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Federal Register

Wednesday
December 12, 1984

Selected Subjects

Administrative Practice and Procedure
Patent and Trademark Office

Animal Drugs
Food and Drug Administration

Communications Common Carriers
Federal Communications Commission

Education of Handicapped
Education Department

Fisheries
National Oceanic and Atmospheric Administration

Foreign Service
United States Information Agency

Hazardous Waste
Environmental Protection Agency

Income Taxes
Internal Revenue Service

Marketing Agreements
Agricultural Marketing Service

Medical Devices
Food and Drug Administration

Mortgages
Internal Revenue Service

Motor Carriers
Interstate Commerce Commission

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Questions and requests for specific information may be directed to the telephone numbers listed under INFORMATION AND ASSISTANCE in the READER AIDS section of this issue.

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Presidential Documents

Title 3—

The President

Proclamation 5287 of December 10, 1984

Bill of Rights Day
Human Rights Day and Week, 1984

By the President of the United States of America

A Proclamation

On December 15, 1791, our Founding Fathers celebrated the ratification of the first ten amendments to the Constitution of the United States—a Bill of Rights that has helped guarantee the freedoms that all Americans cherish.

For the first time in the history of nations, our Founding Fathers established a written Constitution with enumerated rights based on the principle that the rights to life and liberty come not from the prerogative of government, but inhere in each person as a fundamental human heritage. Americans believe that all persons are equal in their possession of these unalienable rights and are entitled to respect because of the immense dignity and value of each human being. With these great principles in mind, the Founding Fathers designed a system of government limited in its powers, based upon just laws, and resting upon the consent of the governed.

When Americans first proclaimed this noble experiment in self-government and human liberty, it seemed to some to be a utopian, unrealistic ideal. Today, virtually every nation in the world has adopted a written constitution expressing in varying degrees fundamental human rights. One hundred and fifty-seven years after the ratification of our Bill of Rights, on December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights affirming an international consensus on behalf of the human rights and individual liberties that we value so highly.

Thirty-six years after the adoption of the Universal Declaration of Human Rights, however, it is clear that this consensus is often recognized more on paper than in practice. Throughout the world, many governments nominally adhere to the Universal Declaration of Human Rights while suppressing free elections, independent trade unions, due process of law, and freedom of religion and of the press.

The United States recognizes a special responsibility to advance the claims of the oppressed; to reaffirm the rights to life and liberty as fundamental rights upon which all others are based; and to safeguard the rights to freedom of thought, conscience, and religion. As we are free, we must speak up for those who are not.

As Americans, we strongly object to and seek to end such affronts to the human conscience as the incarceration in the Soviet Union of men and women who try to speak out freely or who seek to exercise the basic right to emigrate; the harsh treatment accorded one of the great humanitarians of our time, Andrei Sakharov; the denial of basic human rights and self-determination in Eastern Europe and the Baltic states; the failure of the Polish authorities to establish an effective dialogue with the free trade union movement in that country; the manifest injustices of the apartheid system of racial discrimination in South Africa; the persecution of the Baha'i religious minority in Iran; the lack of progress toward democratic government in Chile and Paraguay; the campaign against the Roman Catholic Church in Nicaragua; the suppression of freedom in Cuba and Vietnam; the brutal war waged by Soviet troops against

the people of Afghanistan; and the continuing Vietnamese occupation of Kampuchea.

The American people recognize that it is the denial of human rights, not their advocacy, that is a source of world tension. We recall the sacrifices that generations of Americans have made to preserve and protect liberty around the world. In this century alone, tens of thousands of Americans have laid down their lives on distant battlefields to uphold the cause of human rights. We honor and cherish them all. Today, it is with an abiding sense of gratitude and reverence that we remember the great gift of freedom that they bequeathed to us.

As we give special thought to the blessings that we enjoy as a free people, let us not forget the victims of human rights abuses around the world.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim December 10, 1984, as Human Rights Day and December 15, 1984, as Bill of Rights Day, and call on all Americans to observe the week beginning December 10, 1984, as Human Rights Week.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of Dec., in the year of our Lord nineteen hundred and eighty-four, and of the Independence of the United States of America the two hundred and ninth.

Ronald Reagan

[FR Doc. 84-32565
Filed 12-11-84; 10:46 am]
Billing code 3195-01-M

Editorial note: For the President's remarks of Dec. 10, 1984, on signing Proclamation 5287, see the *Weekly Compilation of Presidential Documents* (vol. 20, no. 50).

Presidential Documents

Memorandum of December 10, 1984

Delegation of Authority for Reports to Congress on Turkey and El Salvador

Memorandum for the Secretary of State; the Administrator, Agency for International Development

By virtue of the authority vested in me as President by the Constitution and the statutes of the United States of America, including Section 621 of the Foreign Assistance Act of 1961, as amended, and Section 301 of Title 3 of the United States Code, I hereby (1) delegate to the Secretary of State the functions vested in me by Title III of the Foreign Assistance and Related Programs Appropriations Act, 1985 (as enacted in P.L. 98–473) (the "Act"), under the unnumbered paragraph entitled "Military Assistance" insofar as they relate to Turkey; and (2) delegate to the Administrator of the Agency for International Development functions vested in me by Section 533 of the Act, to be exercised in consultation with the Secretary of State.

