication for this purpose on a required frequency in the 2000 to 3000 kc/s band or the 156–162 Mc/s band shall be made by a qualified operator each day the vessel is navigated. When this test is performed by a person other than the master and the equipment is found not to be in proper operating condition, the master shall be promptly notified thereof.

5. Section 83.548 is amended to read as follows:

§ 83.548 Trial of radiotelephone installation.

At least once during each calendar day in which a vessel of the United States is navigated while subject to the Great Lakes Radio Agreement, a test communication on a required frequency to demonstrate that the radiotelephone installation is in proper operating condition shall be made by a certified person who is required in accordance with § 83.158, unless the normal daily use of the equipment demonstrates that this installation is in proper operating condition for that purpose. Should the equipment be found at any time by a person other than the master not to be in proper operating condition, the master shall be promptly notified thereof. A record shall be made in the radio station log showing the operating condition of the equipment as determined by either the daily normal communication or the daily test communication referred to in this section, and showing that, if an improper operating condition was found, the master was properly notified thereof.

[F.R. Doc. 69-13133; Filed, Nov. 4, 1969; 8:45 a.m.]

[1] Commissioner Robert E. Lee absent.

FEDERAL RESERVE SYSTEM

[12 CFR Part 217]

[Reg. Q]

CERTAIN BORROWINGS BY BANK AFFILIATES AS DEPOSITS

Notice of Proposed Rule Making

The Board of Governors is considering amending § 217.1(f) of Regulation Q to add the following sentence: "For the purposes of this part, 'deposits' of a member bank also include the liability of (i) an organization that controls a majority of the stock of the bank or (ii) a corporation that is majority-controlled by such an organization, on any promissory note, acknowledgment of advance, due bill, or similar obligation (written or oral), with a maturity of 2 years or less, that is issued or undertaken principally as a means of supplying funds to the bank for use in its banking business, or maintaining the availability of such funds."

The main purpose of this proposal is to apply the rules governing payment of interest on deposits (Regulation Q) to funds received by member banks as the result of issuance, by affiliates of the banks, of obligations commonly described as commercial paper.

Types of obligations within the coverage of this proposal are commercial paper issued for the specified purpose by a member bank's parent company—either one-bank or registered under the Bank Holding Company Act—or by a collateral affiliate of a member bank in such a holding company system.

In the Board's judgment, adoption of a proposal along these lines is necessary because the purposes of section 19 of the Federal Reserve Act are in danger of being frustrated, to a substantial degree, as a result of the issuance of commercial paper by bank affiliates of the types described, the proceeds being channeled to the bank for lending and investing.

The proposal does not refer to issuance of obligations by subsidiaries of member banks. In a related action, on which Governor Maisel dissented, the Board determined that obligations of such subsidiaries are, under present provisions of both Regulations Q and D, in the same status as obligations issued directly by the bank, and, accordingly, covered by § 217.1(f) of Regulation Q and § 204.1(f) of Regulation D. See 12 CFR 250.141; 1968 Fed. Res. Bulletin 681.

This notice is published pursuant to section 553(b) of title 5, United States Code, and § 262.2(a) of the rules of procedure of the Board of Governors.

To aid in the consideration of this matter by the Board, interested persons are invited to submit relevant data, views, or arguments. Any such material should be submitted in writing to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, to be received not later than December 1, 1969. Under the Board's rules regarding availability of information (12 CFR Part 261), such materials will be made available for inspection and copying upon request unless the person submitting the material requests that it be considered confidential.

By order of the Board of Governors, October 28, 1969.

[SEAL] ROBERT P. FORRESTAL,
Assistant Secretary.

[F.R. Doc. 69-13150; Filed, Nov. 4, 1969; 8:46 a.m.]

Notices

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[Serial No. A 2153]

ARIZONA

Notice of Termination of Classification of Public Lands for Transfer Out of Federal Ownership

OCTOBER 30, 1969.

1. Pursuant to the Act of September 19, 1964 (43 U.S.C. 1411–18) and to the regulations in 43 CFR Parts 2410 and 2411 the public lands described below were classified for sale under section 2455 of the revised statutes (43 U.S.C. 1171). The notice of classification published December 19, 1968, in 33 F.R. 18947 segregated the lands from all forms of appropriation under the public land laws, including the mining laws, except for applications for sale under section 2455 of Revised Statutes (43 U.S.C. 1171).

GILA AND SALT RIVER MERIDIAN

PIMA COUNTY

T. 18 S., R. 12 E., secs. 9 and 10, all remaining public land.

The public lands described above aggregate approximately 430 acres.

2. The classification of these public lands for sale under section 2455 of Revised Statutes is hereby terminated. Publication of this notice terminates the segregative effect of the notice of classification as to these lands.

GLENDON E. COLLINS,
Acting State Director.

[F.R. Doc. 69-13193; Filed, Nov. 4, 1969; 8:49 a.m.]

CALIFORNIA

Notice of Filing of Protraction Diagrams

OCTOBER 28, 1969.

Notice is hereby given that effective December 15, 1969, the following protraction diagrams are officially filed and of record in the Sacramento Land Office. In accordance with title 43, Code of Federal Regulations, these protractions will become the basic record for describing the land for all authorized purposes at and after 10 a.m. of the above date. Until this date and time, the diagrams have been placed in the open files and are available to the public for information only.

CALIFORNIA PROTRACTION DIAGRAM 150

(Approved Aug. 27, 1969)

T. 20 N., R. 11 E., M.D.M.
Secs. 3 and 4, fractional.

T. 16 N., R. 5 W.,
Sec. 4, W½;
Sec. 5, all;
Sec. 6, E½;
Sec. 8, W½NE¼, NW¼.

CALIFORNIA PROTRACTION DIAGRAM 152

(Approved May 29, 1969)

T. 11 N., R. 19 E.,
Sec. 4, W½, SE¼;
Sec. 5, E½;
Sec. 9, N½NE¼, NW¼.
T. 12 N., R. 19 E.,
That area between the Von Schmidt Line and the California-Nevada State line in secs. 7, 8, and 17.
T. 10 N., R. 20 E.,
Sec. 25, NE¼, S½;
Sec. 36, N½, N½SE¼.
T. 10 N., R. 21 E., M.D.M.,
Sec. 7, S½;
Sec. 18, N½;
Sec. 30, W½;
Sec. 31, W½, except M.S. 426.

CALIFORNIA PROTRACTION DIAGRAM 153

(Approved May 29, 1969)

T. 23 N., R. 9 E., M.D.M.,
Sec. 29, S½;
Sec. 30, S½;
Sec. 31, N½, N½SE¼;
Sec. 32, N½, N½SW¼.
T. 21 N., R. 10 E., M.D.M.,
Secs. 1 and 2, all;
Sec. 3, NE¼ except Mineral Lots 45 and 46, S½;
Sec. 10, all except M.S. 2638;
Sec. 11, all except M.S. 2638;
Secs. 12 to 15, inclusive, all;
Sec. 22, all except M.S. 5739;
Secs. 23 to 27, inclusive, all;
Sec. 34, N½, SE¼;
Secs. 35 and 36, all.
T. 22 N., R. 10 E., M.D.M.,
Secs. 1 and 2, all;
Sec. 3, NE¼, S½ except M.S. 3624 and Lot 39;
Sec. 10, all, except Mineral Lot 40;
Sec. 11, all, except Mineral Lot 40;
Secs. 12 and 13, all;
Sec. 14, all, except Mineral Lot 40;
Sec. 15, all, except Mineral Lot 40;
Sec. 22, N½, SE¼;
Sec. 23, all;
Sec. 24, N½, SW¼.
T. 23 N., R. 10 E., M.D.M.,
Sec. 22, NE¼, S½;
Sec. 23, NW¼, S½;
Sec. 25, NW¼, S½;
Secs. 26 and 27, all;
Sec. 28, NE¼, S½;
Sec. 33, N½, SE¼;
Secs. 34 to 36, inclusive, all.

CALIFORNIA PROTRACTION DIAGRAM 155

(Approved May 29, 1969)

T. 25 N., R. 4 E., M.D.M.,
Secs. 1 and 2, all;
Sec. 3, NE¼, S½;
Sec. 10, N½, SE¼ except tract 40;
Sec. 11, all, except Lot 39;
Sec. 12, all, except M.S. 4018;
Sec. 13, all, except M.S. 4018;
Sec. 14 all, except lots 38 and 39;
Sec. 15, E½;
Sec. 22, E½;
Sec. 23, all;
Sec. 24, all, except M.S. 4389;
Sec. 25, all, except M.S. 4389;
Sec. 26 all, except M.S. 4386 and 4390;
Sec. 27, E½, except M.S. 4387;
Sec. 34, NE¼, except M.S. 4388;
Sec. 35, N½, except M.S. 4386 and M.S. 4390;
Sec. 36, N½, SE¼.
T. 24 N., R. 7 E., M.D.M.,
Sec. 1, N½;
Sec. 2, N½;
Sec. 3, N½;
Sec. 4, N½;
Sec. 5, N½;
Sec. 6, N½, SW¼;
Sec. 7, W½;
Sec. 18, W½;
Sec. 19, W½.

CALIFORNIA PROTRACTION DIAGRAM 157

(Approved Apr. 23, 1969)

T. 26 N., R. 5 E., M.D.M.
Sec. 5, N½, SW¼;
Sec. 6, all;
Sec. 7, N½.
T. 27 N., R. 5 E., M.D.M.
Sec. 1, fractional;
Secs. 2 to 11, inclusive, all;
Secs. 12 and 13, fractional;
Secs. 14 to 20, inclusive, all;
Sec. 21, all, except H.E.S. 52;
Sec. 22, all;
Sec. 23, all, except H.E.S. 64;
Secs. 24 and 25, fractional;
Sec. 26, all, except H.E.S. 64;
Sec. 27, all, except H.E.S. 64;
Secs. 28 to 32, inclusive, all;
Sec. 33, W½;
Sec. 34, NE¼;
Sec. 35, N½.
T. 28 N., R. 5 E., M.D.M.
Sec. 6, S½;
Sec. 7, N½;
Sec. 33, SE¼;
Secs. 34 and 35, all;
Secs. 36, W½, SE¼.
T. 27 N., R. 6 E., M.D.M.
Sec. 5, W½;
Secs. 6 and 7, all;
Sec. 8, W½;
Sec. 18, all;
Sec. 19, N½, SW¼.

CALIFORNIA PROTRACTION DIAGRAM 159

(Approved Apr. 23, 1969)

T. 30 N., R. 3 E., M.D.M.,
Secs. 1 and 2, fractional;
Secs. 11 to 14, inclusive, all;
Sec. 15, E½;
Sec. 22, E½;
Secs. 23 to 26, inclusive, all;
Sec. 35, N½, SE¼;
Sec. 36, all.
T. 31 N., R. 4 E., M.D.M.,
Sec. 21, E½;
Sec. 22, W½;
Sec. 31, S½;
Sec. 32, S½;
Sec. 33, S½;
Sec. 34, NE¼, S½;
Sec. 35, W½.
T. 30 N., R. 6 E., M.D.M.,
Sec. 25, W½SE¼;
Sec. 26, all;
Sec. 27, NE¼, S½;
Sec. 34, N½, SE¼;
Sec. 35, all;
Sec. 36, N½, SW¼.

CALIFORNIA PROTRACTION DIAGRAM 160

(Approved Apr. 23, 1969)

T. 4 S., R. 7 E., M.D.M.,
Sec. 1, E½.
T. 5 S., R. 8 E., M.D.M.,
Secs. 1 and 2, all;
Sec. 3, all, except H.E.S. 233;
Secs. 10 and 11, all;
Sec. 12, N½, SW¼;
Sec. 15, N½.
T. 5 S., R. 8 E., M.D.M.
Sec. 4, W½;
Sec. 5, E½;
Secs. 26, 27, 34, and 35, fractional.

CALIFORNIA PROTRACTION DIAGRAM 161

(Approved Apr. 23, 1969)

T. 1 S., R. 5 E., H.M.,
Sec. 14, SE¼;
Sec. 13, S½;
Sec. 23, E½;
Sec. 24, all;
Sec. 25, all
Sec. 26, NE¼N½SE¼, SE¼SE¼;
Sec. 36, N½, SE¼.
T. 2 S., R. 5 E., H.M.,
Sec. 1, all;
Sec. 2, NE¼, S½;
Sec. 11, N½, SE¼.
Secs. 12 and 13, all;
Sec. 14, E½;
Sec. 23, NE¼;
Sec. 24, N½, SE¼.
T. 1 S., R. 6 E., H.M.
Sec. 19, NW¼, S½;
Sec. 28, NW¼, S½;
Secs. 29 to 33, inclusive, all;
Sec. 34, NW¼, S½.
T. 2 S., R. 6 E., H.M.,
Secs. 3 to 10, inclusive, all;
Secs. 15 to 22, inclusive, all;
Secs. 29 and 30, all;
Sec. 31, all, except H.E.S. 130;
Sec. 32, all.

CALIFORNIA PROTRACTION DIAGRAM 162

(Approved Apr. 23, 1969)

T. 6 N., R. 6 E., H.M.,
Secs. 1 to 5, inclusive, all;
Sec. 6, all, except Tract No. 40;
Sec. 7, all, except Tracts 40, 41, and 42;
Sec. 8, all, except Tracts 41, and 42;
Secs. 9, 10, and 11, all;
Sec. 12, all, except Tracts 43, 44, and 58;
Sec. 13, all, except Tracts 43, 44, and 58;
Secs. 14 to 17, inclusive, all;
Sec. 18, all, except Tracts 47, 48, and 49;
Sec. 19, all, except Tracts 47, 48, 49, 50, 51, and 52, and lots 37 and 38;
Sec. 20, all, except Tracts 45, 46, 53, 54, 55, H.E.S. 203, Tract 62, and lots 37 and 38;
Sec. 21, all, except Tracts 45, 46, 53, 54, and 55;
Secs. 22 and 23, all;
Sec. 24, all, except Tract 57;
Sec. 25, all, except Tracts 60 and 61;
Sec. 26, all, except Tracts 60 and 61;
Sec. 27, all;
Sec. 28, all, except Tract 58, H.E.S. 322;
Sec. 29, all, except Tracts 59 and 63, and lots 37 and 38;
Sec. 30, all, except Tracts 59 and 62;
Secs. 31 to 36, inclusive, all.
T. 20 N., R. 11 W., M.D.M.,
Sec. 31, W½.

CALIFORNIA PROTRACTION DIAGRAM 163

(Approved Apr. 23, 1969)

T. 37 N., R. 12 W., M.D.M.,
Secs. 1 to 17, inclusive, all;
Sec. 18, all, except M.S. 2279 and M.S. 2321;
Sec. 19, all, except M.S. 2279, 2831, 2832, and 2833;
Secs. 20 to 36, inclusive, all.
T. 38 N., R. 12 W., M.D.M.,
Secs 1 to 12, inclusive, all;
Sec. 13, all, except M.S. 4532;
Secs. 14 to 24, inclusive, all;
Sec. 25, all, except M.S. 6725;
Secs. 26 to 36, inclusive, all.

CALIFORNIA PROTRACTION DIAGRAM 165

(Approved May 29, 1969)

T. 32 N., R. 11 E., M.D.M.,
Secs. 3 to 5, inclusive, fractional.
T 31 N., R. 13 E., M.D.M.,
Sec. 1, all;
Sec. 2, N½, N½SW¼, SW¼;
Sec. 3, N½, N½S½;
Secs. 4 and 5, all;
Sec. 6, N½, SE¼;
Sec. 8, E½;
Sec. 9, all.
Sec. 12, N½;
Sec. 16, all;
Sec. 17, NE¼, S½;
Secs. 20 and 21, all;
Sec. 28, N½, E½SW¼, SE¼;
Sec. 33, fractional.

CALIFORNIA PROTRACTION DIAGRAM 173

(Approved Apr. 23, 1969)

T. 48 N., R. 2 E., M.D.M.,
Secs. 14 to 18, inclusive, fractional;
Secs. 19 to 22, inclusive, all;
Sec. 23, all except NE¼NE¼;
Sec. 24, fractional;
Sec. 25, all, except NE¼NE¼;
Secs. 26 and 27, all;
Secs. 28 to 31, inclusive, fractional;
Sec. 32, W½NW¼, NW¼SW¼;
Secs. 34 to 36, inclusive, all.
T. 47 N., R. 4 E., M.D.M.,
Sec 9, NE¼NE¼, S½NE¼, SE¼;
Sec. 10, all, except NE¼NE¼;
Sec. 11, SW¼NW¼, W½SW¼, SE¼SW¼;
Sec. 14, W½;
Sec. 15, all;
Sec. 16, NE¼, E½SE¼.

CALIFORNIA PROTRACTION DIAGRAM 176

(Approved May 29, 1969)

T. 12 N., R. 5 W., M.D.M.,
Sec. 14, S½;
Sec. 23, N½, fractional;
Secs 31 to 33, inclusive, all;
Sec. 34, W½.
T. 10 N., R. 8 W., M.D.M.,
Sec. 1, all, except M.S. 1067;
Sec. 2, all, except M.S. 1067;
Sec. 3, W½;
Sec. 4, E½; except M.S. 1272 and M.S. 6042.
T. 10 N., R. 9 W., M.D.M.,
Sec. 3, fractional.

CALIFORNIA PROTRACTION DIAGRAM 177

(Approved May 29, 1969)

T. 17 N., R. 12 E., M.D.M.,
Sec. 18, all.
T. 24 N., R. 18 E., M.D.M.,
Sec. 19, S½;
Secs. 30 and 31, all.

CALIFORNIA PROTRACTION DIAGRAM 178

(Approved Apr. 23, 1969)

T. 36 N., R. 10 W., M.D.M.,
Sec. 2, all;
Secs. 4 to 10, inclusive, all;
Sec. 12, all;
Sec. 14, all;
Secs. 16 to 22, inclusive, all;
Sec. 24, all;
Sec. 26, all;
Secs. 28 to 34, inclusive, all;
Sec. 36, all, except E½SE¼SW¼.
T. 36½ N., R. 10 W., M.D.M.,
Secs. 29 to 36, inclusive, fractional.
T. 36 N., R. 11 W., M.D.M.,
Secs. 1 to 36, inclusive, all.
T. 36½ N., R. 11 W., M.D.M.,
Secs. 25 to 30, inclusive, fractional;
Secs. 31 to 36, inclusive, all.
T. 36 N., R. 12 W., M.D.M.,
Secs. 1 to 35, inclusive, all;
Sec. 36, all, except Tract 37.
T. 36½ N., R. 12 W., M.D.M.,
Secs. 25 to 31, inclusive, fractional;
Secs. 32 to 36, inclusive, all.

Copies of these diagrams are for sale at two dollars ($2.00) each by the Survey Records Office, Bureau of Land Management, Room E-2807, Federal Office Building, 2800 Cottage Way, Sacramento, Calif. 95825.

JOHN E. CLUTE,
Chief, Branch of Title and Records.

[F.R. Doc. 69-13166; Filed, Nov. 4, 1969; 8:47 a.m.]