This memorandum shall be published in the **Federal Register.**

Ronald Reagan

THE WHITE HOUSE,
Washington, December 10, 1984.

[FR Doc. 84–32566
Filed 12–11–84; 10:47 am]
Billing code 3195–01–M

Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 907

[Navel Orange Regs. 607, and 605, Amdt. 2]

Navel Oranges Grown in Arizona and Designated Part of California; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 607 establishes the quantity of fresh California-Arizona navel oranges that may be shipped to market during the period December 14–20, 1984. Regulation 605, Amendment 2, increases the quantity of such oranges that may be shipped during the period November 30–December 6, 1984. Such action is needed to provide for the orderly marketing of fresh navel oranges for the periods specified due to the marketing situation confronting the orange industry.

DATES: Amended Regulation 605 (§ 907.905) is effective for the period November 30–December 6, 1984. Regulation 607 (§ 907.907) becomes effective on December 14, 1984.

FOR FURTHER INFORMATION CONTACT: William J. Doyle, 202–447–5975.

SUPPLEMENTARY INFORMATION:

Findings

This rule has been reviewed under USDA procedures and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities.

This regulation and amendment are issued under the marketing agreement, as amended, and Order No. 907, as amended (7 CFR Part 907), regulating the handling of navel oranges grown in Arizona and designated part of California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The action is based upon the recommendation and information submitted by the Navel Orange Administrative Committee and upon other available information. It is hereby found that these actions will tend to effectuate the declared policy of the act.

These actions are consistent with the marketing policy for 1984–85. The marketing policy was recommended by the committee following discussion at a public meeting on September 25, 1984. The committee met again publicly on December 4, 1984 at Lindsay, California, to consider the current and prospective conditions of supply and demand and recommended a quantity of navel oranges deemed advisable to be handled during the specified weeks. The committee reports the demand for navel oranges is excellent.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation and amendment are based and the effective date necessary to effectuate the declared policy of the act. Interested persons were given an opportunity to submit information on views on the regulation and amendment at an open meeting. It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 907

Marketing Agreements and Orders, California, Arizona, Oranges (Navel).

PART 907—[AMENDED]

1. § 907.907 is added as follows:

§ 907.907 Navel Orange Regulation 607.

The quantities of navel oranges grown in California and Arizona which may be handled during the period December 14, 1984, through December 20, 1984, are established as follows:

(a) *District 1:* 1,100,000 cartons;
(b) *District 2:* Unlimited cartons;
(c) *District 3:* Unlimited cartons;
(d) *District 4:* Unlimited cartons.

2. § 907.905 Navel Orange Regulation 605 paragraphs (a) through (d) are hereby revised to read:

§ 907.905 Navel Orange Regulation 605.

(a) *District 1:* 1,700,000 cartons;
(b) *District 2:* Unlimited cartons;
(c) *District 3:* Unlimited cartons;
(d) *District 4:* Unlimited cartons.

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

Dated: December 6, 1984.

Thomas R. Clark,

Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 84-32327 Filed 12-11-84; 8:45 am]

BILLING CODE 3410-02-M

CIVIL AERONAUTICS BOARD

14 CFR Part 241

Service Segment Data; Approval of Extension of Reporting Requirements by the Office of Management and Budget

AGENCY: Civil Aeronautics Board.

ACTION: Notice of Approval of Extension of Reporting Requirements by the Office of Management and Budget.

SUMMARY: The Civil Aeronautics Board has extended the reporting requirements in section 241.19–3 of Part 241 of the Board's Economic Regulations governing the accounting and reporting for certificated air carriers. The Office of Management and Budget approved the extension of these requirements through June 30, 1986, under OMB No. 3024–0014. OMB approval is required under the Paperwork Reduction Act of 1980.

DATED: December 5, 1984.

FOR FURTHER INFORMATION CONTACT: Clay Moritz, Data Requirements Section, Information Management Division, Office of Comptroller, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428, (202) 673–6042.

SUPPLEMENTARY INFORMATION:

List of Subjects in 14 CFR Part 241

Air carriers, Accounting and Reporting requirements.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84-32410 Filed 12-11-84; 8:45 am]

BILLING CODE 6320-01-M

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14 CFR Part 298

Exemptions for Air Taxi Operations; Approval of Extension of Reporting Requirements by the Office of Management and Budget

AGENCY: Civil Aeronautics Board.

ACTION: Notice of Approval of Extension of Reporting Requirements by the Office of Management and Budget.

SUMMARY: The Civil Aeronautics Board has extended the reporting requirements in § 298.61 of Part 298 of the Board's Economic Regulations governing air taxi operations. The Office of Management and Budget approved the extension of these requirements through September 30, 1987, under OMB No. 3024-0009. OMB approval is required under the Paperwork Reduction Act of 1980.

DATED: December 5, 1984.

FOR FURTHER INFORMATION CONTACT: Bernie Stankus, Data Requirements Section, Information Management Division, Office of Comptroller, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428, (202) 673-6042.

SUPPLEMENTARY INFORMATION: .

List of Subjects in 14 CFR Part 298

Air carriers, Registration, Exemptions, Insurance, Reporting and operating requirements.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84-32411 Filed 12-11-84; 8:45 am]

BILLING CODE 6320-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket 8879]

Grolier Incorporated; Prohibited Trade Practices and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Modifying Order.