[Serial No. N-3319]

NEVADA

Notice of Classification of Public Lands for Multiple-Use Management

OCTOBER 24, 1969.

1. Pursuant to the Act of September 19, 1964 (43 U.S.C. 1412), the public lands within the area decribed below are hereby classified for multiple use management. Publication of this notice has the effect of segregating the described land from appropriation under the agriculture land laws (43 U.S.C. Parts 7 and 9, 25 U.S.C. sec. 334) and from sale under section 2455 of the Revised Statutes (43 U.S.C. 1171), and from exchange (43 U.S.C. 315g), from sale under the Act of September 19, 1964 (78 Stat. 988, 43 U.S.C. 1421-1427), and from operation of the mining laws. As used in this order, the term "public lands" means any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, as amended, or within a grazing district established pursuant to the Act of June 28, 1934 (48 Stat. 1269), as amended, which are not otherwise withdrawn or reserved for Federal use or purpose.

2. The land is located near Ash Meadows in Nye County, Nev., containing a spring inhabited by Nevada Pupfish, a rare and endangered species. The land is physically suitable and adaptable to the use for which it is classified.

3. The public land affected by this classification is located within the following described area and is shown on maps on file and available for inspection in the Las Vegas District Office, 1859 North Decatur Boulevard, Las Vegas, Nev. 89108, and the Nevada Land Office, Bureau of Land Management, Room 3008, Federal Building, 300 Booth Street, Reno, Nev. 89502.

4. The land involved is located in Nye County and is described as follows:

MOUNT DIABLO MERIDIAN, NEVADA

T. 18 S., R. 51 E.,
Sec. 18, lot 2, W½SE¼NW¼.

The land described contains 56.35 acres of public land.

5. For a period of 30 days from date of publication in the FEDERAL REGISTER, this classification shall be subject to the exercise of administrative review and modification by the Secretary of the Interior as provided for in 43 CFR 2411.2c. For a period of 30 days, interested parties may submit comments to the Secretary of the Interior, LLM, 320, Washington, D.C. 20240.

NOLAN F. KEIL,
State Director, Nevada.

[F.R. Doc. 69-13164; Filed, Nov. 4, 1969; 8:47 a.m.]

[OR 5049 (Wash.)]

WASHINGTON

Notice of Proposed Withdrawal and Reservation of Land

OCTOBER 28, 1969.

The Department of Agriculture, on behalf of the Forest Service, has filed application, OR 5049 (Wash.), for the withdrawal of the national forest land described below, from all forms of appropriation under the mining laws (30 U.S.C., ch. 2), but not from leasing under the mineral leasing laws, subject to valid existing rights.

The applicant desires the land as an addition to the Snoqualmie Pass-Denny Creek Recreation Area.

For a period of 30 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management, Department of the Interior, 729 Northeast Oregon Street (Post Office Box 2965), Portland, Oreg. 97208.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. He will also undertake negotiations with the applicant agency with the view of adjusting the application to reduce the area to the minimum essential to meet the applicant's needs, to provide for the maximum concurrent utilization of the land for purposes other than the applicant's, to eliminate land needed for purposes more essential than the applicant's, and to reach agreement on the concurrent management of the land and its resources.

He will also prepare a report for consideration by the Secretary of the Interior who will determine whether or not the land will be withdrawn as requested by the applicant agency.

The determination of the Secretary on the application will be published in the FEDERAL REGISTER. A separate notice will be sent to each interested party of record.

If circumstances warrant it, a public hearing will be held at a convenient time and place which will be announced.

The land involved in the application is:

SNOQUALMIE NATIONAL FOREST

WILLAMETTE MERIDIAN

Snoqualmie Pass-Denny Creek Recreation Area Addition

T. 22 N., R. 11 E.,
Sec. 5, lots 5, 18, 19, and 20;
Sec. 8, NW¼NE¼, S½NE¼, and N½NW¼ SE¼.

The area described contains approximately 265 acres.

VIRGIL O. SEISER,
Chief, Branch of Lands.

[F.R. Doc. 69-13165; Filed, Nov. 4, 1969; 8:47 a.m.]

Fish and Wildlife Service

[Docket No. C-310]

JOHN T. TARANTINO

Notice of Loan Application

OCTOBER 30, 1969.

John T. Tarantino, 957 North Point Street, San Francisco, Calif. 94109, has applied for a loan from the Fisheries Loan Fund to aid in financing the purchase of a new 42.6-foot registered length steel vessel to engage in the fishery for salmon, Dungeness crab, and albacore.

Notice is hereby given pursuant to the provisions of Public Law 89-85 and Fisheries Loan Fund Procedures (50 CFR Part 250, as revised) that the above-entitled application is being considered by the Bureau of Commercial Fisheries, Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Any person desiring to submit evidence that the contemplated operation of such vessel will cause economic hardship or injury to efficient vessel operators already operating in that fishery must submit such evidence in writing to the Director, Bureau of Commercial Fisheries, within 30 days from the date of publication of this notice. If such evidence is received it will be evaluated along with such other evidence as may be available before making a determination that the contemplated operations of the vessel will or will not cause such economic hardship or injury.

C. E. PETERSON,
Chief,
Division of Financial Assistance.

[F.R. Doc. 69-13163; Filed, Nov. 4, 1969; 8:47 a.m.]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

AMERICAN CYANAMID CO.

Notice of Withdrawal of Petition for Food Additives

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (sec. 409(b), 72 Stat. 1786; 21 U.S.C. 348(b)), the following notice is issued:

In accordance with § 121.52 *Withdrawal of petitions without prejudice* of the procedural food additive regulations (21 CFR 121.52), American Cyanamid Co., Agricultural Division, Post Office Box 400, Princeton, N.J. 08540, has withdrawn its petition (C35-807V), notice of which was published in the FEDERAL REGISTER of March 22, 1967 (32 F.R. 4366), proposing amendments to the food additive regulations (21 CFR Part 121) to provide for the safe use in chicken feed of aklomide and sulfanitran combined with chlortetracycline with or without sodium sulfate, for the prevention of coccidiosis and for the prevention or treatment of certain conditions in chickens in the amounts and for the purposes specified in § 121.208 *Chlortetracycline.*

Dated: October 27, 1969.

R. E. DUGGAN,
Acting Associate Commissioner for Compliance.

[F.R. Doc. 69-13154; Filed, Nov. 4, 1969; 8:46 a.m.]

BUCKMAN LABORATORIES, INC.

Notice of Filing of Petition for Food Additives

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5), 72 Stat. 1786; 21 U.S.C. 348(b)(5)), notice is given that a petition (FAP OH2468) has been filed by Buckman Laboratories, Inc., Memphis, Tenn. 38108, proposing that § 121.2505 *Slimicides* (21 CFR 121.2505) be amended to provide for the safe use of 2-(thiocyanomethylthio)benzothiazole and 2-hydroxypropyl methanethiolsulfonate to control slime in the manufacture of food-contact paper and paperboard.

Dated: October 28, 1969.

R. E. DUGGAN,
Acting Associate Commissioner for Compliance.

[F.R. Doc. 69-13155; Filed, Nov. 4, 1969; 8:46 a.m.]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

CERTAIN HUD EMPLOYEES IN REGION II (PHILADELPHIA)

Redelegation of Authority To Administer Oaths Under Title VIII (Fair Housing) of Civil Rights Act of 1968

The redelegation of authority to certain HUD employees in Region II (Philadelphia), effective April 18, 1969 (34 F.R. 6664, Apr. 18, 1969), is hereby amended as follows:

(1) In Item 4, delete "Karl O. Jackson" and insert as Item 4 "Theodore M. Daly".

(Redelegation of authority by Regional Administrator, effective Apr. 18, 1969 (34 F.R. 6664, Apr. 18, 1969))

Effective date. This amendment shall be effective upon publication in the FEDERAL REGISTER.

WAGNER D. JACKSON,
Assistant Regional Administrator for Equal Opportunity, Region II.

[F.R. Doc. 69-13189; Filed, Nov. 4, 1969; 8:49 a.m.]

ACTING ASSISTANT REGIONAL ADMINISTRATOR FOR FHA, REGION III (ATLANTA)

Designation

The officers appointed to the following listed positions in Region III (Atlanta) are hereby designated to serve as Acting Assistant Regional Administrator for FHA, Region III, during the absence of the Assistant Regional Administrator for FHA, with all the powers, functions and duties redelegated or assigned to the Assistant Regional Administrator for FHA: *Provided*, That no officer is authorized to serve as Acting Assistant Regional Administrator for FHA unless all other officers whose titles precede his in this designation are unable to serve by reason of absence:

1. Deputy Assistant Regional Administrator for FHA.
2. Director, Project Review Division.

(Delegation effective May 4, 1962, 27 F.R. 4319; Interim Order II, 31 F.R. 815, Jan. 21, 1966)

Effective as of the 5th day of November 1969.

EDWARD H. BAXTER,
Regional Administrator, Region III.

[F.R. Doc. 69-13190; Filed, Nov. 4, 1969; 8:49 a.m.]

ACTING ASSISTANT REGIONAL ADMINISTRATOR FOR FHA, REGION VI (SAN FRANCISCO)

Designation

The officers appointed to the following listed positions in Region VI (San Francisco) are hereby designated to serve as Acting Assistant Regional Administrator for Federal Housing Administration, Region VI (San Francisco), during the absence of the Assistant Regional Administrator for Federal Housing Administration with all the powers, functions, and duties redelegated or assigned to the Assistant Regional Administrator for Federal Housing Administration: *Provided*, That no officer is authorized to serve as Acting Assistant Regional Administrator for Federal Housing Administration unless all other officers whose titles precede his in this designation are unable to act by reason of absence:

1. Deputy Assistant Regional Administrator for Federal Housing Administration.
2. Director, Project Review Division.

This designation revokes the designation effective January 25, 1967 (32 F.R. 4085, March 15, 1967).

(Delegation effective May 4, 1962, 27 F.R. 4319; Interim Order II, 31 F.R. 815, Jan. 21, 1966)

Effective as of the 23d day of September 1969.

WARD ELLIOTT,
Acting Regional Administrator, Region VI.

[F.R. Doc. 69-13191; Filed, Nov. 4, 1969; 8:49 a.m.]

ACTING ASSISTANT REGIONAL ADMINISTRATOR FOR RENEWAL ASSISTANCE, REGION VI (SAN FRANCISCO)

Designation

The officers appointed to the following listed positions in Region VI (San Francisco) are hereby designated to serve as Acting Assistant Regional Administrator for Renewal Assistance, Region VI (San Francisco), during the absence of the Assistant Regional Administrator for Renewal Assistance with all the powers, functions, and duties redelegated or assigned to the Assistant Regional Administrator for Renewal Assistance: *Provided*, That no officer is authorized to serve as Acting Assistant Regional Administrator for Renewal Assistance unless all other officers whose titles precede his in this designation are unable to act by reason of absence:

1. Deputy Assistant Regional Administrator for Renewal Assistance.
2. Director, Field Service Division.
3. Chief, Project Planning and Engineering Branch.

The designation effective March 3, 1968 (33 F.R. 5897, Apr. 17, 1968) is hereby revoked.

(Delegation effective May 4, 1962, 27 F.R. 4319; Dept. Interim Order II, 31 F.R. 815, Jan. 21, 1966)

Effective as of September 21, 1969.

WARD ELLIOTT,
Acting Regional Administrator, Region VI.

[F.R. Doc. 69-13192; Filed, Nov. 4, 1969; 8:49 a.m.]

CIVIL AERONAUTICS BOARD

[Dockets Nos. 20244, 20336; Order 69-10-158]

ALOHA AIRLINES, INC., AND HAWAIIAN AIRLINES, INC.

Order of Investigation and Consolidation

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 31st day of October 1969.

By tariff revisions [1] marked to become effective November 1, 1969, Aloha Airlines, Inc. (Aloha), and Hawaiian Airlines, Inc. (Hawaiian), propose to increase most of their regular one-way fares 1 or 2 dollars. Both carriers also propose to increase their various discount fares which are based on a percentage of the regular one-way fares and to increase their excursion and group fares.

[1] Revisions to Airline Tariff Publishers, Inc., Agent, Tariff C.A.B. No. 101, filed on Sept. 26, 1969, by Aloha and Oct. 2, 1969, by Hawaiian.

The State of Hawaii (Hawaii) has filed a complaint against the proposed fare increases of Aloha and Hawaiian. Hawaii asserts that such increases would have a severe adverse effect on the State's economy; that they would seriously limit people's travel; and that the Hawaiian carriers have had various fare increases in the past 2 years. The complainant contends that the islands of Hawaii cannot have the benefit of competing modes of travel and that almost all of the passenger travel between the islands is by the two certificated inter-island carriers. Hawaii further urges that in lieu of a fare increase favorable consideration be given to the subsidy requests of Aloha and Hawaiian and that, pending disposition of the subsidy case, an investigation of the proposed fare increases be undertaken by the Board.

In support of their proposals Aloha and Hawaiian submit that fare increases are necessary to help alleviate their deteriorating financial position. Aloha asserts that its losses have been mounting and that even with the proposed fare increase, and assuming a significant growth of inter-island traffic, it will barely break even for the year ending June 30, 1970. Hawaiian cites the fact that its financial position has gone from profit to loss during 1969. It experienced a loss of $883,325 in the first 7 months of 1969 and indicates that had the proposed fare increase been in effect for the full 7 months of the year it would have been able to show a profit of $167,000. Both carriers assert that the economic factors which prompted the Board to recently grant the domestic carriers a fare increase apply with equal force to the inter-island operations.

Upon consideration of all relevant facts, the Board finds that the fares proposed by Aloha and Hawaiian may be unjust or unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial, or otherwise unlawful, and should be investigated. The deteriorating financial results upon which the carriers predicate their proposal to raise their passenger fares reflect not only increasing costs of doing business but also a very sharp reduction in load factor as compared with recent periods. Accordingly, we conclude it is necessary to undertake an investigation of these fares to assure that they will reflect the statutory criteria. There is presently before the Board a proceeding in Dockets 20244 and 20336 which concerns the determination of whether Federal subsidy should be provided to these carriers. Many of the basic facts and issues would be common to both investigations, and therefore, we will consolidate the investigation ordered herein with the proceeding in Dockets 20244 and 20336.

We have decided, however, not to suspend the tariff proposals pending investigation. Revenues have not kept pace with increases in expenses, and these two carriers over an extended period of time have not realized earnings at a level the Board has considered reasonable. If effective competitive air service is to be assured in this State, the economic viability of both inter-island carriers

must be maintained. We will therefore deny the request for suspension.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 204(a) and 404 thereof:

It is ordered, That:

1. An investigation be instituted to determine whether the fares and provisions described in Appendix A attached hereto,[3] including subsequent revisions and reissues thereof, and rules, regulations, and practices affecting such fares and provisions, are or will be unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and if found to be unlawful, to determine and prescribe the lawful fares and provisions, and rules, regulations, or practices affecting such fares and provisions;

2. The complaint of the State of Hawaii in Docket No. 21501 is denied insofar as it requests suspension and is otherwise consolidated into the investigation herein ordered;

3. The investigation ordered herein is consolidated in Dockets Nos. 20244 and 20336; and

4. A copy of this order be filed with the aforesaid tariffs and served upon Aloha Airlines, Inc., Hawaiian Airlines, Inc., and the State of Hawaii.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.[3]

[SEAL] HAROLD R. SANDERSON, *Secretary.*

[F.R. Doc. 69-13173; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket Nos. 20878, 21068]

ATLANTA-KANSAS CITY PROCEEDING

Notice of Hearing

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that hearing in the above-entitled matter is assigned to be held on November 20, 1969, at 10 a.m., e.s.t., in Room 911, Universal Building, 1825 Connecticut Avenue NW., Washington, D.C., before Examiner William J. Madden.

Dated at Washington, D.C., October 31, 1969.

[SEAL] THOMAS L. WRENN, *Chief Examiner.*

[F.R. Doc. 69-13174; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket No. 21009]

BRITISH UNITED AIRWAYS (SERVICES), LTD., AND BRITISH UNITED AIRWAYS, LTD.

Notice of Cancellation

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that oral argument in the above-entitled case assigned to be held on November 26, 1969, is canceled.

Dated at Washington, D.C., October 31, 1969.

[SEAL] THOMAS L. WRENN, *Chief Examiner.*

[F.R. Doc. 69-13175; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket No. 21569; Order 69-10-155]

EAGLE AIR DISPATCH, INC.

Order of Investigation and Suspension

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 31st day of October 1969.

By tariff revision[1] marked to become effective November 3, 1969, Eagle Air Dispatch, Inc. (Eagle), an air freight forwarder, proposes to increase its excess valuation rate for air freight shipments from 15 cents to 20 cents for each $100 (or fraction thereof) by which the declared value exceeds 50 cents per pound or $50 per shipment, whichever is higher.

The forwarder does not present any justification in support of its proposal.

Upon consideration of all relevant matters, the Board finds that the proposed rate may be unjust, unreasonable, unjustly discriminatory, unduly preferential or unduly prejudicial, or otherwise unlawful, and should be suspended pending investigation.

Eagle's proposal involves increasing its rate by 33⅓ percent, but no basis has been advanced by the forwarders for such increase.[2] With relatively few exceptions, the air freight forwarders publish excess valuation rates for general domestic traffic amounting to $0.10 or $0.15 per $100 of declared value in excess of $0.50 per pound, subject to a minimum of $50 per shipment.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 204(a) and 1002 thereof:

It is ordered, That:

1. An investigation be instituted to determine whether the provisions and charges in rule No. 85, paragraph 1.(B), appearing on 2d revised page 7 of Eagle Air Dispatch, Inc.'s C.A.B. No. 7, and rules, regulations, and practices affecting such provisions and charges, are or will be unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and if found to be unlawful, to determine and prescribe the lawful provisions and charges, and rules, regulations, or practices affecting such provisions and charges;

2. Pending hearing and decision by the Board, the provisions and charges in rule No. 85, paragraph 1.(B), appearing on 2d revised page 7 of Eagle Air Dispatch, Inc.'s C.A.B. No. 7, are suspended and their use deferred to and including January 31, 1970, unless otherwise ordered by the Board, and that no changes be made therein during the period of suspension except by order or special permission of the Board;

3. The proceeding herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated; and

4. Copies of this order shall be filed with the tariff and served upon Eagle Air Dispatch, Inc., who is hereby made a party to this proceeding.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANDERSON, *Secretary.*

[F.R. Doc. 69-13176; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket No. 20655]

LUFTVERKEHRSUNTERNEHMEN ATLANTIS A. G.

Notice of Oral Argument

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that oral argument in the above-entitled case is assigned to be heard by the Board on November 26, 1969, at 10 a.m., e.s.t., in Room 1027, Universal Building, 1825 Connecticut Avenue NW., Washington, D.C.

Dated at Washington, D.C., October 31, 1969.

[SEAL] THOMAS L. WRENN, *Chief Examiner.*

[F.R. Doc. 69-13177; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket No. 21545]

NORTH CANADA AIR, LTD.

Notice of Prehearing Conference

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that a prehearing conference on the above-entitled application is assigned to be held on November 17, 1969, at 10 a.m., e.s.t., in Room

[3] Statement of members Minetti and Murphy and Appendix A filed as part of the original document.

[1] Revision to Eagle Air Dispatch, Inc.'s Tariff C.A.B. No. 7 filed October 3, 1969.

[2] Cf., "Increased valuation and c.o.d. charges proposed by Railway Express Agency, Inc.," 27 C.A.B. 542 (1958). The Board after investigation found REA's proposed increases in excess valuation and c.o.d. charges unjust and unreasonable chiefly on the ground that REA had failed to sustain the burden of coming forward with evidence to show what the increased costs of such services are. In similar actions, the Board suspended, pending investigation: (1) increased excess valuation charges proposed by REA (order E-13820, May 1, 1959), (2) revision to its liability rule for parcel post shipments proposed in 1965 by WTC (order E-22846, Nov. 4, 1965), (3) increased excess valuation charges proposed by Bekins Airvan Co. of $1.50 per $100 (order E-23746, May 27, 1966), (4) increased excess valuation rates for parcel post shipments proposed by WTC Air Freight (order 69-2-10, Feb. 3, 1969); and (5) increased excess valuation rates by Astro Air Express, Inc., and Comet Air Freight (order 69-4-26, Apr. 4, 1969).

805, Universal Building, 1825 Connecticut Avenue NW., Washington, D.C., before Examiner Joseph L. Fitzmaurice.

Dated at Washington, D.C., October 31, 1969.

[SEAL] THOMAS L. WRENN,
Chief Examiner.

[F.R. Doc. 69-13178; Filed, Nov. 4, 1969; 8:48 a.m.]

[Docket No. 21496]

CALEDONIAN AIRWAYS (PRESTWICK), LTD.

Notice of Proposed Approval

Application of Caledonian Airways (Prestwick), Ltd., for approval of an aircraft purchase pursuant to section 408 of the Federal Aviation Act of 1958, as amended, Docket 21496.

Notice is hereby given, pursuant to the statutory requirements of section 408(b) of the Federal Aviation Act of 1958, as amended, that the undersigned intends to issue the order set forth below under delegated authority on November 5, 1969. Prior to that time, interested persons may file comments or request a hearing with respect to the action proposed in the order.

Dated at Washington, D.C., November 3, 1969.

[SEAL] A. M. ANDREWS,
Director,
Bureau of Operating Rights.

ORDER APPROVING PURCHASE

Issued under delegated authority.

Application of Caledonian Airways (Prestwick) Ltd., for Board action respecting section 408 of the Federal Aviation Act, as amended; Docket 21496.

By application filed October 7, 1969, and amended thereafter Caledonian Airways (Prestwick) Ltd. (Caledonian), requests that the Board disclaim jurisdiction, or in the alternative approve, pursuant to section 408(b) of the Federal Aviation Act of 1958, as amended (the Act), an agreement calling for acquisition by Caledonian through Airlease International (Airlease) of one Boeing 707-320C aircraft and related equipment from Executive Jet Sales, Inc. (EJS).[1] The purchase price of the aircraft and related equipment is $7,148,581.[2]

Caledonian is a United Kingdom independent air carrier engaged in worldwide passenger and property charter transportation activities. The carrier is the holder of a foreign air carrier permit issued by the Board which authorizes Caledonian to engage in transatlantic charter air transportation.[3] The applicant has submitted its request since it believes it may be deemed to be "a person engaged in any phase of aeronautics," a factor which potentially places the proposed transaction under section 408(a)(2) of the Act.

EJS, in turn, is a wholly owned subsidiary of Executive Jet Aviation, Inc. (EJA). The parent company is an air taxi operator pursuant to Part 298 of the Board's economic regulations and also holds exemption authority to perform charter transportation using designated aircraft types. At the time of filing, EJS owned or leased two Boeing 707-320's, two Boeing 727's, two Falcon jets and 13 Lear Jet aircraft. The aircraft which Caledonian proposes to purchase from EJS was formerly leased to Transavia Holland, N.V., a registered Dutch charter carrier.[4]

The applicant states it intends to assign the Aircraft Purchase Agreement, in one manner or another, to Airlease who will purchase the aircraft and associated equipment and thereupon lease them to Caledonian.[5] The activities of Airlease are managed by Airlease International Management, Ltd. (Management), a British company formed by, and whose shareholders are, the partners of Airlease plus Price Forbes & Co., Ltd. The managing official of Management is R. S. Sowter, formerly of Hawker Siddeley International. The applicant adds that neither Airlease, Management nor Mr. Sowter have any interest, relationships, arrangement, or agreement of any type with EJS, EJA, or any company affiliated with either of them except the agreements and arrangements referred to in the application. The applicant states that under the purchase agreement the aircraft and associated equipment will be delivered into the possession of Caledonian in Brussels, Belgium on October 15, 1969 so that Caledonian can cause Sabena Airlines to undertake such modifications as are required to place the aircraft on British Registry after its purchase. Under the agreement, if the Board grants the relief requested, the sale of the aircraft to Caledonian will take place two banking days after the Board gives notice of its favorable action. On the other hand, if such favorable action is not forthcoming by November 5, 1969, the agreements will terminate and Caledonian will be required to redeliver the aircraft and associated equipment to EJS and to pay the cost entailed in remodifying the aircraft to its original delivery condition. In further support of its request, the applicant states that the proposed aircraft transaction is in the public interest and that the only persons with a substantial interest in the proposed transaction are EJS and Caledonian, and that consequently no other person possesses the requisite interest to require a hearing.

No objections to the application or requests for a hearing have been received.

Notice of intent to dispose of the application without a hearing has been published in the FEDERAL REGISTER and a copy of such notice has been furnished by the Board to the Attorney General not later than 1 day following such publication, both in accordance with section 408(b) of the Act.

Upon consideration of the application it is concluded that the sale involves a substantial part of the properties of EJA and therefore is subject to section 408 of the Act. The aircraft represents 25 percent of EJS' fleet of large jet aircraft.[6] However, it is further concluded that the transaction does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly and does not restrain competition. Furthermore, no person disclosing a substantial interest in the proceeding is currently requesting a hearing and it is found that the public interest does not require a hearing. The transaction results from the Board's direction that EJA terminate the lease involving this particular aircraft with Transavia. Approval of the transaction is not inconsistent with the public interest as previously determined in Order 69-10-67.[7]

Pursuant to authority delegated by the Board in its Organization Regulations, 14 CFR 385.13, it is found that the foregoing purchase should be approved without hearing under section 408(b).

Accordingly, it is ordered:

1. That the sale of one Boeing 707-320C aircraft by Executive Jet Sales, Inc., to Airlease International under the agreement filed in Docket 21496 between Executive Jet Sales, Inc., and Caledonian Airways (Prestwick) Ltd., to Airlease International, be and it hereby is approved; and

2. That to the extent not granted, the application be and it hereby is denied.

Persons entitled to petition the Board for review of this order pursuant to the Board's regulations, 14 CFR 385.50, may file such petitions within 10 days after the date of service of this order.

Because the imminence of the purchase date requires immediate action, this order shall be effective upon issuance, and the filing of petitions for review shall not stay its effectiveness.

[SEAL] MABEL MCCART,
Acting Secretary.

[F.R. Doc. 69-13243; Filed, Nov. 4, 1969; 8:50 a.m.]

FEDERAL MARITIME COMMISSION

[Independent Ocean Freight Forwarder License No. 1253]

JOSE ASTENGO, JR.

Order of Revocation

By letter dated October 15, 1969, Mr. Jose Astengo, Jr., Post Office Box 1888, 1300 South Beacon Street, San Pedro,

[1] Apparently, Caledonian has determined to finance the purchase of the aircraft and associated equipment from EJS through the medium of Airlease for financial and tax considerations. Acquisition will result either from the assignment to Airlease of the Caledonian-EJS aircraft purchase agreement, or, by a novation wherein Airlease will appear as party in lieu of Caledonian in the exact existing form of the aircraft purchase agreement. Immediately upon purchase of the aircraft, Airlease will lease the aircraft and associated equipment to Caledonian for a period of 10 years with options to extend the lease term thereafter.

[2] The related equipment comprises one spare JT3D-3B engine, one BEC Kit and a small amount of miscellaneous spare parts.

[3] Authority granted in Order 68-9-62, served Sept. 16, 1968.

[4] Under a settlement agreement reached with the Board in Docket 17657 and cited in the order to cease and desist, Oct. 14, 1969, 69-10-67, EJA agreed that it would cancel and terminate all agreements to wet lease or dry lease aircraft to Transavia, no later than Oct. 21, 1969. The subject agreement flows from that termination.

[5] Airlease International (Airlease) is a British partnership formed in August 1969, for the purpose of leasing aircraft and aircraft equipment. Its partners are as follows: Bank of Scotland; Barclays Bank Ltd.; Barclays Bank D.C.O.; Brown, Shipley & Co., Ltd.; Kleinwort, Bensen, Ltd.; Lazard Brothers & Co., Ltd.; Lloyds Bank Ltd.; Midland Bank Finance Corp., Ltd.; Morgan Grenfell & Co., Ltd.; National Westminister Bank, Ltd.; and The Commercial Union Assurance Co., Ltd.

[6] The Board previously asserted jurisdiction over the lease by EJA to Transavia of the particular aircraft which will now be sold to Caledonian. See Order E-26756, May 6, 1968.

[7] EJA and the Penn Central Transportation Co. have filed affidavits stating that neither they, their subsidiaries, officers or directors have any direct or indirect interest in Caledonian, Airlease, or in any subsidiary thereof.

Calif. 90733, voluntarily returned his individual Independent Ocean Freight Forwarder License No. 1253 to the Federal Maritime Commission for cancellation.

By virtue of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order 201.1, section 6.03:

It is ordered, That the Independent Ocean Freight Forwarder License No. 1253 of Jose Astengo, Jr., be and is hereby revoked effective October 30, 1969.

It is further ordered, That this revocation is without prejudice to reapplication at a later date.

It is further ordered, That a copy of this Order be published in the FEDERAL REGISTER and served upon Jose Astengo, Jr.

JOHN F. GILSON,
Deputy Director,
Bureau of Domestic Regulation.

[F.R. Doc. 69-13156; Filed, Nov. 4, 1969; 8:47 a.m.]

[Independent Ocean Freight Forwarder License No. 72]

SHIPPING UNLIMITED

Order of Revocation

By letter dated September 18, 1969, Shipping Unlimited, 11 Broadway, New York, N.Y. 10004, advised that it had ceased operations as an independent ocean freight forwarder and under cover of letter dated October 8, 1969, voluntarily returned its License No. 72 for cancellation.

By virtue of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order 201.1, section 6.03:

It is ordered, That the Independent Ocean Freight Forwarder License No. 72 of Shipping Unlimited be and is hereby revoked effective October 30, 1969.

It is further ordered, That a copy of this order be published in the FEDERAL REGISTER and served upon Shipping Unlimited.

LEROY F. FULLER,
Director,
Bureau of Domestic Regulation.

[F.R. Doc. 69-13157; Filed, Nov. 4, 1969; 8:47 a.m.]

CALIFORNIA ASSOCIATION OF PORT AUTHORITIES

Notice of Agreement Filed for Approval

Notice is hereby given that the following agreement has been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and obtain a copy of the agreement at the Washington office of the Federal Maritime Commission, 1405 I Street NW., Room 1202, or may inspect agreements at the offices of the District Managers, New York, N.Y., New Orleans, La., and San Francisco, Calif. Comments with reference to an agreement including a request for hearing, if desired, may be submitted to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 20 days after publication of this notice in the FEDERAL REGISTER. A copy of any such statement should also be forwarded to the party filing the agreement (as indicated hereinafter), and the comments should indicate that this has been done.

Notice of agreement filed for approval by:

Mr. C. R. Nickerson, Executive Secretary, California Association of Port Authorities, 9 First Street, San Francisco, Calif. 94105.

Agreement No. 7345-13, between the members of the California Association of Port Authorities, modifies the basic agreement which provides for the establishment and maintenance of just and reasonable terminal rates, rules, and regulations at members' terminals at ports in the State of California. The purpose of the modification is to provide for activity within the organization of "operating" and "non-operating" members.

Dated: October 31, 1969.

By order of the Federal Maritime Commission.

THOMAS LISI,
Secretary.

[F.R. Doc. 69-13158; Filed, Nov. 4, 1969; 8:47 a.m.]

LYKES BROS. STEAMSHIP CO., INC., AND GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

Notice of Agreement Filed for Approval

Notice is hereby given that the following agreement has been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and obtain a copy of the agreement at the Washington office of the Federal Maritime Commission, 1405 I Street NW., Room 1202, or may inspect agreements at the offices of the District Managers, New York, N.Y., New Orleans, La., and San Francisco, Calif. Comments with reference to an agreement including a request for hearing, if desired, may be submitted to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 20 days after publication of this notice in the FEDERAL REGISTER. A copy of any such statement should also be forwarded to the party filing the agreement (as indicated hereinafter), and the comments should indicate that this has been done.

Notice of agreement filed for approval by:

Mr. L. J. Fitzpatrick, Lykes Bros. Steamship Co., Inc., Post Office Box 50998, New Orleans, La. 70150.

Agreement No. T-2348 between Lykes Bros. Steamship Co., Inc. (Lykes), and Gulf & South American Steamship Co., Inc. (G&SA), is a terminal agreement whereby Lykes agrees to provide certain labor, materials, and services to G&SA at Lykes' Nashville Avenue Terminal, New Orleans, La. The parties will share wharf space on an agreed upon schedule and priority use. Costs incurred by Lykes in the operation of the terminal will be prorated between the two companies as outlined in the agreement.

Dated: October 31, 1969.

By order of the Federal Maritime Commission.

THOMAS LISI,
Secretary.

[F.R. Doc. 69-13159; Filed, Nov. 4, 1969; 8:47 a.m.]

PORT OF SEATTLE AND ALASKA STEAMSHIP CO.

Notice of Agreement Filed for Approval

Notice is hereby given that the following agreement has been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and obtain a copy of the agreement at the Washington office of the Federal Maritime Commission, 1405 I Street NW., Room 1202, or may inspect agreements at the offices of the District Managers, New York, N.Y., New Orleans, La., and San Francisco, Calif. Comments with reference to an agreement including a request for hearing, if desired, may be submitted to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 20 days after publication of this notice in the FEDERAL REGISTER. A copy of any such statement should also be forwarded to the party filing the agreement (as indicated hereinafter), and the comments should indicate that this has been done.

Notice of agreement filed for approval by:

Mr. T. P. McCutchan, Manager, Property Management Department, Port of Seattle, Post Office Box 1209, Seattle, Wash. 98111.

Agreement No. T-2185-1 between the Port of Seattle (Port) and Alaska Steamship Co. (Alaska Steam) amends the month-to-month basic agreement, which superseded and canceled several previous individual lease agreements between the parties. The purpose of the modification is to reinstitute a term lease for a portion of the area previously covered on a month-to-month lease basis.

Dated: October 31, 1969.

By order of the Federal Maritime Commission.

THOMAS LISI,
Secretary.

[F.R. Doc. 69-13160; Filed, Nov. 4, 1969; 8:47 a.m.]

FEDERAL POWER COMMISSION

[Docket No. RI70-349]

ATLANTIC RICHFIELD CO.

Order Providing for Hearing on and Suspension of Proposed Change in Rate, and Allowing Rate Change To Become Effective Subject to Refund

OCTOBER 29, 1969.

Respondent named herein has filed a proposed change in rate and charge of a currently effective rate schedule for the sale of natural gas under Commission jurisdiction, as set forth in Appendix A hereof.

The proposed changed rate and charge may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful.

The Commission finds: It is in the public interest and consistent with the Natural Gas Act that the Commission enter upon a hearing regarding the lawfulness of the proposed change, and that the supplement herein be suspended and its use be deferred as ordered below.

The Commission orders:

(A) Under the Natural Gas Act, particularly sections 4 and 15, the regulations pertaining thereto (18 CFR Ch. I), and the Commission's rules of practice and procedure, a public hearing shall be held concerning the lawfulness of the proposed change.

(B) Pending hearing and decision thereon, the rate supplement herein is suspended and its use deferred until date shown in the "Date Suspended Until" column, and thereafter until made effective as prescribed by the Natural Gas Act: *Provided, however*, That the supplement to the rate schedule filed by respondent shall become effective subject to refund on the date and in the manner herein prescribed if within 20 days from the date of the issuance of this order respondent shall execute and file under its above-designated docket number with the Secretary of the Commission its agreement and undertaking to comply with the refunding and reporting procedure required by the Natural Gas Act and § 154.102 of the regulations thereunder, accompanied by a certificate showing service of a copy thereof upon the purchaser under the rate schedule involved. Unless respondent is advised to the contrary within 15 days after the filing of its agreement and undertaking, such agreement and undertaking shall be deemed to have been accepted.[1]

(C) Until otherwise ordered by the Commission, neither the suspended supplement, nor the rate schedule sought to be altered, shall be changed until disposition of this proceeding or expiration of the suspension period.

(D) Notices of intervention or petitions to intervene may be filed with the Federal Power Commission, Washington, D.C. 20426, in accordance with the rules of practice and procedure (18 CFR 1.8 and 1.37 (f)) on or before December 15, 1969.

By the Commission.

[SEAL] GORDON M. GRANT, *Secretary.*

[1] If an acceptable general undertaking, as provided in Order No. 377, has previously been filed by a producer, then it will not be necessary for that producer to file an agreement and undertaking as provided herein. In such circumstances the producer's proposed increased rate will become effective as of the expiration of the suspension period without any further action by the producer.

APPENDIX A

Docket No.	Respondent	Rate schedule No.	Supplement No.	Purchaser and producing area	Amount of annual increase	Date filing tendered	Effective date unless suspended	Date suspended until—	Cents per Mcf: Rate in effect	Cents per Mcf: Proposed increased rate	Rate in effect subject to refund in docket Nos.
RI70-349	Atlantic Richfield Co., Post Office Box 2819, Dallas, Tex. 75221.	158	[2] 37	Tennessee Gas Pipeline Co., a division of Tenneco Inc. (Grand Isle Block 43 Field, West Delta Area) (Offshore Louisiana).	$56,250	10-1-69	[4] 11-1-69	11-2-69	[7] [8] 19.0	[4] [6] 19.5	

[2] Applicable only to acreage added by Supplement No. 10. Acreage located in Disputed Zone.
[3] Applies only to the sale of gas well gas.
[4] Periodic rate increase.
[5] Pressure base is 15.025 p.s.i.a.
[6] Includes 1.5 cents tax reimbursement.
[7] Temporary certificated rate being collected subject to a refund floor of 18.5 cents.
[8] Such rate to hold for sale of casinghead gas pending dissolution of the stay of the effectiveness of the rate reduction provided for in Opinion No. 546.