SUMMARY: This Order reopens the proceeding and modifies the 1978 Commission Order, 43 FR 18652, revised December 10, 1981 and made final March 9, 1982, 47 FR 12613, which required a seller of encyclopedias to cease engaging in certain unfair and deceptive trade practices in connection with the sale of its products and the recruitment of door-to-door sales personnel. Pursuant to the company's petition, the Order has been modified to closely conform with the modification granted Encyclopaedia Britannica in October of 1982, 47 FR 51558. Among other things, the Order no longer requires the firm to include in employment ads information such as the nature of the employment, the location of the company or the basis of compensation so long as they provide such information to potential employees during the initial job interview. The company may provide information concerning income and expenses to prospective employees when an actual job offer is made. The Order no longer requires the company to disclose in advertisements and promotional material that a sales representative will contact consumers who return inquiry cards, provided the firm can demonstrate through surveys that most readers of ads understand this implicitly. Business cards of sales representatives may be reduced from three-by-five to two-by three-and-a-half inches. Further, when making "free" merchandise offers or claims concerning the "regular prices" for encyclopedias, Grolier may follow relevant Commission guidelines, and is no longer required to attach lists of prices and free products to encyclopedia contracts.

DATES: Final Order issued on March 9, 1982; Modified Order issued on November 19, 1984.

FOR FURTHER INFORMATION CONTACT: FTC/B-417-5, Lewis Franke, Washington, D.C. 20580, (202) 376-2863.

SUPPLEMENTARY INFORMATION: In the Matter of Grolier Incorporated, a corporation, et al. Codification appearing at 47 FR 12613 remains unchanged.

Lists of Subjects in 16 CFR Part 13

Encyclopedias, Trade practices.

(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)

Before the Federal Trade Commission

Commissioners: James C. Miller III, Chairman, Patricia P. Bailey, George W. Douglas, Terry Calvani.

[Docket No. 8879]

Order Reopening the Proceeding and Modifying Cease and Desist Order

In the matter of Grolier Incorporated, a corporation, et al.

On October 13, 1983, respondents, Grolier Incorporated, et al., filed a "Request to Reopen Proceedings To Modify Order and Application for Stay of the Order." ("Request") The Order became effective on October 11, 1983. On August 23, and October 4, 1984, Grolier supplemented the "Request" with a revised Appendix B, which sets out the methodology to be used by Grolier to show compliance with Paragraph II.A. of the proposed Order.

Grolier granted the Commission until November 19, 1984 to decide its "Request". The Commission previously granted Grolier's "Request for Extension of Time" for the Commission to act to allow Grolier more time to complete its surveys bearing on the disclosures required by Paragraphs II.A. and B., which are subject paragraphs of the pending "Request".

Grolier seeks Order modifications virtually identical to those the Commission made to a similar Commission Order against Encyclopaedia Britannica (Docket No. 8908) on October 5, 1982.

On November 23, 1983 the Commission granted the stay as to Order Paragraphs IC. (2), (3) and (4); ID.; I E.; II A-E; II G (7); II M (1) and (2); II S; and Paragraph V, pending resolution of the request for Order modification.

On the basis of the information provided by Grolier and in view of the Order modifications granted to Encyclopaedia Britannica the Commission has determined that pursuant to § 2.51 of the Commission's Rules of Practice changed conditions of fact and the public interest require that the proceedings be reopened and the Order modified. *It is therefore ordered* that the proceedings be reopened and the Order modified as follows:

I

* * * * *

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the expenses that may be incurred by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing to disclose, clearly and conspicuously, in all advertising offering employment in any way involving door-to-door sales that the respondent concerned is recruiting persons for the sole purpose of soliciting or selling.

(2) [Deleted]

(3) [Deleted]

(4) [Deleted]

D. Failing to provide clearly and conspicuously, both orally and in

writing, to any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1)(a) That respondent is recruiting persons for the sole purpose of soliciting or selling;

(b) That the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(c) The basis for compensating persons so engaged;

(2) That conditions or limitations upon the receipt of compensation, if any, do in fact exist, together with an example of such a material condition or limitation, and that all such conditions and limitations will be stated in detail in an interview in the event an offer of employment is made to such person;

* * * * *

(4) That expenses will be incurred by such person in performing required duties, together with an example of such a material expense, and that all such expense items will be stated in detail in an interview in the event an offer of employment is made to such person; and

(5) That such soliciting or selling will be on an "in-home" basis, if such is the fact, or will include soliciting or selling on an "in-home" basis, if such is the fact.

E. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at an interview at which an offer of employment is made and prior to executing any employment agreement with any such person, the following information:

(1) A complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(2) A complete and detailed description of any expense or expenses any such person may incur in performing the required duties;

(3)(a) The total number of sales employees employed by the office offering the position during the most recent calendar quarter, and (b) the number of sales employees employed by the office who, during the prior calendar quarter, received net earnings equivalent to or greater than the amount represented in the advertisement to which the prospective employee is responding; provided, however, that if the office has been in existence for less than three months or has fewer than five sales employees, respondents shall provide the information described above pertaining to the Division in which the office is located; provided further that such information need not be furnished if the prospective sales employee contacts respondents more than ten days following the dissemination of the most recent advertisement that contains representations of earnings. Respondents shall afford any prospective sales employee an adequate opportunity to review and consider the above information prior to requesting execution of any employment agreement.

F. Failing to furnish to persons at an interview when an offer of employment is made and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II and V of this Order together with a cover letter as set forth in *Appendix A* attached hereto. Respondents shall afford any prospective sales employee an adequate opportunity to review and consider these provisions of the Order prior to requesting execution of any employment agreement.

G. Making, distributing or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph I or Paragraph II of the Order.

II

* * * * *

A. Representing, directly or by implication, in any advertisement or promotional material that solicits participation in any contest, drawing, or sweepstakes, or solicits any response to any offer of merchandise, service, or information, and that employs any return card, coupon, or other device to respond to such solicitation, that a person who replies as requested will not be contacted directly by a salesperson for the purpose of selling respondents' products, unless such is the fact. Such advertisements or promotional material shall comply with this Paragraph only if they meet the criteria set forth in *Appendix B.*

B. Failing, upon the written request of the Associate Director for Enforcement or his designee, to (1) submit any advertisement or promotional material or (2) test any such advertisement or promotional material, using the procedure set forth in *Appendix B,* to determine whether it complies with Paragraph II.A.

C. Failing to disclose clearly and conspicuously, during any telephone contact and before commencing any sales presentation to prospective customers, the fact that the individual making the call is either soliciting the sale, rental or lease of publications, merchandise or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, the respondent concerned will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental or lease of said publications, merchandise or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a business card of at least 2 inches by 3 inches containing only the following information, is presented to such person:

(1) The name of the corporation;

(2) The name of the salesperson;

(3) The term "sales representative;

(4) An address and telephone number at which the corporation or salesperson may be contacted;

(5) The product of the corporation logo or identifying mark.

* * * * *

G. Representing, directly or by implication, either orally or in writing that:

(1) Any person telephoning or visiting the home of any prospective purchaser is:

* * * * *

(c) Telephoning or visiting the home of said prospect for the primary purpose of delivering or disseminating any vacation gift certificate, prizes, gifts, gift certificates, chances in any contest, or any other merchandise or item of chance;

* * * * *

(7) Any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of any of respondents' publications, merchandise or services, pursuant to any agreement to purchase, rent or lease any other publication, merchandise, or service, or combination thereof, from such respondent, unless respondent complies with all of the terms of the Federal Trade Commission's "Guide Concerning Use of the Word 'Free' and Similar Representations," 16 CFR Part 251, which is hereby incorporated into this Order, and with any modifications or changes that are made to this Guide. All of the provisions of the aforesaid Guide shall be construed as mandatory and binding upon the respondents.

* * * * *

M. Representing to any person, directly or by implication, either orally or in writing that:

(1) Any price is the retail, regular, usual or words of similar import or effect, price for any publication in any binding, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time;

(2) Any price is the retail, regular, usual or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

* * * * *

S. [Deleted]

T. [Deleted]

* * * * *

By the Commission.

Issued: November 19, 1984.

Appendix A

Notice

Attached hereto are the *pertinent provisions* of a cease and desist order entered against Grolier, Incorporated and certain of its subsidiaries, including Grolier Interstate, Inc. by the Federal Trade Commission, an agency of the Federal Government. Violation of any provision of this Order can result in severe monetary penalties to Grolier, Incorporated and Grolier Interstate, Inc. If you are employed by Grolier, Incorporated or any of its subsidiaries, you will be *required* to observe the provisions of this Order. Violation of any provision of this Order by an employee constitutes a violation of a federal law.

You should carefully read this Order before agreeing to any employment arrangement with Grolier, Incorporated or any of its subsidiary companies.

(President),

Grolier, Incorporated.

Appendix B

This Appendix sets forth the methodology respondents shall employ to determine whether advertisements or promotional materials represent that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products, and the criteria for determining whether such advertisements or promotional materials comply with Paragraph II.A.

1. *Format*—Respondents shall test the comprehension level of advertisements or promotional material by conducting a mall-intercept test or an in-home survey using the questionnaires attached hereto as Exhibit 1.

2. *Sample Size*—The sample shall consist of at least 150 subjects.

3. *Demographics*—Test subjects must:

(a) Be between 25 and 49 years of age;

(b) Have at least one child fifteen years of age or younger living at home;

(c) Have household incomes of at least $15,000 per year for 85% of the subjects tested and the remaining 15% must have household incomes of less than $15,000 per year; *provided* that, upon respondents' request, the Division of Enforcement shall increase this figure by increments of $5,000 whenever the percentage of households earning at least the requested amount equals or exceeds the percentage of households that, according to the 1980 United States Census, have household incomes of at least $15,000 per year. The data for future changes shall be based on the most recently published edition of the *Statistical Abstract of the United States.*

4. *Location of Markets*—The interviewing will be conducted in four geographically dispersed markets. In the case of mall-intercept tests, the same central location facilities will be used wherever possible. If it is necessary to change any interviewing facility, the new facility shall have demographic characteristics similar to those of the facility it is replacing.

5. *Criteria for Acceptability of New Coupon Copy*—New promotional material copy shall comply with Paragraph II.A if at least seventy-five percent of the test subjects in both the group surveyed with household incomes in excess of $15,000 and the group with household incomes of less than $15,000 answer "yes" to question 2 of the questionnaires (Exhibit 1).