Atlantic Richfield Co.'s (Atlantic) proposed rate increase under its FPC Gas Rate Schedule No. 158 is applicable to gas produced from acreage dedicated by an agreement dated August 31, 1964, on file as Supplement No. 10 to Rate Schedule No. 158. The proposed increase [9] from 19 cents to 19.5 cents per Mcf is for second vintage gas well gas sold from the Grand Isle Block 43 Field, West Delta Area, Offshore Louisiana (Disputed Zone). There is a dispute now pending in court as to whether this gas is produced from the Federal Domain or within the taxing jurisdiction of the State of Louisiana. The currently effective rate of 19 cents per Mcf is being collected subject to refund down to a floor of 18.5 cents under a temporary certificate.[10]

Atlantic's proposed rate of 19.5 cents is equal to the area rate established in Opinion No. 546 for second vintage gas well gas produced from within the state taxing jurisdiction but exceeds the 18-cent rate established for second vintage gas well gas produced from the Federal Domain. In these circumstances, we conclude that it would be in the public interest to suspend Atlantic's proposed increase for 1 day from November 1, 1969, the requested effective date, and thereafter to permit Atlantic to collect the increased rate subject to refund down to 18 cents per Mcf for all gas finally held to have been produced in the Federal Domain.

[9] Limited to the sale of gas well gas only.
[10] As of Oct. 1, 1968, Atlantic under Opinion No. 546 has a refund obligation down to 18 cents of the gas is finally held to have been produced in the Federal Domain.

[F.R. Doc. 69-13142; Filed, Nov. 4, 1969; 8:46 a.m.]

[Docket No. E-7508]

DEPARTMENT OF THE INTERIOR AND BONNEVILLE POWER ADMINISTRATION

Notice of Request for Confirmation of Rate Schedules and Rate Schedule Provisions, and for Extension of Confirmation of Wholesale Rates and Charges

OCTOBER 23, 1969.

Notice is hereby given that the Secretary of the Interior on behalf of Bonneville Power Administration (BPA), pursuant to section 5 of the Bonneville Project Act (50 Stat. 731, 734-735, as amended 59 Stat. 546) and section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890), on October 16, 1969, filed with the Federal Power Commission a request for confirmation and approval of proposed rate schedules and general rate schedule provisions for the sale of power by BPA, to become effective December 20, 1969.

The Secretary states that the proposed rate schedules and general rate schedule provisions are identical to those currently in effect with the exception that section 9 "Billing Modification" of Schedule E-5 is deleted. That section was included in 1965 when the BPA rates were increased and modified to provide a floor and ceiling on the billing under that rate schedule. It was designed to smooth the impact of the rate increase on the customers purchasing power under the E-5 rate by providing a maximum and minimum increase as compared to the preceding E-4 rate schedule. It was an interim arrangement to be effective only through December 20, 1969. Consequently, section 9 is deleted from the E-5 rate schedule now being filed.

The Commission's aproval is also requested for continued special application of the wholesale rates and charges as previously approved in the following:

1. Docket No. E-6611 concerning sale of provisional energy to any industrial customer purchasing firm and interruptible or modified firm and interruptible energy as last approved in Docket 7242.

2. Docket No. E–7312 concerning sale of energy to the Washington Public Power Supply System for use only at the Hanford generating plant.

3. Docket No. E–7449 concerning sale of energy to the U.S. Bureau of Reclamation to firm up output of the Roza project.

4. That portion of Docket No. E–7242 dated May 29, 1968, concerning modification of the general rate schedule provisions applicable to contracts for the sale of power and energy transferred over the Pacific Northwest-Pacific Southwest intertie lines.

Copies of the proposed rate schedules and rate schedule provisions are attached hereto as Exhibit A.[1]

The proposed rate schedules and general rate schedule provisions are on file with the Commission for public inspection. Any person desiring to make comment or suggestions for the Commission's consideration should submit the same in writing on or before November 14, 1969, to the Federal Power Commission, Washington, D.C. 20426.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69–13140; Filed, Nov. 4, 1969; 8:46 a.m.]

[Docket No. CP70–104]

FLORIDA GAS TRANSMISSION CO.

Notice of Application

OCTOBER 29, 1969.

Take notice that on October 21, 1969, Florida Gas Transmission Co. (applicant), Post Office Box 44, Winter Park, Fla. 32789, filed in Docket No. CP70–104 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of certain natural gas facilities and the sale of volumes of natural gas to Florida Gas Transmission Co., Lakeland Division, for resale in the cities of Frostproof and Avon Park, Fla., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant proposes to construct and operate approximately 7.35 miles of pipeline loop paralleling its existing 6-inch Avon Park lateral gas transmission line between the cities of Frostproof, in Polk County, and Avon Park, in Highlands County, and to construct and operate two 4-inch sales laterals and install measuring, regulating and appurtenant facilities to sell and deliver natural gas to Florida Gas Co.

The total estimated cost of the proposed facilities is $294,000, to be financed by cash on hand.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 26, 1969, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69–13136; Filed, Nov. 4, 1969; 8:45 a.m.]

[Project No. 2336]

GEORGIA POWER CO.

Notice of Application for Approval of Exhibit R (Recreational Use Plan) for Project

OCTOBER 29, 1969.

Public notice is hereby given that application has been filed under the regulations under the Federal Power Act (16 U.S.C. 791a–825r) by Georgia Power Co. (correspondence to: I. S. Mitchell, vice president and secretary, Georgia Power Co., Post Office Box 4545, Atlanta, Ga. 30302), for approval of an exhibit R for the Lloyds Shoals Project No. 2336, located on Ocmulgee River in Butts, Jasper, and Newton Counties, Ga., in the vicinity of the towns of Jackson and Monticello.

The plan of recreational development presented by exhibit R lists the following existing privately owned recreation facilities open to the public: (1) Two areas for boat launching, picnicking, and camping; (2) one site for boat launching and camping; and (3) three sites for boat launching only. Company proposes to set aside four tracts of land for future recreational development by State and local agencies; (1) a 50-acre site adjacent to the dam and a 400-acre site at the Newton Factory Bridge Road, each of which could be developed for camping, swimming, picnicking, and other outdoor activities; and (2) a 6-acre tract at Conley Ditch Road Bridge and a 1.5-acre tract at the crossing of Tussahaw Creek by Georgia Highway 36 for boat launching ramps.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 31, 1969, file with the Federal Power Commission, Washington, D.C. 20426, petitions to intervene or protests in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Persons wishing to become parties to a proceeding or to participate as a party in any hearing therein must file petitions to intervene in accordance with the Commission's rules. The application is on file with the Commission and available for public inspection.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69–13137; Filed, Nov. 4, 1969; 8:45 a.m.]

[Docket No. RP70–6]

LAWRENCEBURG GAS TRANSMISSION CORP.

Order Suspending Proposed Changes in Rates; Correction

OCTOBER 23, 1969.

In the order suspending proposed changes in rates, issued September 30, 1969 and published in the FEDERAL REGISTER October 9, 1969 (34 F.R. 15667) beginning in the twelfth line of ordering paragraph (A): Change "Texas Gas' FPC Gas Tariff" to "Lawrenceburg's FPC Gas Tariff."

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69–13138; Filed, Nov. 4, 1969; 8:46 a.m.]

[Docket No. RI70–337, etc.]

UNION PRODUCING CO. ET AL.

Order Providing for Hearing on and Suspension of Proposed Changes in Rates, and Allowing Rate Changes To Become Effective Subject to Refund [1]

OCTOBER 24, 1969.

The respondents named herein have filed proposed changes in rates and

[1] Exhibit A filed as part of original document.

[1] Does not consolidate for hearing or dispose of the several matters herein.

charges of currently effective rate schedules for sales of natural gas under Commission jurisdiction, as set forth in appendix A hereof.

The proposed changed rates and charges may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful.

The Commission finds: It is in the public interest and consistent with the Natural Gas Act that the Commission enter upon hearings regarding the lawfulness of the proposed changes, and that the supplements herein be suspended and their use be deferred as ordered below.

The Commission orders:

(A) Under the Natural Gas Act, particularly sections 4 and 15, the regulations pertaining thereto (18 CFR Ch. I), and the Commission's rules of practice and procedure, public hearings shall be held concerning the lawfulness of the proposed changes.

(B) Pending hearings and decisions thereon, the rate supplements herein are suspended and their use deferred until date shown in the "Date Suspended Until" column, and thereafter until made effective as prescribed by the Natural Gas Act: *Provided, however,* That the supplements to the rate schedules filed by respondents, as set forth herein, shall become effective subject to refund on the date and in the manner herein prescribed if within 20 days from the date of the issuance of this order, respondents shall each execute and file under its above-designated docket number with the Secretary of the Commission its agreement and undertaking to comply with the refunding and reporting procedure required by the Natural Gas Act and § 154.102 of the regulations thereunder, accompanied by a certificate showing service of copies thereof upon all purchasers under the rate schedule involved. Unless respondents are advised to the contrary within 15 days after the filing of their respective agreements and undertakings, such agreements and undertakings shall be deemed to have been accepted.[2]

(C) Until otherwise ordered by the Commission, neither the suspended supplements, nor the rate schedules sought to be altered, shall be changed until disposition of these proceedings or expiration of the suspension period.

(D) Notices of intervention or petitions to intervene may be filed with the Federal Power Commission, Washington, D.C. 20426, in accordance with the rules of practice and procedure (18 CFR 1.8 and 1.37(f)) on or before December 10, 1969.

By the Commission.

[SEAL] GORDON M. GRANT, *Secretary.*

[2] If an acceptable general undertaking, as provided in order No. 377, has previously been filed by a producer, then it will not be necessary for that producer to file an agreement and undertaking as provided herein. In such circumstances the producer's proposed increased rate will become effective as of the expiration of the suspension period without any further action by the producer.

APPENDIX A

Docket No.	Respondent	Rate schedule No.	Supplement No.	Purchaser and producing area	Amount of annual increase	Date filing tendered	Effective date unless suspended	Date suspended until—	Cents per Mcf: Rate in effect	Cents per Mcf: Proposed increased rate	Rate in effect subject to refund in Dockets Nos.
RI70-337	Union Producing Co.,[3] 900 Southwest Tower, Houston, Tex. 77012.	64	[4] 8	United Gas Pipe Line Co. (Carthage Field, Panola County, Tex.) (RR. District No. 6).		10-2-69	[5] 11-2-69	(Accepted)			
		64	9		$588	10-2-69	[5] 11-2-69	[6] 11-3-69	11.9004	[7] [8] 14.0	RI69-333.
RI70-338	Union Producing Co. (Operator) et al.[3]	65	[4] 17	do		10-2-69	[5] 11-2-69	(Accepted)			
		65	18		335,936	10-2-69	[5] 11-2-69	[6] 11-3-69	11.9004	[7] [8] 14.0	RI69-331.

[3] Union and United are wholly subsidiaries of Penzoil United, Inc.
[4] Contract amendment dated Sept. 1, 1969, which provides for 13.8231 cents from Sept. 1, 1969 to Jan. 1, 1972, and 14.8104 cents thereafter or the area rate, whichever is higher. Also extends term of contract to Jan. 1, 1983.
[5] The stated effective date is the effective date requested by Respondent.
[6] The suspension period is limited to 1 day.
[7] Renegotiated rate increase.
[8] Pressure base is 14.65 p.s.i.a.

Union Producing Co. and Union Producing Co. (Operator), et al. (both referred to herein as Union) have submitted proposed renegotiated rate increases from 11.9004 cents to 14 cents per Mcf for sales to United Gas Pipe Line Co. (United), in Texas Railroad District No. 6. Even though Union's proposed rate increases do not exceed the area increased rate ceiling for Texas Railroad District No. 6 they should be suspended for one day from November 2, 1969, the proposed effective date, because Union and United are affiliates.

Concurrently with the filing of their rate increases, Union submitted two contract amendments dated September 1, 1969, designated as Supplement Nos. 8 and 17 to Union's FPC Gas Rate Schedules Nos. 64 and 65, respectively, which provide the basis for Union's proposed rate increases. We believe that it would be in the public interest to accept for filing Union's contract amendments to become effective as of November 2, 1969, the proposed effective date, but not the proposed rates contained therein which are suspended as ordered herein.

[F.R. Doc. 69-13149; Filed, Nov. 4, 1969; 8:46 a.m.]

[Docket No. CP70-103]

UNITED GAS PIPE LINE CO.

Notice of Application

OCTOBER 29, 1969.

Take notice that on October 20, 1969, United Gas Pipe Line Co. (applicant), 1500 Southwest Tower, Houston, Tex. 77002, filed in Docket No. CP70-103 an application pursuant to section 7 of the Natural Gas Act for permission and approval to abandon, and transfer to a wholly owned subsidiary, Pennzoil Pipeline Co. (Pennzoil), certain natural gas facilities, and to abandon certain sales of natural gas; and for a certificate of public convenience and necessity authorizing the sale of natural gas to Pennzoil, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

To reflect the intrastate nature of the gas utilized, applicant proposes to transfer facilities in Texas known as its Beaumont properties to Pennzoil, and to sell to Pennzoil volumes of gas approximately the former volume utilized by the Beaumont properties. Applicant states that the transfer will be at the net book cost in exchange for common stock and the assumption by Pennzoil of contracted obligations and certain incident liabilities. Applicant further states that there will be no changes in gas deliveries or rates.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 26, 1969, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be

taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate or permission and approval for the proposed abandonment is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69-13139; Filed, Nov. 4, 1969; 8:46 a.m.]

[Project No. 2334]

WESTERN MASSACHUSETTS ELECTRIC CO.

Notice of Application for Amendment of License for Constructed Project

OCTOBER 24, 1969.

Public notice is hereby given that application for amendment of its license for constructed Project No. 2334 has been filed under the Federal Power Act (16 U.S.C. 791a–825r) by Western Massachusetts Electric Co. (correspondence to Robert E. Barrett, Jr., President, Western Massachusetts Electric Co., 174 Brush Hill Avenue, West Springfield, Mass.).

The existing project, known as Gardners Falls Project, is located on Deerfield River in the towns of Buckland and Shelburne in Franklin County, Mass.

The application seeks Commission authorization to remove generating Unit No. 1 of 400 kilowatts capacity because the company states that its operation is no longer economical. The penstock leading to the unit will be filled with sand and plugged with concrete. Removal of the Unit No. 1 will reduce the installed capacity of the project from 3,980 kw. to 3,580 kw. but the application states that the dependable capacity rating for the project of 3,100 kw. will not be affected and that the unit has not produced any kilowatt-hours since 1964 due to mechanical unreliability.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 16, 1969, file with the Federal Power Commission, Washington, D.C. 20426, petitions to intervene or protests in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Persons wishing to become parties to a proceeding or to participate as a party in any hearing therein must file petitions to intervene in accordance with the Commission's rules. The application is on file with the Commission and available for public inspection.

GORDON M. GRANT,
Secretary.

[F.R. Doc. 69-13141; Filed, Nov. 4, 1969; 8:46 a.m.]

FEDERAL RESERVE SYSTEM

DENVER UNITED STATES BANCORPORATION, INC.

Notice of Application for Approval of Acquisition of Shares of Bank

Notice is hereby given that application has been made, pursuant to section 3(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(a)), by Denver United States Bancorporation, Inc., which is a bank holding company located in Denver, Colo., for prior approval by the Board of Governors of the acquisition by Applicant of at least 80 percent of the voting shares of The Colorado Springs National Bank, Colorado Springs, Colo.

Section 3(c) of the Act provides that the Board shall not approve:

(1) Any acquisition or merger or consolidation under section 3 which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) Any other proposed acquisition or merger or consolidation under section 3 whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Section 3(c) further provides that, in every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

Not later than thirty (30) days after the publication of this notice in the FEDERAL REGISTER, comments and views regarding the proposed acquisition may be filed with the Board. Communications should be addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The application may be inspected at the office of the Board of Governors or the Federal Reserve Bank of Kansas City.

Dated at Washington, D.C., this 29th day of October 1969.

By order of the Board of Governors.

[SEAL] ROBERT P. FORRESTAL,
Assistant Secretary.

[F.R. Doc. 69-13151; Filed, Nov. 4, 1969; 8:46 a.m.]

FIRST NATIONAL BANCORPORATION, INC.

Notice of Application for Approval of Acquisition of Shares of Bank

Notice is hereby given that application has been made, pursuant to section 3(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(a)), by The First National Bancorporation, Inc., which is a bank holding company located in Denver, Colo., for prior approval by the Board of Governors of the acquisition of 80 percent or more of the voting shares of The First National Bank of Greeley, Greeley, Colo.

Section 3(c) of the Act provides that the Board shall not approve:

(1) Any acquisition or merger or consolidation under section 3 which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) Any other proposed acquisition or merger or consolidation under section 3 whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Section 3(c) further provides that, in every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and convenience and needs of the community to be served.

Not later than thirty (30) days after the publication of this notice in the FEDERAL REGISTER, comments and views regarding the proposed acquisition may be filed with the Board. Communications should be addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The application may be inspected at the office of the Board of Governors or the Federal Reserve Bank of Kansas City.

Dated at Washington, D.C., this 29th day of October 1969.

By order of the Board of Governors.

[SEAL] ROBERT P. FORRESTAL,
Assistant Secretary.

[F.R. Doc. 69-13152; Filed, Nov. 4, 1969; 8:46 a.m.]

MERRILL BANKSHARES CO.

Notice of Application for Approval of Acquisition of Shares of Bank

Notice is hereby given that application has been made, pursuant to section 3(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(a)), by Merrill Bankshares Co., which is a bank holding company located in Bangor, Maine, for prior approval by the board of governors of the acquisition by applicant of at least 51 percent of the voting shares of Federal Trust Co., Waterville, Maine.

Section 3(c) of the Act provides that the Board shall not approve:

(1) Any acquisition or merger or consolidation under section 3 which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) Any other proposed acquisition or merger or consolidation under section 3 whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Section 3(c) further provides that, in every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

Not later than thirty (30) days after the publication of this notice in the FEDERAL REGISTER, comments and views regarding the proposed acquisition may be filed with the Board. Communications should be addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The application may be inspected at the office of the Board of Governors or the Federal Reserve Bank of Boston.

Dated at Washington, D.C., this 29th day of October 1969.

By order of the Board of Governors.

[SEAL] ROBERT P. FORRESTAL,
Assistant Secretary.

[F.R. Doc. 69-13153; Filed, Nov. 4, 1969; 8:46 a.m.]

SECURITIES AND EXCHANGE COMMISSION

[812-2632]

BORG-WARNER OVERSEAS CAPITAL CORP.

Notice of Filing of Application for Order Exempting Company

OCTOBER 29, 1969.

Notice is hereby given that Borg-Warner Overseas Capital Corp. ("Applicant"), care of Robert W. Murphy, Esq., Borg-Warner Corp., 200 South Michigan Avenue, Chicago, Ill. 60604, has filed an application, pursuant to section 6(c) under the Investment Company Act of 1940 ("Act") for an order effective as of November 10, 1969, exempting Applicant from each and every provision of the Act. All interested persons are referred to the application on file with the Commission for a statement of the representations therein, which are summarized below.