Modifications to this Appendix, including the questionnaire, may be made upon a request by respondents and the approval of the Associate Director for Enforcement.

Exhibit 1.—Mall Screener

Comprehension Study—Card

Hello, I'm ———— from ————, a national marketing research firm. We're conducting a survey and would like to ask you a few brief questions.

A. Are you the (male/female) head of your household?

(APPLY TO APPROPRIATE QUOTA)

Male head of household.....1
Female head of household.....2

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE.)

Neither.....1/2/3/4/5/6/7/8/9/0

B. Which of the following groups best describes your age? Are you . . . (READ LIST)?

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE.)

Under 25.....1/2/3/4/5/6/7/8/9/0

(CONTINUE)

25–29.....1
30–34.....2
35–39.....3
40–44.....4
45–49.....5

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE.)

50 or over.....1/2/3/4/5/6/7/8/9/0

(DO NOT READ)

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE.)

Refused.....1/2/3/4/5/6/7/8/9/0

C. And, which of the following groups best describes your annual household income before taxes for 1983? Is it . . . (READ LIST)?

(APPLY TO APPROPRIATE QUOTA)

Under $15,000.....1
$15,000–$24,999.....2
$25,000 or more.....3

(DO NOT READ)

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE)

Refused.....1/2/3/4/5/6/7/8/9/0

IF OVER QUOTA—$15,000 OR MORE, "X" FIRST UNUSED BOX, TERMINATE AND RE-USE. 1/2/3/4/5/6/7/8/9/0

D. How many school age children, 15 years of age or younger, live in your household?

_____

("X" FIRST UNUSED BOX, TERMINATE AND RE-USE.)

None.....1/2/3/4/5/6/7/8/9/0

Mall

Comprehension Study Card, Main Questionnaire

(HAND RESPONDENT DRAWING CARD)

1. Now I'd like to ask you a few questions about this free drawing card.

Based on what you just read, what would you expect to happen if you filled out the card? (PROBE) What else would you expect to happen?

_____

_____

2. For the purpose of this research, let's suppose that you filled out the card. That is, you are interested in receiving information about the educational materials described. Would you expect to be contacted by a sales representative?

Yes.....1
No.....2

(TAKE BACK DRAWING CARD)

THANK RESPONDENT AND TERMINATE.

Respondent's Name: _____
Telephone: ( ) _____
Address: _____
City: _____
State: _____
Zip: _____
Interviewer's Name: _____
Date: _____

Emily H. Rock,

Secretary.

[FR Doc. 84-32346 Filed 12-11-84; 8:45 am]
BILLING CODE 3510-22

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16 CFR Part 13

[Docket No. 9149]

Thompson Medical Company, Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Final Order.

SUMMARY: This Final Order requires a New York City pharmaceutical company to cease, in connection with the advertising, sale or distribution of over-the counter (OTC) health care products, using the brand name "Aspercreme" for any product that does not contain a significant amount of aspirin; or misrepresenting by any other means that aspirin is an active ingredient of such product. TV and radio advertising for "Aspercreme" must include an explicit aspirin disclaimer statement and such disclaimer must also be prominently displayed in print advertising and product labelling. The Order further bars the firm from misrepresenting the contents, validity, results or interpretations of tests or studies; and from representing, without prescribed substantiation, the speed or effectiveness of its products in the relief of minor pain and other symptoms of arthritis, bursitis, rheumatism or other musculoskeletal disorders. Additionally, the Order dismisses Paragraph 12(f) of the Complaint.

DATES: Complaint issued on February 5, 1981; Final Order issued on November 23, 1984.[1]

FOR FURTHER INFORMATION CONTACT: FTC/B-411-8, Elizabeth T. Guarino, Washington, D.C. 20580, (202) 376-8648.

SUPPLEMENTARY INFORMATION: In the Matter of Thompson Medical Company, Inc., a corporation. The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Advertising Falsely or Misleadingly: § 13.20 Comparative data or merits; § 13.45 Content; § 13.95 Identity of product; § 13.135 Nature of product or service; § 13.170 Qualifies or properties of product or service; § 13.190 Results; § 13.205 Scientific or other relevant facts; § 13.210 Scientific tests. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-20 Disclosures. Subpart—Misbranding Or Mislabeling: § 13.1200 Content; § 13.1230 Identity; § 13.1290 Qualities or properties; § 13.1310 Results; § 13.1320 Scientific or other relevant facts. Subpart—Misrepresenting Oneself and Goods—Goods: § 13.1575 Comparative data or merits; § 13.1605 Content; § 13.1655 Identity; § 13.1685 Nature; § 13.1685-15 By misleading trade or corporate name; § 13.1710 Qualities or properties; § 13.1730 Results; § 13.1740 Scientific or other relevant facts. Subpart—neglecting, Unfairly or Deceptively, To Make Material Disclosure: § 13.1850 Content; § 13.1855 Identity; § 13.1870 Nature; § 13.1885 Qualities or properties; § 13.1895 Scientific or other relevant facts. Subpart—Packaging or Labeling of Consumer Commodities Unfairly and/or Deceptively: § 13.2100 Packaging or labeling of consumer commodities unfairly and/or deceptively; § 13.2100-5 Labeling. Subpart—Using Misleading Name—Goods: § 13.2300 Identity: § 13.2315 Nature; § 13.2325 Qualities or properties.