1. Applicant intends to issue for offer and sale outside the United States to non-United States purchasers not more than DM (Deutsche Mark) 100,000,000 principal amount (worth approximately $25,000,000 American dollars) of bearer bonds (hereinafter called the Bonds) to be issued in 1969 with final maturity in 1984.

2. Applicant is now, and upon issuance of the Bonds referred to above will be, in compliance with all of the provisions of paragraph (b) of rule 6c–1 under the Act and would be in compliance with the provisions of paragraph (c)–1 of such rule with respect to the Bonds if the Interest Equalization Tax (Internal Revenue Code, ch. 41, sections 4911–4931) were in effect at the time of issuance thereof in the form in which it existed immediately prior to its expiration on September 30, 1969.

3. Applicant is a Delaware corporation with authorized capital stock consisting of 2 million shares of common stock with a par value of $1 per share, all of which is owned by Borg-Warner Corp. ("Borg-Warner"), a Delaware corporation which manufactures a broad line of durable goods and chemicals. Borg-Warner represents that either it or one of its wholly-owned subsidiaries (other than any investment company as defined in section 3(a) of the Act) will purchase any additional equity securities which Applicant may issue in the future and that neither Borg-Warner nor its wholly-owned subsidiaries will dispose of any equity securities of Applicant except to the Applicant, to Borg-Warner, or to another wholly-owned subsidiary of Borg-Warner (other than any investment company as defined in section 3(a) of the Act.)

4. Applicant was formed by Borg-Warner for the purpose of making investments, including loans, in connection with various international operations of Borg-Warner and its subsidiaries outside the United States. A principal purpose of Applicant is to assist in improving the balance of payments program of the United States by serving as a vehicle through which Borg-Warner may obtain funds in foreign countries for its foreign operations.

5. The common stock of Borg-Warner is registered under section 12 of the Securities Exchange Act of 1934.

6. Debt securities of Applicant heretofore issued to or now held by the public have been, and debt securities of Applicant which may hereafter be issued to or held by the public will be, guaranteed by Borg-Warner as to payment of principal, interest, and premium, if any.

7. The Bonds will be offered and sold abroad to foreign nationals under circumstances designed to prevent any reoffering or resale in the United States or its territories or possessions or to any United States national or president or any Canadian resident in connection with this offering. The underwriters agree that they will not offer, or deliver the Bonds directly or indirectly in the United States of America. The underwriters further represent that they will not offer, sell, or deliver any Bonds to nationals or residents of the United States or to Canadian persons, except with respect to an underwriter or dealer who will agree that it is purchasing as principal and not for reoffering or resale in Canada or the United States or its territories or possessions, or to citizens, nationals, or residents thereof.

8. Upon completion of the long-term investment program of Applicant, at least 80 percent of its assets, exclusive of U.S. Government securities and cash items, will consist of investments in or loans to foreign companies (or domestic companies, substantially all the business of which is conducted outside the United States).

9. At least 90 percent of the assets of Applicant, exclusive of U.S. Government securities and cash items and short-term investments in foreign government and commercial paper, are and will be invested in or loaned to companies at least 10 percent of the equity securities of which are, or at the completion of the investment will be, owned, directly, by Applicant; and any assets of Applicant not invested in such companies are or will only be invested in or loaned to companies which are customers or suppliers of Borg-Warner or a subsidiary of Borg-Warner; and any of the assets invested in or loaned to investment companies will only be invested in or loaned to investment companies which are wholly owned subsidiaries of Applicant.

10. Applicant will not deal or trade in securities.

11. The Treasury Department has requested the National Association of Securities Dealers, Inc., and national securities exchanges to request members and member firms to continue existing procedures on securities transactions which previously were subject to the Interest Equalization Tax (34 F.R. 15386). It is the opinion of counsel for Borg-Warner that if the Interest Equalization Tax is reinstated in the form in which it existed immediately prior to its expiration, acquisition of the Bonds will be subject to the Interest Equalization Tax unless, and to the extent that, a specific statutory exclusion or exemption is available. Even if the offering of the Bonds occurs prior to reinstatement of the Interest Equalization Tax, counsel believes that the likelihood of retroactive reinstatement of such tax and the burden of paying such tax if reinstated, should have the practical effect of discouraging purchases of the Bonds by U.S. persons.

12. The Bonds will bear a legend in the English language prominently indicating that the Bonds would, if purchased by nationals or residents of the

United States, its territories or possessions, be subject to the Interest Equalization Tax unless, and to the extent that, a specific statutory exemption or exclusion is available, if such Tax shall be in effect at the time of such purchase.

13. It is presently contemplated that the Bonds will be listed on the Frankfurt Stock Exchange.

Applicant has submitted that it is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act for the Commission to enter an order effective as of November 10, 1969, exempting the Applicant from each and every provision of the Act. In addition to the foregoing statement of facts, Applicant has represented the following:

1. The payment of the Bonds which is guaranteed by Borg-Warner does not depend on the operation or investment policy of the Applicant because the Bond holders are entitled ultimately to look to the business enterprise of Borg-Warner. Accordingly, the public policy which dictated the enactment of the Act is not applicable to the Applicant, nor do the security holders of the Applicant require the protection afforded by the Act.

2. The Applicant's security holders will have the benefit of the information made generally available by the disclosure and reporting provisions of the Securities Exchange Act of 1934 and the New York Stock Exchange with respect to the business operations and financial condition of Borg-Warner.

Applicant agrees that this order may be issued subject to the condition that Applicant will not issue, subsequent to the sale and offering of the Bonds, without a further order of the Commission, any securities (except to Borg-Warner or a subsidiary of Borg-Warner which is not an investment company) in the event that the U.S. Equalization Tax is not reenacted, or is reenacted and expires, or is repealed or the rate thereof is reduced to zero and such tax is not replaced by another tax providing a comparable deterrent to the purchase of Applicant's securities by U.S. persons.

Nothing contained in the order, or the conditions to which it may be subject, requested by this application shall preclude the Applicant from being exempt from the Act by virtue solely of (i) the Applicant becoming exempt from each and every provision of the Act pursuant to rule 6c–1 under the Act or (ii) the Commission adopting, amending, or interpreting a rule under the Act which would exempt the Applicant from each and every provision of the Act.

Notice is further given that any interested person may, not later than November 18, 1969, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or of law proposed to be controverted, or he may request that he be notified if the Commission should order a hearing hereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20459. A copy of such request shall be served personally or by mail (airmail if the person being served is located more than 500 miles from the point of mailing) upon Applicant at the address stated above. Proof of such service (by affidavit or in case of an attorney at law by certificate) shall be filed contemporaneously with the request. At any time after said date, as provided by rule 0–5 of the rules and regulations promulgated under the Act, an order disposing of the application herein may be issued by the Commission upon the basis of the information stated in said application, unless an order for hearing upon said application shall be issued upon request or upon the Commission's own motion. Persons who request a hearing or advice as to whether a hearing is ordered, will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission (pursuant to delegated authority).

[SEAL] ORVAL L. DUBOIS, *Secretary.*

[F.R. Doc. 69–13167; Filed, Nov. 4, 1969; 8:47 a.m.]

[70–4804]

GULF POWER CO.

Notice of Proposed Issue and Sale of Commercial Paper Notes and Notes to Banks and Request for Exception From Competitive Bidding

OCTOBER 30, 1969.

Notice is hereby given that Gulf Power Co. ("Gulf"), 75 North Pace Boulevard, Pensacola, Fla. 32502, an electric utility subsidiary company of The Southern Co., a registered holding company, has filed an application with this Commission pursuant to the Public Utility Holding Company Act of 1935 ("Act"), designating section 6(b) of the Act and Rule 50 promulgated thereunder as applicable to the proposed transactions. All interested persons are referred to the application, which is summarized below, for a complete statement of the proposed transactions.

Gulf requests that from the effective date of the Commission's order herein to December 31, 1970, the exemption from the provisions of section 6(a) of the Act afforded by the first sentence of section 6(b) of the Act, relating to the issue of short-term notes, be increased from 5 percent of the principal amount and value of the other securities of Gulf at the time outstanding to approximately 10 percent thereof. Such increase will permit Gulf to issue the maximum aggregate principal amount of short-term notes permissible under its charter (without a vote of holders of its outstanding preferred stock). As at September 30, 1969, this amount was approximately $15,900,000, and such amount represents the maximum amount of notes presently to be authorized herein. Changes may be made in the maximum amount of notes to be outstanding and in the amounts to be borrowed from the various banks by the filing of a posteffective amendment and a further order of the Commission. Under the proposed exemption pursuant to section 6(b), Gulf proposes to issue and sell short-term notes to a group of banks and to issue and sell commercial paper from time to time prior to December 31, 1970, which together shall not exceed $15,900,000 in aggregate principal amount at any one time outstanding, including currently outstanding short-term notes which consist of bank loans aggregating $3,195,000 in principal amount.

The proposed notes to banks will be dated the date of the borrowing, will mature not more than 9 months after the date of issue, and will not exceed $7,695,000 outstanding at any one time. The group of banks to which notes are to be issued consists of two New York City banks, The Chase Manhattan Bank and Irving Trust Co. (maximum of $2 million and $3 million, respectively, to be borrowed) and 21 local banks (maximum of $2,695,000 to be borrowed). Each bank note will bear interest at the prime rate in effect at the lending bank on the date of the borrowing, except that notes to The Chase Manhattan Bank will bear interest at the rate in effect from time to time at that bank. Gulf may prepay the notes, in whole or in part, without penalty or premium.

The proposed commercial paper will be in the form of promissory notes with varying maturities not to exceed 270 days, will be issued in denominations of not less than $50,000 and not more than $5 million, and will not be prepayable prior to maturity. The commercial paper will be sold by Gulf directly to a dealer at a discount which will not be in excess of the discount rate per annum prevailing at the date of issuance for prime commercial paper of comparable quality of the particular maturity sold by issuers thereof to commercial paper dealers: *Provided, however,* That no commercial paper notes will be issued having a maturity more than 90 days at an effective interest cost which exceeds the effective interest cost at which the applicant company could borrow from banks. No commission or fee will be payable in connection with the issuance and sale of commercial paper. The dealer, as principal, will reoffer the commercial paper at a discount rate of one-eighth of 1 percent per annum less than the prevailing discount rate to Gulf to not more than 100 customers of the dealer identified and designated in a nonpublic list prepared in advance by the dealer.

The proceeds from the bank notes and commercial paper will be used by Gulf to reimburse its treasury for part of the expenditures in connection with its construction program, to finance in part its future construction program, to pay at maturity from time to time outstanding notes and commercial paper, and for

other lawful purposes. The total estimated construction expenditures of Gulf for 1969 and 1970 are $31,114,000 and $21,664,000, respectively. The application states that any bank notes and commercial paper of Gulf outstanding after December 31, 1970, will be retired from internal cash resources or from the proceeds of permanent debt or equity financing.

Gulf asserts that the issue and sale of commercial paper should be excepted from the competitive bidding requirements of Rule 50 because the commercial paper will have a maturity not in excess of 270 days, current rates for commercial paper for prime borrowers such as Gulf are published daily in financial publications, and it is not practical to invite invitations for bids for commercial paper. Gulf also requests authority to file certificates of notification under Rule 24 in respect of its commercial paper on a quarterly basis.

Gulf's fees and expenses to be incurred in connection with the proposed transactions are estimated at $1,050, including legal fees of $650. The application represents that the Florida Public Service Commission has jurisdiction over the issuance by Gulf of its notes to banks and the issuance and sale of its commercial paper and that no Federal commission, other than this Commission has jurisdiction over the proposed transactions.

Notice is further given that any interested person may, not later than November 21, 1969, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said application which he desires to controvert; or he may request that he be notified if the Commission should order a hearing thereon. Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request should be served personally or by mail (airmail if the person being served is located more than 500 miles from the point of mailing) upon the applicant at the above-stated address, and proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. At any time after said date, the application, as filed or as it may be amended, may be granted as provided in Rule 23 of the general rules and regulations promulgated under the Act, or the Commission may grant exemption from such rules as provided in Rules 20(a) and 100 thereof or take such other action as it may deem appropriate. Persons who request a hearing or advice as to whether a hearing is ordered will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission (pursuant to delegated authority).

[SEAL] ORVAL L. DUBOIS,
Secretary.

[F.R. Doc. 69-13168; Filed, Nov. 4, 1969; 8:47 a.m.]

[70-4803]

MISSISSIPPI POWER & LIGHT CO.

Notice of Proposed Issue and Sale of First Mortgage Bonds at Competitive Bidding and Proposed Increase of Common Stock Capital Account

OCTOBER 30, 1969.

Notice is hereby given that Mississippi Power & Light Co. ("Mississippi"), Post Office Box 1640, Jackson, Miss. 39205, a public-utility subsidiary company of Middle South Utilities, Inc., a registered holding company, has filed a declaration with this Commission, pursuant to the Public Utility Holding Company Act of 1935 ("Act"), designating sections 6(a) and 7 of the Act and Rule 50 promulgated thereunder as applicable to the proposed transactions. All interested persons are referred to the declaration, which is summarized below, for a complete statement of the proposed transactions.

Mississippi proposes to issue and sell, subject to the competitive bidding requirements of Rule 50 promulgated under the Act, $20 million principal amount of its First Mortgage Bonds,_____percent Series due 1999. The interest rate on the bonds (which will be a multiple of one-eighth of 1 percent and the price, exclusive of accrued interest, to be paid to Mississippi (which will be not less than 100 percent nor more than 102¾ percent of the principal amount thereof) will be determined by the competitive bidding. The bonds will be issued under Mississippi's Mortgage and Deed of Trust, Trust Company of New York and Frederick G. Herbst (E. J. McCabe, Successor), as Trustees, as heretofore supplemented and as to be further supplemented by a Tenth Supplemental Indenture to be dated as of December 1, 1969, and which contains a prohibition until December 1, 1974, against refunding the issue with the proceeds of funds borrowed at a lower cost of money. The net proceeds from the sale of the bonds are to be used by Mississippi for its 1969–70 construction program (estimated at $21,687,000 and $46,593,000, respectively) and for other corporate purposes, including the payment of short-term bank notes and commercial paper.

As of August 31, 1969, the earned surplus of Mississippi amounted to $15,081,000 and the common stock capital account amounted to $62 million. Mississippi proposes to transfer $3,100,000 of its earned surplus to its common stock capital account, thus increasing the stated value of its common stock, no par value, from $20 to $21 per share and thereby permanently capitalizing such amount.

It is stated that the fees and expenses incident to the proposed issuance and sale of the bonds are estimated at $70,000, including auditors' fees of $4,500 and counsel fees of $20,000. The fees and expenses of counsel for the underwriters, estimated at $8,000, are to be paid by the successful bidders. In connection with the proposed increase in the common stock capital account, no special or separable expenses of any kind are anticipated. It is further stated that no State commission and no Federal commission, other than this Commission, has jurisdiction over the proposed transactions.

Notice is further given that any interested person may, not later than November 21, 1969, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said declaration which he desires to controvert; or he may request that he be notified if the Commission should order a hearing thereon. Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request should be served personally or by mail (airmail if the person being served is located more than 500 miles from the point of mailing) upon the declarant at the above-stated address, and proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. At any time after said date, the declaration, as filed or as it may be amended, may be permitted to become effective as provided in Rule 23 of the general rules and regulations promulgated under the Act, or the Commission may grant exemption from such rules as provided in Rules 20(a) and 100 thereof or take such other action as it may deem appropriate. Persons who request a hearing or advice as to whether a hearing is ordered will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission (pursuant to delegated authority).

[SEAL] ORVAL L. DUBOIS,
Secretary.

[F.R. Doc. 69-13169; Filed, Nov. 4, 1969; 8:47 a.m.]

SMALL BUSINESS ADMINISTRATION

PALO ALTO CAPITAL CO.

Notice of Application for License as Small Business Investment Corporation

On September 5, 1968, a notice of application for a license as a small business investment company was published in the FEDERAL REGISTER (34 F.R. 14098) stating that an application had been filed with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations Governing Small Business Investment Companies (13 CFR Part 103, 33 F.R. 326) for a license as a small business investment company by Palo Alto Capital Co., 611 Hansen Highway, Palo Alto, Calif. 94303.

Interested parties were invited to submit their written comments to SBA. No comments were received.

Notice is hereby given that pursuant to section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information and facts with regard thereto, License No. 12/12-0149 was issued in Washington, D.C., on October 16, 1969, to Palo Alto Capital Co. to operate as a small business investment company.

Dated: October 23, 1969.

A. H. SINGER,
Associate Administrator for Investment.

[F.R. Doc. 69-13170; Filed, Nov. 4, 1969; 8:48 a.m.]

INTERSTATE COMMERCE COMMISSION

[Section 5a Application No. 64, Amdt. 4]

STEEL CARRIERS' TARIFF ASSOCIATION, INC.

Petition for Approval of Amendments to Agreement

OCTOBER 31, 1969.

The Commission is in receipt of a petition in the above-entitled proceeding for approval of amendments to the agreement therein approved.

Filed October 22, 1969, by Warren A. Rawson, Managing Director, Steel Carriers' Tariff Association, Inc., 6410 Kenilworth Avenue, East Riverdale, Md. 20840.

The amendments involve: Changes in the agreement so as to (1) remove the specification of Cleveland, Ohio, as the city in which the monthly meetings of the Tariff Committee are to be held; (2) revise and clarify the circumstances warranting emergency handling under the Emergency Proposal procedure; (3) introduce a new section to cover tariff changes in those situations not subject to docket procedures; (4) revise the schedule of dues and charges and eliminate the precise schedules of fees; and (5) renumber certain sections and paragraphs made necessary by the foregoing changes.

The petition is docketed and may be inspected at the office of the Commission, in Washington, D.C.

Any interested person desiring to protest and participate in this proceeding shall notify the Commission in writing within 20 days from the date of publication of this notice in the FEDERAL REGISTER. As provided by the general rules of practice of the Commission, persons other than applicants should fully disclose their interests, and the position they intend to take with respect to the petition. Otherwise, the Commission, in its discretion may proceed to investigation and determine the matters involved without public hearing.

[SEAL] H. NEIL GARSON,
Secretary.

[F.R. Doc. 69-13181; Filed, Nov. 4, 1969; 8:48 a.m.]

FOURTH SECTION APPLICATIONS FOR RELIEF

OCTOBER 31, 1969.

Protests to the granting of an application must be prepared in accordance with Rule 1100.40 of the general rules of practice (49 CFR 1100.40) and filed within 15 days from the date of publication of this notice in the FEDERAL REGISTER.

LONG-AND-SHORT HAUL

FSA No. 41794—*Blacks from points in Louisiana and Texas.* Filed by Southwestern Freight Bureau, agent (No. B-100), for interested rail carriers. Rates on carbon blacks, in carloads, as described in the application, from specified points in Louisiana and Texas, to Institute, W. Va.

Grounds for relief—Market competition and rate relationship.

Tariff—Supplement 34 to Southwestern Freight Bureau, agent, tariff ICC 4814.

AGGREGATE-OF-INTERMEDIATES

FSA No. 41793—*Superphosphate from Occidental, Fla.* Filed by O. W. South, Jr., agent (No. A6138), for interested rail carriers. Rates on superphosphate, not defluorinated superphosphate, nor feed grade superphosphate, in bulk, in carloads, as described in the application, from Occidental, Fla., to specified points in Connecticut and Massachusetts, also Fox Point, R.I.

Grounds for relief—Market competition.

Tariff—Supplement 33 to Southern Freight Association, agent, tariff ICC S-818.

By the Commission.

[SEAL] H. NEIL GARSON,
Secretary.

[F.R. Doc. 69-13182; Filed, Nov. 4, 1969; 8:48 a.m.]

[Notice 574]

MOTOR CARRIER ALTERNATE ROUTE DEVIATION NOTICES

OCTOBER 31, 1969.

The following letter-notices of proposals to operate over deviation routes for operating convenience only have been filed with the Interstate Commerce Commission, under the Commission's Deviation Rules Revised, 1957 (49 CFR 1042.1(c)(8)) and notice thereof to all interested persons is hereby given as provided in such rules (49 CFR 1042.1(d)(4)).

Protests against the use of any proposed deviation route herein described may be filed with the Interstate Commerce Commission in the manner and form provided in such rules (49 CFR 1042.1(e)) at any time, but will not operate to stay commencement of the proposed operations unless filed within 30 days from the date of publication.

Successively filed letter-notices of the same carrier under the Commission's Deviation Rules Revised, 1957, will be numbered consecutively for convenience in identification and protests if any should refer to such letter-notices by number.

MOTOR CARRIERS OF PROPERTY

No. MC 59583 (Deviation No. 35), THE MASON & DIXON LINES, INCORPORATED, Post Office Box 969, Kingsport, Tenn. 37622, filed October 21, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *general commodities*, with certain exceptions, over a deviation route as follows: From New York, N.Y., over Interstate Highway 80 to junction Interstate Highway 69, thence over Interstate Highway 69 to Fort Wayne, Ind., and return over the same route for operating convenience only. The notice indicates that the carrier is presently authorized to transport the same commodities, over a pertinent service route as follows: From New York, N.Y., over U.S. Highway 22 to Harrisburg, Pa., thence over U.S. Highway 11 to Chambersburg, Pa., thence over U.S. Highway 30 to Pittsburgh, Pa., thence over U.S. Highway 19 to junction U.S. Highway 40, thence over U.S. Highway 40 to Richmond, Ind., thence over U.S. Highway 35 to junction Indiana Highway 28, thence over Indiana Highway 28 to junction Indiana Highway 9, thence over Indiana Highway 9 to Fort Wayne, Ind., and return over the same route.

No. MC 59655 (Deviation No. 1), SHEEHAN CARRIERS, INC., 62 Lime Kiln Road, Suffern, N.Y. 10901, filed October 20, 1969. Carrier's representative: Norman Weiss, 2 West 45th Street, New York, N.Y. 10036. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *general commodities*, with certain exceptions, over deviation routes as follows: (1) Between Albany, N.Y., and Suffern, N.Y., over the New York State Thruway (Interchange 15 at Suffern, N.Y.), and (2) between Suffern, N.Y. (Interchange 15) and Newburgh, N.Y., over the New York State Thruway, for operating convenience only. The notice indicates that the carrier is presently authorized to transport the same commodities, over pertinent service routes as follows: (1) From Albany, N.Y., over U.S. Highway 9W to Newburgh, N.Y., thence over New York Highway 32 to Harriman, N.Y., thence over New York Highway 17 to the New York-New Jersey State line, thence over New Jersey Highway 17 to junction unnumbered highway, thence over unnumbered highway to Lodi, N.J., thence over unnumbered highway to Newark, N.J., and return over the same route, and (2) from Lodi, N.J., over unnumbered highway via Ridgewood, Midland Park, and Ramsey, N.J., to junction New Jersey Highway 17, thence over New Jersey Highway 17 to the New Jersey-New York State line, thence over New York Highway 17 to junction New York Highway 302, thence over New York Highway 302 to Pine Bush, N.Y., thence over New York Highway 52 to Newburgh, N.Y.; and return, from Newburgh over U.S. Highway 9W to Nyack, N.Y., thence over New York Highway 59 to Suffern, N.Y., thence over U.S. Highway 202 to junction New Jersey Highway

17, thence over New Jersey Highway 17 to junction unnumbered highway (near Ramsey, N.J.), thence over unnumbered highways via Ramsey, Allendale, Waldwick, Hohokus, and Ridgewood, N.J., to Paterson, N.J., thence over U.S. Highway 46 to junction unnumbered highway, thence over unnumbered highway to Lodi, N.J.

No. MC 59680 (Deviation No. 79), STRICKLAND TRANSPORTATION CO., INC., Post Office Box 5689, Dallas, Tex. 75222, filed October 23, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *general commodities*, with certain exceptions, over a deviation route as follows: From Detroit, Mich., over Interstate Highway 75 to junction Interstate Highway 280, within the city limits of Toledo, Ohio, thence over Interstate Highway 280 to junction of Interstate Highway 90, thence over Interstate Highway 90 to Cleveland, Ohio, and return over the same route, for operating convenience only. The notice indicates that the carrier is presently authorized to transport the same commodities, over a pertinent service route as follows: From Detroit, Mich., over Interstate Highway 94 (formerly U.S. Highway 12) to Ann Arbor, Mich., thence over unnumbered highway via Lima, Mich., to junction Interstate Highway 94 (formerly U.S. Highway 12), thence over Interstate Highway 94 to junction unnumbered highway, thence over unnumbered highway via Battle Creek, Marshall, Marengo, Albion, and Parma, Mich., to junction Interstate Highway 94, thence over Interstate Highway 94 to junction Interstate Business Highway 94, thence over Interstate Business Highway 94 via Kalamazoo, Mich., to junction unnumbered highway (formerly U.S. Highway 12), thence over unnumbered highway via Oshtemo, Paw Paw, Lawrence, Hartford, Watervliet, and Coluna, Mich., to junction Business Interstate Highway 94, thence over Business Interstate Highway 94 via Benton Harbor, Mich., to junction Interstate Highway 94 (formerly U.S. Highway 12), thence over Interstate Highway 94 to junction unnumbered highway (formerly U.S. Highway 12), thence over unnumbered highway via Herbert, Lakeside, and Union Pier, Mich., to junction U.S. Highway 12 at or near New Buffalo, Mich., thence over U.S. Highway 12 to Gary, Ind., thence over U.S. Highway 6 to Lorain, Ohio, thence over Ohio Highway 57 to junction Ohio Highway 254, thence over Ohio Highway 254 to Cleveland, Ohio, and return over the same route.

No. MC 75651 (Deviation No. 3), R. C. MOTOR LINES, INC., Post Office Box 2561, Jacksonville, Fla. 32203, filed October 24, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *general commodities*, with certain exceptions, over deviation routes as follows: (1) From Atlanta, Ga., over Interstate Highway 75 to junction of Interstate Highway 81, thence over Interstate Highway 81 to junction Interstate Highway 78, thence over Interstate Highway 78 to New York, N.Y., and (2) from Atlanta, Ga., over Interstate Highway 75 to junction Interstate Highway 81, thence over Interstate Highway 81 to junction Interstate Highway 66, thence over Interstate Highway 66 to Washington, D.C., and return over the same routes, for operating convenience only. The notice indicates that the carrier is presently authorized to transport the same commodities, over a pertinent service route as follows: From Atlanta, Ga., over U.S. Highway 78 to Athens, Ga., thence over U.S. Highway 29 to Charlotte, N.C., thence over North Carolina Highway 49 to junction U.S. Highway 64, thence over U.S. Highway 64 to Raleigh, N.C., thence over U.S. Highway 1 to Philadelphia, Pa., thence over U.S. Highway 13 to Trenton, N.J., thence over U.S. Highway 1 to New York, N.Y., and return over the same route.

MOTOR CARRIERS OF PASSENGERS

No. MC 67308 (Deviation No. 1), COLONIAL TRAILWAYS, 520 North Court St., Post Office Box 1427, Montgomery, Ala. 36104, filed October 21, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicles, of *passengers and their baggage, and express and newspapers* in the same vehicle with passengers, over a deviation route as follows: From Montgomery, Ala., over Interstate Highway 65 to junction Alabama Highway 225 (an access road), thence over Alabama Highway 225 to junction U.S. Highway 31 at Spanish Fort, Ala., and return over the same route for operating convenience only. The notice indicates that the carrier is presently authorized to transport passengers and the same property, over pertinent service routes as follows: (1) From Monroeville, Ala., over Alabama Highway 21 to Montgomery, Ala., and (2) from Monroeville, Ala., Highway 21 (formerly Alabama Highway 11) to Atmore, Ala., thence over U.S. Highway 31 to Mobile, Ala., and return over the same routes.

No. MC 67308 (Deviation No. 2), COLONIAL TRAILWAYS, 520 North Court Street, Post Office Box 1427, Montgomery, Ala. 36104, filed October 21, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *passengers and their baggage, and express and newspapers* in the same vehicle with passengers, over a deviation route as follows: From Montgomery, Ala., over U.S. Highway 31 to Georgiana, Ala., thence over Alabama Highway 106 to junction Interstate Highway 65, thence over Interstate Highway 65 to junction Alabama Highway 225, thence over Alabama Highway 225 to junction U.S. Highway 31 at Spanish Fort, Ala., and return over the same route for operating convenience only. The notice indicates that the carrier is presently authorized to transport passengers and the same property, over pertinent service routes as follows: (1) From Monroeville, Ala., over Alabama Highway 21 to Montgomery, Ala., and (2) from Monroeville, Ala., over Alabama Highway 21 (formerly Alabama Highway 11) to Atmore, Ala., thence over U.S. Highway 31 to Mobile, Ala., and return over the same routes.

No. MC–67308 (Deviation No. 3), COLONIAL TRAILWAYS, 520 North Court Street, Post Office Box 1427, Montgomery, Ala. 36104, filed October 21, 1969. Carrier proposes to operate as a *common carrier*, by motor vehicle, of *passengers and their baggage, and express and newspapers* in the same vehicle with passengers, over a deviation route as follows: From junction U.S. Highway 90 and Alabama Highway 59 (near Loxley, Ala.), over Alabama Highway 59 (an access road) to junction Interstate Highway 10, thence over Interstate Highway 10 to junction Interstate Highway 110, thence over Interstate Highway 110 to Pensacola, Fla., and return over the same route, for operating convenience only. The notice indicates that the carrier is presently authorized to transport passengers and the same property, over a pertinent service route as follows: From junction U.S. Highway 31 and unnumbered highway east of Mobile, Ala., over unnumbered highway to junction U.S. Highway 90 near Malbis, Ala., thence over U.S. Highway 90 via Loxley, Ala., to junction unnumbered highway near Rosinton, Ala., thence over unnumbered highway to junction U.S. Highway 90 approximately 3.5 miles east of Robertsdale, Ala., thence over U.S. Highway 90 via Seminole, Ala., to junction Alternate U.S. Highway 90, thence over Alternate U.S. Highway 90 to junction U.S. Highway 29 approximately 9 miles north of Pensacola, Fla., thence over U.S. Highway 29 to Pensacola, Fla., and return over the same route.

By the Commission.

[SEAL] H. NEIL GARSON, *Secretary*.

[F.R. Doc. 69–13183; Filed, Nov. 4, 1969; 8:48 a.m.]

[Notice 1344]

MOTOR CARRIER APPLICATIONS AND CERTAIN OTHER PROCEEDINGS

OCTOBER 31, 1969.

The following publications are governed by the new Special Rule 247 of the Commission's rules of practice, published in the FEDERAL REGISTER, issue of December 3, 1963, which became effective January 1, 1964.

The publications hereinafter set forth reflect the scope of the applications as filed by applicant, and may include descriptions, restrictions, or limitations which are not in a form acceptable to the Commission. Authority which ultimately may be granted as a result of the applications here noticed will not necessarily reflect the phraseology set forth in the application as filed, but also will eliminate any restrictions which are not acceptable to the Commission.

APPLICATIONS ASSIGNED FOR ORAL HEARING

MOTOR CARRIERS OF PROPERTY

No. MC 61592 (Sub-No. 156), filed October 20, 1969. Applicant: JENKINS TRUCK LINE, INC., 3708 Elm Street, Bettendorf, Iowa 52722. Applicant's representative: Donald W. Smith, 900 Circle Tower Building, Indianapolis, Ind. 46204. Authority sought to operate as

a *common carrier*, by motor vehicle, over irregular routes, transporting: *New furniture*, from Altavista and Rocky Mount, Va., to points in Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, South Carolina, Tennessee, and Wisconsin. NOTE: Applicant states that the requested authority cannot be tacked with its existing authority. Common control may be involved.

HEARING: November 13, 1969, at the Offices of the Interstate Commerce Commission, Washington, D.C., before an examiner to be later designated.

No. MC 2542 (Sub-No. 13) (Republication), filed April 9, 1969, published in the FEDERAL REGISTER issue of May 1, 1969, and republished this issue. Applicant: THE ADLEY CORPORATION, doing business as ADLEY EXPRESS COMPANY, 900 Chapel Street, New Haven, Conn. Applicant's representative: Thomas W. Murrett, 410 Asylum Street, Hartford, Conn. 06103. By application filed April 9, 1969, as amended, applicant seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular routes of general commodities (except those of unusual value, and except dangerous explosives, household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467, commodities requiring special equipment, and those injurious or contaminating to other lading), between junction Interstate Highway 91 and Massachusetts-Vermont State line and Island Pond, Vt., from junction Interstate Highway 91 and the Massachusetts-Vermont State line over Interstate Highway 91 to the end of Interstate Highway 91 near Norwich, Vt., thence over U.S. Highway 5 to St. Johnsbury, Vt., thence over Vermont Highway 114 to Island Pond, Vt., and return over the same route, as an alternate route, in connection with applicant's authorized regular route authority, serving no intermediate points. By order dated June 19, 1969, and served June 30, 1969, it was ordered that this proceeding be handled under modified procedure.

An order of the Commission Operating Rights Board, dated October 14, 1969, and served October 28, 1969, finds that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a *common carrier* by motor vehicle, of *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities requiring special equipment, and those injurious or contaminating to other lading), between Greenfield, Mass., and Island Pond, Vt., from Greenfield, Mass., over interstate Highway 91 to junction U.S. Highway 5 near Norwich, Vt., thence over U.S. Highway 5 to St. Johnsbury, Vt., thence over Vermont Highway 114 to Island Pond, Vt., and return over the same routes, serving no intermediate points, but serving Island Pond, Vt., for the purpose of joinder only, as an alternate route for operating convenience only, in connection with applicant's presently authorized regular-route operations, restricted to the transportation of traffic moving between Greenfield, Mass., and the port of entry on the Canadian-United States international boundary line at Norton, Vt.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties, who may have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen, or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 107295 (Sub-No. 172) (Republication), filed February 24, 1969, published in the FEDERAL REGISTER issue of March 20, 1969, and republished this issue. Applicant: PRE-FAB TRANSIT CO., a corporation, 100 South Main Street, Post Office Box 146, Farmer City, Ill. 61842. Applicant's representative: Dale L. Cox (same address as applicant), and Mack Stephenson, 301 Building, 301 North Second Street, Springfield, Ill. 62702. By application filed on February 24, 1969, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of prefabricated building parts; heating, cooling, and air handling systems and materials, supplies, and accessories used in the installation of such systems, from Rockford, Ill., to points in the United States (except Iowa, Missouri, Arkansas, Wisconsin, Illinois, Indiana, Michigan, Ohio, Kentucky, Tennessee, Alaska, and Hawaii). The application was referred to Examiner Earl E. Meisenbach for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 20, 1969, at Chicago, Ill. A report and order of the Commission, served September 24, 1969, effective October 24, 1969, finds that the present and future public convenience and necessity require operation by applicant as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, of *air duct, and fittings therefor*, from the plantsite and facilities of United Sheet Metal Division of United McGill Corp. at Rockford, Ill., to points in the United States (except Alaska, Arkansas, Hawaii, Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, Tennessee, and Wisconsin), restricted to shipments originating at the described origin sites; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties, who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file an appropriate petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 109397 (Sub-No. 169) (Republication), filed May 20, 1969, published in the FEDERAL REGISTER issue of June 12, 1969, and republished this issue. Applicant: TRI-STATE MOTOR TRANSIT CO., a corporation, Post Office Box 113, Interstate Business Route I-44, Joplin, Mo. 64801. Applicant's representative: Max G. Morgan, 600 Leininger Building, Oklahoma City, Okla. 73112. By application filed May 20, 1969, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over routes, of explosives, nitro-carbo-nitrate, blasting materials and supplies, from Biwabik, Minn., to points in Alabama, Arizona, Arkansas, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Washington, and Wisconsin. An order of the Commission, Operating Rights Board, dated October 14, 1969, and served October 27, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier*, by motor vehicle, over irregular routes, of *explosives, nitro-carbo-nitrate, blasting materials and supplies* from Biwabik, Minn., to points in Alabama, Arizona, Arkansas, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Washington, and Wisconsin, limited, in point of time, to a period expiring 5 years from the date of the issuance of a certificate herein; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other persons, who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 115067 (Sub-No. 3) (Republication), filed May 1, 1967, published in the FEDERAL REGISTER issue of May 25, 1967, and republished this issue. Applicants: CLARENCE D. SPENCER AND LOUISE M. SPENCER, a partnership, doing business as INDEPENDENCE MOTOR TRANSPORT, 530 West Queen Avenue, Albany, Oreg. Applicant's representative: Earl V. White, 2400 Southwest Fourth Avenue, Portland, Oreg. 97201. By application filed May 1, 1967, applicant seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, transporting: Household goods, as defined by the Commission, between points in Linn and Benton Counties, Oreg., restricted to shipments moving on through bill of lading of a forwarder operating under the section 402(b)(2) exemption, and having an immediately prior or subsequent line-haul movement by rail, motor, water, or air carrier. By Order dated July 11, 1967, and served July 17, 1967, it was ordered that this proceeding be handled under modified procedure. A Report of the Commission, Review Board No. 2, decided September 23, 1968, found that applicant failed to establish that the present or future public convenience and necessity require the operations proposed; and that the application should be denied without prejudice to the right of applicant to petition this Commission.