List of Subjects in 16 CFR Part 13

Over-the-counter drug products, Trade practices.

(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, 52)

Before the Federal Trade Commission

Final Order

Commissioners: James C. Miller III, Chairman; Patricia P. Bailey; George W. Douglas; and Terry Calvani.

In the matter of Thompson Medical Company, Inc., a corporation.

[Docket No. 9149]

The matter has been heard by the Commission upon the appeal of counsel for respondent Thompson Medical Company, Inc. and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for reasons stated in the accompanying Opinion, has granted a portion of complaint counsel's appeal and denied that of respondent. Therefore

It is ordered that the initial decision of the administrative law judge be adopted as the Findings of Fact Conclusions of Law of the Commission except as is otherwise inconsistent with the attached opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered that the following Order to Cease and Desist be entered:

Order

I

It is ordered that respondent, Thompson Medical Company, Inc., a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of any over-the-counter "drug" as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Employing the brand name "Aspercreme" for such products or otherwise representing directly or by implication that an active ingredient of such product is aspirin, unless such product contains aspirin in therapeutically significant quantities; *Provided, however,* That the brand name "Aspercreme" may be used for such product if its advertising and labeling clearly and prominently disclose that the product does not contain aspirin.

(1) In television advertisements, an explicit and simple aspirin disclaimer statement (such as "ASPIRIN-FREE") shall be superimposed on the television screen simultaneously with a vocal aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") at the end of each advertisement.

(2) In radio advertisements, an explicit aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") shall be made at the end of each advertisement.

(3) In print advertisements, an explicit aspirin disclaimer statement (such as "ASPERCREME DOES NOT CONTAIN ASPIRIN") shall be displayed prominently and conspicuously in relation to each such advertisement as a whole.

---

[1] Copies of the Complaint, Initial Decision and Opinion of the Commission are filed with the original document.

(4) In labeling, an explicit aspirin disclaimer statement (such as "DOES NOT CONTAIN ASPIRIN") shall be prominently and conspicuously printed in the front package panel (or in the front of the container if no package is used).

B. Representing, directly or by implication, that such product involves a new scientific principle, when such product or one involving such principle has been available for purchase in the United States as an over-the-counter drug for more than one year.

C. Misrepresenting the contents, validity, results, conclusions, or interpretations of any test or study.

D. Misrepresenting the identity of the active ingredient(s) in such product.

II

It is further ordered that Thompson Medical Company, Inc., a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or in distribution of any OTC analgesic "drug," as that term is defined in the Federal Trade Commission Act, in or effecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing that such product is effective for the relief of minor pain and other symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders).

B. Representing that such product is as fast as or faster than, or is as effective as, or more effective than any other drug or device in the relief of minor pain and other symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders);

Unless at the time of the dissemination of any such representation, respondent possesses and relies upon a reasonable basis for such representation consisting of competent and reliable scientific or medical evidence. For analgesic drug products competent and reliable scientific or medical evidence shall include at least two adequate and well-controlled, double blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. Provided however, with respect to any representation covered by this part other than claims of superior or comparative effectiveness or safety, if the Food and Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective under the Food, Drug and Cosmetic Act, then in lieu of the above, respondent may rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation.

III

It is further ordered that so much of the complaint as relates to Paragraph 12(f) be, and the same hereby is, dismissed.

IV

It is further ordered that respondent Thompson Medical Company, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in its corporation which may affect compliance obligations under this Order.

V

It is further ordered that the respondent herein shall within sixty (60) days after service of this Order upon it and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with the Order.

By the Commission.

Issued: November 23, 1984.

Emily H. Rock,

Secretary.

[FR Doc. 84-32347 Filed 12-11-84; 8:45 am]

BILLING CODE 6790-01-M

ENVIRONMENTAL PROTECTION AGENCY

21 CFR Part 193

[FAP 1H5312/R711; FRL-2732-4]

Food for Human Consumption; Tolerances for Pesticides in Food Administered by the Environmental Protection Agency; Methoprene

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a temorary tolerance for residues of the insecticide methoprene in or on various foods in conjuction with an experimental use permit requested by the Zoecon Corp.

EFFECTIVE DATE: Effective on December 12, 1984.

ADDRESS: Written objections, identified by the document control number [FAP 1H5312/R711], may be submitted to the Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:

By mail: Timothy Gardner, Product Manager (PM) 17, Registration Division (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 207, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-2690).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the Federal Register of July 2, 1982 (47 FR 28994), that Zoecon Corp., 975 California Ave., Palo Alto, CA 94304, had filed a food additive petition (FAP 1H5312), proposing that 21 CFR Part 193 be amended by establishing a regulation permitting tolerances for residues of the insect growth regulator methoprene (isopropyl (*E,E*)-11-methoxy-3, 7, 11-trimethyl-2,4 dodecadienoate) in or on raisins, wheat flour, macaroni (wheat), rice cereal, rye cereal, barley cereal, wheat cereal, corn cereal, corn meal, grits, hominy, oat cereal, spices, dry dog food, dried apples, dried apricots, dried peaches, and dried prunes at 10.0 parts per million (ppm).

No comments were received by the Agency in response to the notice of filing.

The pesticide is considered useful for the purpose for which the regulation is sought, and it is concluded that the pesticide can be safely used in accordance with provisions of the experimental use permit (20954-EUP-20) that was issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (86 Stat. 973; 7 U.S.C. 136 *et seq.*). Therefore, a food additive regulation is established for the commodities as set forth below.

A related document [PP 1G2539/T468] renewing temporary tolerances for methoprene in or on certain raw agricultural commodities appears elsewhere in this issue of the Federal Register.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the Federal Register, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation

deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–534, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new food or feed additive levels, or conditions for safe use of additives, or raising such food or feed additive levels do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24945).

(Sec. 409(c)(1), 72 Stat. 1786 (21 U.S.C. 346(c)(1)))

List of Subjects in 21 CFR Part 193

Food additives, Pesticides and pests.

Dated: November 27, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

PART 193—[AMENDED]

Therefore, Part 193 is amended in § 193.285 by designating the existing text as paragraph (a) and adding new paragraph (b), to read as follows:

§ 193.285 Methoprene.

(a) * * *

(b)(1) A tolerance of 10 parts per million is established for the insect growth regulator methoprene in or on raisins, wheat flour, macaroni (wheat), rice cereal, rye cereal, barley cereal, wheat cereal, corn cereal, corn meal, grits, hominy, oat cereal, spices, dry dog food, dried apples, dried apricots, dried peaches, and dried prunes resulting from applications of methoprene in accordance with the provisions of an experimental use permit that expires September 21, 1986.

(2) The total amount of the active ingredient to be used shall not exceed the quantity authorized by the experimental use permit.

(3) The Company concerned shall immediately notify the Environmental Protection Agency of any findings for the experimental use that have a bearing on safety. The firm shall also keep records of production, distribution, and performance, and on request make the records available to any authorized officer or employee of the Environmental Protection Agency or the Food and Drug Administration.

[FR Doc. 84-31986 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 540

Penicillin Antibiotic Drugs for Animal Use; Amoxicillin Trihydrate and Cavulanate Potassium Tablets

Correction

In FR Doc. 84–30129, beginning on page 45420 in the issue of Friday, November 16, 1984, make the following corrections:

1. On page 45421, in the second column, in § 540.103g, the second line of paragraph (a)(3)(ii)(*a*) (the last line of the column) should read "(*a*) The amoxicillin trihydrate used in making the batch: 12 packages, each".

2. Also on page 45421, in the third column, in § 540.103g, the second line of paragraph (a)(3)(ii)(*b*) (the fourth line of the column) should read "making the batch: 12 packages, each".

BILLING CODE 1505-01-M

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Hygromycin B

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed for Carl S. Akey, Inc., providing for use of a 2.4-gram-per-pound hygromycin B premix for making complete swine feeds for control of large roundworms, nodular worms, and whipworms, and for making complete chicken feeds for control of large roundworms, cecal worms, and capillary worms.

EFFECTIVE DATE: December 12, 1984.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV–135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3410.

SUPPLEMENTARY INFORMATION: Carl S. Akey, Inc., P.O. Box 607, Lewisburg, OH 45338, is sponsor of supplemental NADA 127–508, providing for use of a 2.4-gram-per-pound hygromycin B premix for making complete swine and chicken feeds. The complete swine feed is used as an aid in the control of large roundworms, nodular worms, and whipworms. The complete chicken feed is used as an aid in the control of large roundworms, cecal worms, and capillary worms. This supplement was filed by Elanco Products Co. for the sponsor. The supplement is approved and the regulations are amended to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of Part 20 (21 CFR Part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch, (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, from 9 a.m. to 4 p.m., Monday through Friday.

The Center for Veterinary Medicine has determined pursuant to 21 CFR 25.24(d)(1)(i) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Center for Veterinary Medicine (21 CFR 5.83), Part 558 is amended in § 558.274 by adding new paragraph (a)(7) to read as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

§ 558.274 Hygromycin B.

(a) * * *

(7) Premix level of 2.4 grams per pound granted to sponsor 011790 in § 510.600(c) of this chapter for use in chickens as in paragraph (e)(1)(i) of this section and in swine as in paragraph (e)(1)(ii) of this section.

* * * * *

Effective date. December 12, 1984.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))

Dated: November 29, 1984.

Marvin A. Norcross,

Acting Associate Director for Scientific Evaluation.

[FR Doc. 84-32316 Filed 12-11-84; 8:45 am]

BILLING CODE 4160-01-M

21 CFR Part 803

[Docket No. 79N-0182]

Medical Device Reporting; OMB Approval and Effective Date

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the Office of Management and Budget (OMB) has approved the information collection requirements in the final rule on medical device reporting. FDA also is announcing a clarification of its views regarding whether a submission under the final rule or the release of a submission by FDA constitutes an admission of liability. In addition, FDA is affirming the effective date of the final rule.

EFFECTIVE DATE: December 13, 1984.

FOR FURTHER INFORMATION CONTACT: Joseph Sheehan, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 14, 1984 (49 FR 36326) (corrected at 49 FR 36644; September 19, 1984), FDA published a final rule (21 CFR Part 803) that requires manufacturers and importers of medical devices, including diagnostic devices, to report to FDA whenever the manufacturer or importer receives or otherwise becomes aware of information that reasonably suggests that one of its marketed devices (1) may have caused or contribute to a death or serious injury or (2) has malfunctioned and that the device or any other device marketed by the manufacturer or importer would be likely to cause or contributed to a death or serious injury if the malfunction were to recur. Importers are required to establish and maintain files of reports and records.