Upon consideration of the petition filed by applicant the proceeding was reopened for further processing under the modified procedure on July 11, 1969, by the Commission, Division 1, acting as an Appellate Division; the verified statement tendered by applicant was received in evidence and made a part of the record in MC 115067 (Sub-No. 3). A Report of the Commission on further consideration, Review Board No. 2, decided October 13, 1969, and served October 20, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier* by motor vehicle, over irregular routes, of *used household goods*, restricted to the transportation of traffic having a prior or subsequent movement in containers beyond the points authorized, and further restricted to the performance of pickup and delivery service in connection with packing, crating, and containerization or unpacking, uncrating, and decontainerization of such traffic, between points in Linn and Benton Counties, Oreg.; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties, who have relied upon the notice of the application as published may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 126203 (Sub-No. 2) (Republication), filed December 26, 1968, published in the FEDERAL REGISTER issue of January 30, 1969, and republished this issue. Applicant: EVERETT CHARTER SYSTEM, INC., 3532 Smith Street, Everett, Wash. 98201. Applicant's representative: Joseph O. Earp, 411 Lyon Building, 607 Third Avenue, Seattle, Wash. 98104. By application filed December 26, 1968, as amended, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers and their baggage, in charter coach service, beginning and ending at points in Snohomish County, Wash., and extending to points in Oregon, Idaho, Montana, California, Nevada, Utah, Colorado, Arizona, Wyoming, and New Mexico and points in British Columbia and Alberta Provinces, Canada. An order of the Commission, Review Board Number 5, decided September 23, 1969, and served October 6, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier* by motor vehicle, over irregular routes, of *passengers and their baggage*, in the same vehicle with passengers, in round-trip charter operations, beginning and ending at points in Snohomish County, Wash., and extending to points in Oregon, Idaho, Montana, Salt Lake City, Utah, and those points in Washington which are ports of entry on the international boundary line between the United States and Canada; that applicant is fit, willing and able properly to perform such service and to conform to the Commission's rules and regulations thereunder. Because it is possible that other persons who have relied upon the notice of the publication as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

Nos. MC 128814 (Sub-No. 4) (Republications), filed June 26, 1967, published in the FEDERAL REGISTER issues of July 13, 1967, July 27, 1967, and August 10, 1967; MC 128814 (Sub-No. 11) filed December 8, 1967, published in the FEDERAL REGISTER December 21, 1967; MC 128814 (Sub-No. 13) filed December 8, 1967, published in the FEDERAL REGISTER December 21, 1967; and MC 128814 (Sub-No. 14) filed December 8, 1967, published in the FEDERAL REGISTER issues of December 21, 1967, and February 1, 1968. Applicant: TRI-STATE MOTOR TRANSIT CO., as operator of H. MESSICK, INC., Post Office Box 113, Business I-44, Joplin, Mo. 64802. Applicant's representative: Max G. Morgan, 450 American National Building, Oklahoma City, Okla. 73102. In the above-entitled proceedings, applicant, a common carrier, seeks permits to transport explosives and certain other dangerous commodities from, to, or between various points under contract with Hercules, Inc. In each application, applicant requested that if its separate application, jointly filed with H. Messick, Inc., a motor contract carrier, on November 21, 1966, for authority under section 5 of the act to purchase the permanent and temporary authority operating rights and certain other property is approved, that the applications be treated as applications for common carrier authority. A Report of the Commission, Review Board Number 3 has determined that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a common carrier, by motor vehicle, over irregular routes of the commodities, to and from points substantially as indicated below.

An order of the Commission, Review Board No. 3, decided October 10, 1969, and served October 21, 1969, finds that the operations proposed by applicant in each proceeding are actually those of a common carrier by motor vehicle; that the persent and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier* by motor vehicle over irregular routes: (1) In No. MC-128814 (Sub-No. 4), of *explosives, blasting agents, and supplies*, between Hampton and St. Paul, Minn., and points within 5 miles thereof, on the one hand, and, on the other, points in Minnesota, Iowa, Wisconsin, North Dakota, South Dakota, and those in the upper Peninsula of Michigan; (2) in No. MC-128814 (Sub-No. 11), of *explosives* from Kenvil, N.J., to Electra, Bridgeport, and Laredo, Tex., and points within 5 miles of each; (3) in No. MC-128814 (Sub-No. 13), of *explosives* from the plantsite of Hercules, Inc., at Kenvil, N.J., to Merriam, Kans., and points within 5 miles thereof; and (4) in No. MC-128814 (Sub-No. 14), of *blasting caps* between Port Ewen, N.Y.; Jasonville, Ind.; Fairbanks, Pa.; Carthage, Mo.; Sedalia, Colo.; North Salt Lake City, Utah; Lincoln, Calif.; and points within 5 miles of each; that the authority granted herein should be limited, in point of time, to a period expiring 5 years from the date of the issuance of a certificate in each proceeding; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulation thereunder; that to the extent the authority granted in each proceeding herein duplicates applicant's existing authority it shall not be construed as conferring more than a single operating right. Because it is possible that other persons, who have relied upon

the notice of the applications as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of the certificates in each proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 128975 (Republication), filed March 30, 1967, published in the FEDERAL REGISTER issue of April 13, 1967, and republished this issue. Applicant: KLAMATH MOVING & STORAGE CO., a corporation, Post Office Box 1527, Klamath Falls, Oreg. Applicant's representative: Earle V. White, 2400 Southwest Fourth Avenue, Portland, Oreg. 97201. By application filed March 30, 1967, applicant seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, transporting: Household goods, as defined by the Commission, between points in Klamath, Lake, and Jackson Counties, Oreg., and points in Siskiyou and Modoc Counties, Calif., restricted to shipments having an immediately prior or subsequent movement by rail, water, motor, or air and moving on the through bill of lading of a forwarder operating under the exemption of section 402(b)(2) of the Interstate Commerce Act. By order dated June 28, 1967, and served July 7, 1967, it was ordered that this proceeding be handled under modified procedure. A report of the Commission, Review Board No. 2, decided September 23, 1968, found that applicant failed to establish that the present and future public convenience and necessity require the operations proposed; and that the application should be denied without prejudice to the right of applicant to petition this Commission.

Upon consideration of the petition filed by applicant the proceeding was reopened for further processing under the modified procedure on July 11, 1969, by the Commission, Division 1, acting as an Appellate Division; the verified statement tendered by applicant was received in evidence and made a part of the record in MC 128975. A report of the Commission on further consideration, Review Board No. 2, decided October 13, 1969, and served October 20, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier*, by motor vehicle, over irregular routes, of *used household goods*, restricted to the transportation of traffic having a prior or subsequent movement in containers beyond the points authorized, and further restricted to the performance of pickup and delivery service in connection with packing, crating, and containerization, or unpacking, uncrating, and decontainerization of such traffic, between points in Klamath, Lake, and Jackson Counties, Oreg., and Siskiyou and Modoc Counties, Calif.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 128979 (Sub-No. 1) (Republication), filed July 28, 1967, published in the FEDERAL REGISTER issue of August 10, 1967, and republished this issue. Applicant: SMITH TRANSFER, INC., 1024 East Pike Street, Seattle, Wash. 98122. Applicant's representative: E. L. Hahn (same address as applicant). By application filed July 28, 1967, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, transporting: Household goods, as defined by the Commission, between points in King, Kitsap, Island, Pierce, Thurston, Mason, and Snohomish Counties, Wash., restricted to shipments having a prior or subsequent out-of-State movement. By order dated September 21, 1967, and served September 26, 1967, it was ordered that this proceeding be handled under modified procedure. A report of the Commission, Review Board No. 2, decided September 23, 1968, found that the applicant failed to establish that the present or future public convenience and necessity require the operations proposed; and that the application should be denied without prejudice to the right of applicant to petition this Commission. Upon consideration of the petition filed by applicant the proceeding was reopened for further processing under the modified procedure on July 11, 1969, by the Commission, Division 1, acting as an Appellate Division; the verified statement tendered by applicant was received in evidence and made a part of the record in MC 128979 (Sub-No. 1).

A report of the Commission on further consideration, Review Board No. 2, decided October 13, 1969, and served October 20, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier*, by motor vehicle, over irregular routes, of *used household goods*, restricted to the transportation of traffic having a prior or subsequent movement in containers beyond the points authorized, and further restricted to the performance of pickup and delivery service in connection with packing, crating, and containerization, or unpacking, uncrating, and decontainerization of such traffic, between points in King, Kitsap, Island, Pierce, Thurston, Mason, and Snohomish Counties, Wash.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 129515 (Sub-No. 1) (Republication), filed February 12, 1968, published in the FEDERAL REGISTER issue of February 22, 1968, and republished this issue. Applicant: TORRANCE VAN & STORAGE COMPANY, doing business as S & M TRANSFER & STORAGE COMPANY, 1916 Border Avenue, Torrance, Calif. 90501. Applicant's representative: Carl H. Fritze, 1545 Wilshire Boulevard, Los Angeles, Calif. 90017. By application filed February 12, 1968, applicant seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of used household goods between points in Los Angeles, Orange, San Diego, and Ventura Counties, Calif., restricted to the transportation of shipments having an immediately prior or subsequent movement by rail, water, motor, or air and moving on the through bill of lading of a forwarder operating under the exemption of section 402(b)(2) of the Interstate Commerce Act. An order of the Commission, dated April 4, 1968, and served April 10, 1968, ordered that this proceeding be handled under modified procedure. A report of the Commission, Review Board No. 2, decided September 23, 1968, found that applicant failed to establish that the present and future convenience and necessity require the operations proposed; and that the application should be denied without prejudice to the right of applicant to petition this Commission.

Upon consideration of the petition filed by applicant the proceeding was reopened for further processing under the modified procedure on July 11, 1969, by the Commission, Division 1, acting as an Appellate Division; the verified statement tendered by applicant was received in evidence and made a part of the record in MC 129515 (Sub-No. 1). A report of the Commission on further consideration, Review Board No. 2, decided October 13, 1969, and served October 20, 1969, finds that the present and

future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a *common carrier*, by motor vehicle, over irregular routes, of *used household goods*, restricted to the transportation of traffic having a prior or subsequent movement in containers beyond the points authorized, and further restricted to the performance of pickup and delivery service in connection with packing, crating, and containerization, or unpacking, uncrating, and decontainerization of such traffic, between points in Los Angeles County, Calif.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Commission and the Commission's rules and regulations thereunder. Because it is possible that other persons, who have relied upon the notice of the application as published may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 129677 (Republication) filed January 26, 1968, published in the FEDERAL REGISTER issue of February 8, 1968, and republished this issue. Applicant: YOUNG'S TRANSFER & STORAGE, INC., 402 California Avenue, Bakersfield, Calif. 93304. By application filed January 26, 1968, applicant seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, transporting: Household goods, as defined by the Commission, between Bakersfield, Oildale, East Bakersfield, Edison, Techachapi, Arvin, Lamont, Gorman, New Cuyama, Frazier Park, Maricopa, Taft, Ford City, Fellows, McKittrick, Buttonwillow, Lost Hills, Wasco, McFarland, Shafter, Delano, Earlimart, Corcoran, and Porterville, Calif., with no restrictions. By order dated March 20, 1968, and served March 26, 1968, it was ordered that this proceeding be handled under modified procedure. A report of the Commission, Review Board No. 2, decided September 23, 1968, found that applicant failed to establish that the present and future public convenience and necessity require the operations proposed; that the application should be denied without prejudice to the right of applicant to petition this Commission. Upon consideration of the petition filed by applicant the proceeding was reopened for further processing under modified procedure on July 11, 1969, by the Commission, Division 1, acting as Appellate Division; the verified statement tendered by applicant was received in evidence and made a part of the record in MC 129677.

A report of the Commission on further consideration, Review Board No. 2, decided October 13, 1969, and served October 20, 1969, finds that the present and future public convenience and necessity require operation by applicant, in interstate of foreign commerce, as a *common carrier* by motor vehicle, over irregular routes, of *used household goods*, restricted to the transportation of traffic having a prior or subsequent movement in containers beyond the points authorized, and further restricted to the performance of pickup and delivery service in connection with packing, crating and containerization, or unpacking, uncrating, and decontainerization of such traffic, between points in Kern, Kings, Santa Barbara, Fresno, and Tulare Counties, Calif.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Because it is possible that other parties who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

No. MC 129780 (Sub-No. 1) (Republication), filed August 6, 1968, published in the FEDERAL REGISTER issue of September 6, 1968, and republished this issue. Applicant: LABERGE & FILS LTEE, Route 640, St-Eustache, Province of Quebec, Canada. Applicant's representative: Adrien Roger Paquette, 200 St. James Street West, Room 1010, Montreal, Province of Quebec, Canada. By report and order entered in the above-entitled proceeding, the examiner recommended the issuance of a permit to applicant, authorizing the operations, in foreign commerce as a contract carrier by motor vehicle over irregular routes of, the commodities, to and from points substantially as indicated below. An order of the Commission, Division 1, served September 22, 1969, and effective October 22, 1969, finds that operation in foreign commerce by applicant as a *contract carrier* by motor vehicle, under a continuing contract with Dion Freres, Inc., of St. Therese, Quebec, Canada, of (1) *agricultural machinery, and agricultural machinery parts*, from ports of entry on the International boundary line between the United States and Canada, located in Maine, Michigan (except port of entry at Detroit, Mich.), New Hampshire, New York, and Vermont to points in Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin; and

(2) *Damaged, defective, and returned agricultural machinery, and agricultural machinery parts, and materials, equipment, and supplies* used in the manufacture of agricultural machinery and of agricultural machinery parts, from points in Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin, to ports of entry on the international boundary line between the United States and Canada, located in Maine, Michigan (except the port of entry at Detroit, Mich.), New Hampshire, New York, and Vermont, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of the Interstate Commerce Act and with the lawful requirements, rules, and regulations thereunder. Because it is possible that other persons, who have relief upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted will be published in the FEDERAL REGISTER and the issuance of a permit in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate relief setting forth in detail the precise manner in which it has been so prejudiced.

APPLICATIONS UNDER SECTIONS 5 AND 210a(b)

The following applications are governed by the Interstate Commerce Commission's special rules governing notice of filing of applications by motor carriers of property or passengers under sections 5(a) and 210a(b) of the Interstate Commerce Act and certain other proceedings with respect thereto (49 CFR 1.240).

MOTOR CARRIERS OF PROPERTY

No. MC-F-10644. Authority sought for purchase by LIGHTNING EXPRESS, INC., 2701 Railroad Street, Pittsburgh, Pa. 15222, of a portion of the operating rights of ARTHUR R. WILLIAMS, doing business as H. A. PARKS AND SON, 40 North Pittsburgh Street, Uniontown, Pa. 15401, and for acquisition by CHARLES E. SALVATORA, also of Pittsburgh, Pa., of control of such rights through the purchase. Applicants' attorneys: John A. Vuono, 2310 Grant Building, Pittsburgh, Pa. 15219, and Jerome Solomon, 704 Grant Building, Pittsburgh, Pa. 15219. Operating rights sought to be transferred: *General commodities*, excepting, among others, classes A and B explosives,

household goods and commodities in bulk, as a *common carrier*, over regular routes, between Washington, Pa., and Uniontown Pa., serving all intermediate points, and certain off-route points, between Washington, Pa., and Monongahela, Pa., between Waynesburg, Pa., and West Brownsville, Pa., serving all intermediate points; *general commodities*, except those of unusual value, classes A and B explosives, livestock, fresh and smoked meats, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over irregular routes, between points in Fayette County, Pa., on the one hand, and, on the other, certain specified points in West Virginia; *general commodities*, excepting, among others, classes A and B explosives, household goods and commodities in bulk, between points in Fayette County, Pa., on the one hand, and, on the other, points in Garrett County, Md.; *fresh and smoked meats*, between points in Fayette County, Pa., on the one hand, and, on the other, certain specified points in West Virginia. Vendee is authorized to operate as a *common carrier* in Pennsylvania, West Virginia, and Ohio. Application has not been filed for temporary authority under section 210a(b).

No. MC–F–10645. Authority sought for purchase by A. & H. TRUCK LINE, INC., 1111 East Louisiana Street, Evansville, Ind. 47717, of a portion of the operating rights and certain property of TENNESSEE CARTAGE CO., INC., 813 Ewing Avenue, Post Office Box 1193, Nashville, Tenn. 37202, and for acquisition by DONALD H. ANDERSON, 981 Meadow Road, Evansville, Ind., of control of such rights and property through the purchase. Applicants' attorney: Robert H. Kinker, 711 McClure Building, Frankfurt, Ky. Operating rights sought to be transferred: *General commodities*, except articles of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment, as a *common carrier*, over regular routes, between Nashville, Tenn., and Nashville, Tenn., in a circuitous route, serving all intermediate points in Kentucky on said route between Greenville and Hopkinsville, including Greenville, and serving Hopkinsville for purpose of joinder only, between Springfield, Tenn., and Hopkinsville, Ky., serving no intermediate points, and serving Springfield and Hopkinsville for purpose of joinder only, between Princeton, Ky., and Hopkinsville, Ky., serving all intermediate points, and serving Hopkinsville for purpose of joinder only, between Dawson Springs, Ky., and Providence, Ky., serving all intermediate points. Restriction: The operations authorized herein are restricted against the transportation of shipments originating at or destined to the plantsite of Princeton Co., at or near Princeton, Ky. Vendee is authorized to operate as a *common carrier* in Indiana, Kentucky, Ohio, Tennessee, Illinois, and Missouri. Application has been filed for temporary authority under section 210a(b).

No. MC–F–10647. Authority sought for purchase by SANBORN'S MOTOR EXPRESS, INC., 550 Forest Avenue, Portland, Maine 04101, of a portion of the operating rights of J. SCHWARTZ MOTOR TRANSPORTATION, INC., 185 Woodland Avenue, Manchester, N.H. 03101, and for acquisition by HOWARD L. SANBORN, H. BLAINE SANBORN, and DWIGHT L. SANBORN, all also of Portland, Maine, of control of such rights through the purchase. Applicants' attorney and representative: Mary E. Kelley, 11 Riverside Avenue, Medford, Mass. 02155, and Robert Dastin, 875 Elm Street, Manchester, N.H. 03101. Operating rights sought to be transferred: *General commodities*, excepting, among others, classes A and B explosives, household goods and commodities in bulk, as a *common carrier*, over regular routes, between Manchester, N.H., and Boston, Mass., serving all intermediate points; and off-route points within 5 miles of Boston, and those within 5 miles of Manchester, from Manchester over U.S. Highway 3 to junction U.S. Highway 3A (formerly portion of U.S. Highway 3), thence over U.S. Highway 3A via North Chelmsford, Lowell, and Billerica, Mass., to junction U.S. Highway 3, thence over U.S. Highway 3 to Boston, and return over the same route, from Manchester over New Hampshire Highway 28 to the New Hampshire-Massachusetts State line, thence over Massachusetts Highway 28 to Boston, and return over the same route. Vendee is authorized to operate as a *common carrier* in Maine, New Hampshire, Massachusetts, New York, Connecticut, Rhode Island, New Jersey, and Pennsylvania. Application has not been filed for temporary authority under section 210a(b).

MOTOR CARRIERS OF PASSENGERS

No. MC–F–10646. Authority sought for purchase by TRENTON-PHILA. COACH CO., 200 West Wyoming Avenue, Philadelphia, Pa. 19140, of a portion of the operating rights of RED ARROW LINES, INC., 69th Street Terminal Building, Upper Darby, Pa. 19082, and for acquisition by SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, 2028 PSFS Building, 12 South 12th Street, Philadelphia, Pa. 19107, of control of such rights through the purchase. Applicants' representative: John W. Ennis, Jr., 2028 PSFS Building, Philadelphia, Pa. 19107. Operating rights sought to be transferred: Passengers and their baggage, in the same vehicle with passengers, as a *common carrier*, over regular routes, between Philadelphia, Pa., and Medford Lakes, N.J., between Ellisburg, N.J., and Kingsway Village, N.J., between Kingsway Village, N.J., and Downs Farm, N.J., serving all intermediate points; and passengers and their baggage, between Ellisburg, N.J., and Kingston Estates, N.J., serving all intermediate points. Vendee is authorized to operate as a *common carrier* in Pennsylvania and New Jersey. Application has not been filed for temporary authority under section 210a(b).

By the Commission.

[SEAL] H. NEIL GARSON, *Secretary.*

[F.R. Doc. 69–13184; Filed, Nov. 4, 1969; 8:48 a.m.]

NOTICE OF FILING OF MOTOR CARRIER INTRASTATE APPLICATIONS

OCTOBER 31, 1969.

The following applications for motor common carrier authority to operate in intrastate commerce seek concurrent motor carrier authorization in interstate or foreign commerce within the limits of the intrastate authority sought, pursuant to section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962. These applications are governed by Special Rule 245 (49 CFR 1100.245) of the Commission's rules of practice, published in the FEDERAL REGISTER, issue of April 11, 1963, page 3533, which provides, among other things, that protests and requests for information concerning the time and place of State Commission hearings or other proceedings, any subsequent changes therein, any other related matters shall be directed to the State Commission with which the application is filed and shall not be addressed to or filed with the Interstate Commerce Commission.

State Docket No. MC–5317, filed October 17, 1969. Applicant: NED R. McWHERTER, doing business as VOLUNTEER TRUCKING COMPANY, 22 Bypass Road, Dresden, Tenn. 38225. Applicant's representative: Walter Harwood, 1822 Parkway Towers, Nashville, Tenn. 37219. Certificate of public convenience and necessity sought to operate a freight service as follows: Transportation of *general commodities*, except classes A and B explosives, household goods, commodities in bulk, and articles requiring special equipment; (1) from Nashville, Tenn., via Interstate Highway 40 to junction with Tennessee Highway 22, thence via Tennessee Highway 22 to Weakley County line, thence via any and all highways and roads in Weakley and Obion Counties, Tenn., serving all points in said counties, and return over the same routes; (2) from Nashville, Tenn., via U.S. Highway 70 to Huntingdon, Tenn., thence via Tennessee Highway 22 to Weakley County line, thence via any and all highways and roads in Weakley and Obion Counties, Tenn., serving all points in said counties, and return over the same routes; and (3) via any and all connecting roads and highways between Interstate Highway 40 and U.S. Highway 70 between Nashville and Tennessee Highway 22, for operating convenience only in connection with routes (1) and (2) above. Both intrastate and interstate authority sought.

HEARING: Tuesday, January 13, 1970 at 9:30 a.m., Commission's Court Room, C–1 Cordell Hull Building, Nashville,

Tenn. Requests for procedural information, including the time for filing protests, concerning this application should be addressed to the Tennessee Public Service Commission, Cordell Hull Building, Nashville, Tenn. 37219, and should not be directed to the Interstate Commerce Commission.

State Docket No. 10569, filed October 15, 1969. Applicant: COMET DISTRIBUTION SERVICE, INC., doing business as COMET TRUCKING SERVICE, 2125 Sorrell Avenue, Baton Rouge, La. 70802. Applicant's representative: Clint L. Pierson, 947 Gardere Lane, Route 3, Baton Rouge, La. 70808. Certificate of public convenience and necessity sought to operate a freight service as follows: Transportation of *general commodities*, particularly industrial chemicals, materials and supplies, in packages, bags, or drums and excepting bulk shipments, either dry or liquid, over the following described routes and territories: (1) U.S. Highway 61 from St. Francisville to Baton Rouge, La.; (2) U.S. Highway 61 from Baton Rouge to New Orleans, La.; (3) Louisiana Highway 30 from Baton Rouge to Union, La.; and from Highway 30 across Sunshine Bridge to Highway 1 at Donaldsonville, La.; thence over Highway 1 from Donaldsonville to Port Allen, La.; and thence to Baton Rouge over the I-10-Mississippi River Bridge; (4) U.S. Highway 190 and/or Interstate 12 from Baton Rouge to Hammond, La.; and (5) U.S. Highway 51 or Interstate 55 from Hammond to Highway 61 at La Place, La., and serving all intermediate points along said routes and connected thereto within 5 miles of either side of said highways. Both intrastate and interstate authority sought.

HEARING: Not yet assigned. Requests for procedural information, including the time for filing protests concerning this application should be addressed to the Louisiana Public Service Commission, Baton Rouge, Louisiana, and should not be directed to the Interstate Commerce Commission.

By the Commission.

[SEAL] H. NEIL GARSON, *Secretary.*

[F.R. Doc. 69-13187; Filed, Nov. 4, 1969; 8:48 a.m.]

[Notice 935]

MOTOR CARRIER TEMPORARY AUTHORITY APPLICATIONS

OCTOBER 31, 1969.

The following are notices of filing of applications for temporary authority under section 210a(a) of the Interstate Commerce Act provided for under the new rules of Ex Parte No. MC-67 (49 CFR Part 1131) published in the FEDERAL REGISTER, issue of April 27, 1965, effective July 1, 1965. These rules provide that protests to the granting of an application must be filed with the field official named in the FEDERAL REGISTER publication, within 15 calendar days after the date of notice of the filing of the application is published in the FEDERAL REGISTER. One copy of such protests must be served on the applicant, or its authorized representative, if any, and the protests must certify that such service has been made. The protests must be specific as to the service which such protestant can and will offer, and must consist of a signed original and six copies.

A copy of the application is on file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, D.C., and also in field office to which protests are to be transmitted.

MOTOR CARRIERS OF PROPERTY

No. MC 1824 (Sub-No. 47 TA), filed October 28, 1969. Applicant: PRESTON TRUCKING COMPANY, INC., 151 Easton Boulevard, Preston, Md. 21655. Applicant's representative: Frank V. Klein (same address as above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Insulation material*, from Parsonsburg, Md., to points in Connecticut, Pennsylvania, Rhode Island, Virginia, Delaware, District of Columbia, Maryland, Massachusetts, New Jersey, and New York, for 180 days. Supporting shipper: Cellutron Products Corp., Post Office Box 76, Route 346, Parsonsburg, Md. 21849; Roland S. Jones. Send protests to: Paul J. Lowry, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 206 Old Post Office Building, 129 East Main Street, Salisbury, Md. 21801.

No. MC 96098 (Sub-No. 35 TA), filed October 29, 1969. Applicant: MILTON TRANSPORTATION, INC., Rural Delivery 2, Milton, Pa. 17847. Applicant's representative: George A. Olsen, 69 Tonnele Avenue, Jersey City, N.J. 07306. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Printing paper other than newsprint, not printed*, from Lock Haven, Pa., to points in Maryland, Virginia, and the District of Columbia, for 150 days. Supporting shipper: Hammermill Paper Co., Lock Haven, Pa. 17745. Send protests to: Robert W. Ritenour, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 508 Federal Building, Post Office Box 869, Harrisburg, Pa. 17108.

No. MC 98154 (Sub-No. 5 TA), filed October 28, 1969. Applicant: BRUCE CARTAGE, INCORPORATED, 3460 East Washington Road, Saginaw, Mich. 48601. Applicant's representative: Karl L. Gotting, Union Savings & Loan Building, 117 West Allegan Street, Lansing, Mich. 48933. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Merchandise as is dealt with by retail department stores*, between Saginaw and Grand Rapids, Mich., on the one hand, and, on the other, J. C. Penney stores and warehouses located at points in Michigan south of a line formed by the north boundaries of Manistee, Wexford, Missaukee, Roscommon, Ogenaw, and Iosco Counties, Mich., restricted against movements to or from stores and warehouses located in Monroe, Washtenaw, Oakland, Macomb, St. Clair, and Wayne Counties, Mich., for 180 days. Supporting shipper: J. C. Penney Co., Inc., 1301 Avenue of the Americas, New York, N.Y. 10019. Send protests to: C. R. Flemming, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 225 Federal Building, Lansing, Mich. 48933.

No. MC 112593 (Sub-No. 16 TA), filed October 27, 1969. Applicant: SIDNEY W. JOHNSON, doing business as SOUTHWESTERN FILM SERVICE, 8319 Aztec Northeast, Albuquerque, N. Mex. 87110. Applicant's representative: Jerry R. Murphy, 708 LaVeta Drive NE., Albuquerque, N. Mex. 87108. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Exposed and processed film and prints, complimentary replacement film, incidental dealer handling supplies and advertising literature moved therewith*, between Albuquerque, N. Mex., and Clovis, Deming, Farmington, Gallup, Grants, Las Cruces, Las Vegas, Los Alamos, Lordsburg, Raton, Santa Fe, Santa Rosa, Silver City, Socorro, Taos, and Truth or Consequences, N. Mex., on traffic having a prior or subsequent out-of-State movement, for 120 days. NOTE: Applicant intends to interline at Albuquerque with regular route air carriers. Supporting shipper: Eastman Kodak Co., General Traffic Department, Building 205, Kodak Park Division, Rochester, N.Y. 14650. Send protests to: Wm. R. Murdoch, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 10515 Federal Building and U.S. Courthouse, 500 Gold Avenue SW., Albuquerque, N. Mex. 87101.

No. MC 113388 (Sub-No. 94 TA), filed October 29, 1969. Applicant: LESTER C. NEWTON TRUCKING CO., Post Office Box 618, Seaford, Del. 19973. Applicant's representative: Robert E. Scott (same address as above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Canned vegetables and canned mushrooms*, from Sadsbury, Pa., to points in Connecticut, Delaware, District of Columbia, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and West Virginia, for 180 days. Supporting shipper: Green Giant Co., LeSueur, Minn.; Gerald R. Russeth, Motor Transportation Supervisor. Send protests to: Paul J. Lowry, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 206 Old Post Office Building, 129 East Main Street, Salisbury, Md.

No. MC 127505 (Sub-No. 29 TA), filed October 28, 1969. Applicant: RALPH H. BOELK, doing business as R. H. BOELK TRUCK LINES, 1201 14th Avenue, Mendota, Ill. 61342. Applicant's representative: Walter Kobos, 1016 Kehoe Drive, St. Charles, Ill. 60174. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Plastic foam articles, insulating materials, wallboard, and plumbing materials and supplies and bathroom or lavatory fixtures*, from Bloomington, Ill., to points in Minnesota, Wisconsin, Illinois, Kentucky, Tennessee, Mississippi, Louisiana (on and east of Mississippi River), and all States east thereof including Washington, D.C., for 180 days.

NOTE: Applicant states no tacking possible but intends to interline at all possible points with all possible carriers. Supporting shipper: Chembest Division, Unarco Industries, Inc., 111 West Perry Street, Bloomington, Ill. 61701. Send protests to: William E. Gallagher, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 219 South Dearborn Street, Room 1086, Chicago, Ill. 60604.

No. MC 133207 (Sub-No. 1 TA), filed October 29, 1969. Applicant: UNITED COURIER CORPORATION, 301 South Tryon Street, Charlotte, N.C. 28201. Applicant's representative: William F. King, Suite 301, Tavern Square, Alexandria, Va. 22314. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Commercial papers, documents and written instruments* (except currency, coin and bullion) as are used in the business of banks and banking institutions, between points in North Carolina, South Carolina, Tennessee, and Virginia, for 180 days. Supporting shippers: North Carolina National Bank, Charlotte, N.C.; American Bank and Trust, Orangeburg, S.C.; First National Bank of Norfolk, Norfolk, Va.; Southern Bank and Trust Co., Greenville, S.C.; Virginia National Bank, Norfolk, Va.; National Bank of South Carolina, Sumter, S.C.; and First Union National Bank of North Carolina, Charlotte, N.C. Send protests to: Jack K. Huff, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 316 East Morehead, Suite 417 (BSR Bldg.), Charlotte, N.C. 28202.

No. MC 134050 (Sub-No. 1 TA), filed October 28, 1969. Applicant: J. M. FOSTER, Route 6, Brookhaven, Miss. 39601. Applicant's representative: Donald B. Morrison, Post Office Box 22628, Deposit Guaranty National Bank Building, Jackson, Miss. 39205. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *lumber*, from Ferriday, Newellton, Plaquemine, St. Francisville, Sondheimer, Tallulah, and Zachary, La., to Fayette, Miss.; and (2) *cross-ties*, from Brookhaven and Bogue Chitto, Miss., to Mobile, Ala., and Slidell and Alexandria, La., for 150 days. Supporting shippers: Cullen Beeson, Route 1, Brookhaven, Miss. 39601; W. C. Ingle, Route 1, Box 94–A, Brookhaven, Miss., 39601; James Ferguson, Bogue Chitto, Miss. 39629; Fayette Enterprises, Inc., Post Office Box 188, Fayette, Miss. 39069. Send protests to: Alan C. Tarrant, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Room 212, 145 East Amite Building, 145 East Amite Street, Jackson, Miss. 39201.

No. MC 134129 (Sub-No. 1 TA), filed October 29, 1969. Applicant: WILLIAM A. LONG, Bealeton, Va. 22712. Applicant's representative: Daniel B. Johnson, Perpetual Building, Washington, D.C. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Culvert pipe, culvert sectional plate and couplings and coatings for culvert pipe and sections*, from Bedford, Pa. to Bealeton, Va. (2) *Culvert banding and coupling materials, coatings and steel plates* used in the manufacture of culvert pipe and couplings, from Bealeton, Va., to Bedford, Pa. (3) *steel coil*, from the plantsite of Bethlehem Steel Corp., at Sparrows Point, Md., to Bedford, Pa., for 180 days. Supporting shipper: Lane Juniata, Inc., Post Office Box 164, Bedford, Pa. 15522. Send protests to: Robert D. Caldwell, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 12th and Constitution Avenue NW., Room 2210, Washington, D.C. 20423.

By the Commission.

[SEAL] H. NEIL GARSON, *Secretary.*

[F.R. Doc. 69–13185; Filed, Nov. 4, 1969; 8:48 a.m.]

[Notice 439]

MOTOR CARRIER TRANSFER PROCEEDINGS

OCTOBER 31, 1969.

Synopses of orders entered pursuant to section 212(b) of the Interstate Commerce Act, and rules and regulations prescribed thereunder (49 CFR Part 1132), appear below:

As provided in the Commission's special rules of practice any interested person may file a petition seeking reconsideration of the following numbered proceedings within 20 days from the date of publication of this notice. Pursuant to section 17(8) of the Interstate Commerce Act, the filing of such a petition will postpone the effective date of the order in that proceeding pending its disposition. The matters relied upon by petitioners must be specified in their petitions with particularity.

No. MC–FC–71605. By order of October 29, 1969, the Motor Carrier Board approved the transfer to Flinton Eitzen, Coin, Iowa 51636, of certificate No. MC–94206 issued November 23, 1949, to Harold Inman, Northboro, Iowa 51647 authorizing the transportation of livestock between points in Missouri and Iowa within 15 miles of College Springs, Iowa; from College Springs, Iowa, and points within 15 miles of College Springs to Omaha and Nebraska City, Nebr., and St. Joseph, Mo., from points within 10 miles of Clarinda, Iowa, except those within 15 miles of College Springs, Iowa, to St. Joseph, Mo., and Omaha, Nebr.; from Omaha, Nebr., to College Springs, Iowa, and points within 15 miles of College Springs, and Clarinda, Iowa, and points within 10 miles of Clarinda, except those within 15 miles of College Springs; and from St. Joseph, Mo., to College Springs, Iowa, and points within 15 miles of College Springs; feed, from Omaha, Nebr., to College Springs, and Clarinda, Iowa, and points within 15 miles of College Springs, and those points within 10 miles of Clarinda; and from St. Joseph, Mo., to College Springs, Iowa; building materials, fencing, and posts, from Omaha, Nebr., to College Springs, Iowa; brick and tile from Nebraska City, Nebr., to College Springs, Iowa; animal and poultry feed from Humboldt, Nebr., to College Springs, Iowa; grain, hay, and livestock between points in Missouri and Iowa, within 15 miles of College Springs, Iowa; and between Maryville, Mo., and points in Iowa within 15 miles of College Springs, Iowa, and farm machinery between Omaha, Nebr., and points in Iowa within 10 miles of Clarinda, not including Clarinda.

No. MC–FC–71681. By order of October 28, 1969, the Motor Carrier Board approved the transfer to John F. D'Andrade, doing business as Red D'Andrade Marine Transport, East Northport, N.Y., of certificate No. MC–117802 (Sub-No. 1) issued July 17, 1960, to Seaford Marine Boat Haulers, Inc., Seaford, N.Y., authorizing the transportation of: Boats, not exceeding 33 feet in length, from specified points in Maine, New York, and Virginia, to points in Massachusetts, Rhode Island, Connecticut, New Hampshire, New Jersey, Maryland, and Florida. Arthur J. Piken, 160 Jamaica, Avenue, Jamaica, N.Y. 11432, attorney for applicants.

[SEAL] H. NEIL GARSON, *Secretary.*

[F.R. Doc. 69–13186; Filed, Nov. 4, 1969; 8:48 a.m.]

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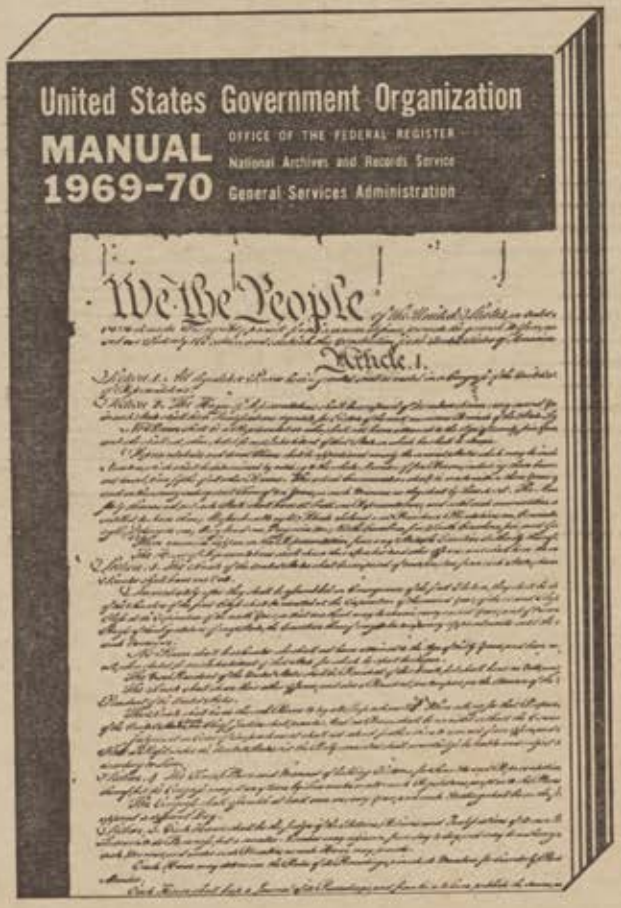
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