The final rule is intended to assure that FDA is informed promptly of all serious or potentially serious problems associated with marketed devices.

OMB Approval

In the preamble to the final rule (49 FR 36348), FDA advised that the collection of information requirements contained in §§ 803.24 and 803.31 of the rule had been submitted to OMB for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) and § 1320.13(g) of OMB's regulations (5 CFR 1320.13(g)) implementing that act. The agency also stated that §§ 803.24 and 803.31 would not be effective until FDA obtained OMB approval of these information collection requirements, and that it would publish in the **Federal Register** a notice of OMB's decision to approve, modify, or disapprove them.

On November 9, 1984, OMB sent FDA a notice of action stating that the collection of information requirements are approved for use through January 31, 1986, under OMB control number 0910-0201. In its remarks accompanying its notice of action, OMB stated in pertinent part:

> This information collection is approved through 1/86 to permit OMB to perform a thorough practical utility review. Upon resubmission FDA must provide OMB with a report of the first year's operation of the MDR [medical device reporting] rule. This report should contain an explanation of how FDA uses this system to further the protection of the public health. Specifically, the report must include: 1. An accounting of the number and type of reports (including a breakdown of telephone reports and follow-up reports) filed and an appropriate adjustment of the estimated annual burden. 2. An explanation of how FDA has used MDR reports as a basis for regulatory actions, including but not limited to, enforcement proceedings, consideration of reclassification actions, PMA review, 510(k) review, waiver of 510(k) requirements, and the development of performance standards. 3. An accounting of the number of instances (and explanation thereof) in which FDA notified a manufacturer or importer that a record is no longer necessary pursuant to 21 CFR 803.24(d)(4). 4. Copies of all existing internal and public documents that have been developed to provide FDA officials, or the public, with information stemming from MDR reports. * * * Finally, any regulatory guidelines of general applicability [see 21 CFR 10.90(b)] for the MDR must be submitted for PRA [Paperwork Reduction Act] approval.

Following publication of the final rule and during the time that OMB was conducting its review of the rule, FDA received a request from counsel for Johnson & Johnson that FDA clarify its position, stated in the preamble, that the agency "does not believe that the submission [or release] of information that reasonably suggests that a device may have caused or contributed to a death or serious injury will be treated by the courts as an admission that the device actually caused or contributed to a death or serious injury." (49 FR 36329, 36338.)

FDA believes that its position, which was stated in response to comments on the medical device reporting reproposal (see paragraphs 7 and 49a of the preamble to the final rule (49 FR 36329, 36338)), is correct. In addition, FDA does not believe that the submission or release of information that reasonably suggests that a device has malfunctioned will be treated by the courts as an admission that the device actually malfunctioned. FDA agrees, therefore, that the response does not completely set forth FDA's position. For this reason, FDA is adding new § 803.24(f) to the final rule which states: "A report or information submitted by a manufacturer or importer under this section (and any release by FDA of that report or information) does not necessarily reflect a conclusion by the manufacturer, importer, or FDA that the report or information constitutes an admission that the device caused or contributed to a death or serious injury or malfunctioned. A manufacturer or importer need not admit, and may deny, that the report or information submitted under this section constitutes an admission that the device caused or contributed to a death or serious injury or malfunctioned." FDA advises, however, that although it does not intend for such a report or information to be viewed as an admission of liability, whether a court will treat a submission under the final rule as an admission will depend on, among other factors, the nature of the statements in the submission. None of these factors is within FDA's control. Thus, FDA does not intend that the mere act of submitting a report—an act which is mandated by law—will constitute an admission. As stated, whether the report, or the information therein, constitutes an admission will depend on its contents.

Section 803.24(f) is not a "rule" within the meaning of the Administrative Procedure Act (APA) (5 U.S.C. 551(4)) because it neither creates new rights and obligations, *British Caledonian Airways, Ltd.* v. *CAB*, 584 F.2d 982, 989-991 (D.C. Cir. 1978), nor binds the courts, *Energy Consumers & Producers Assn.* v. *DOE*, 632 F.2d 129, 139 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980). Accordingly, § 803.24(f) is not subject to the rulemaking and effective date requirements of the APA (5 U.S.C. 553). At most, § 803.24(f) is a "general statement of policy." A general statement of policy must be published (5 U.S.C. 552(a)(1)(D)) but is exempt from the rulemaking and effective date requirements of section 553 of the APA (5 U.S.C. 553 (b)(A), (d)(2)). For these reasons, FDA is not subjecting § 803.24(f) to notice and public procedure and is making the section

effective December 13, 1984, concurrent with the effective date of the final rule.

List of Subjects in 21 CFR Part 803

Medical devices; Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 502(t), 510, 519, 701(a), 704 (a) and (e) 52 Stat. 1055, 76 Stat. 792–795 as amended, 90 Stat. 564–565, 578, 581 (21 U.S.C. 352(t), 360, 360i, 371(a), 374 (a) and (e))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), Part 803 is amended as follows:

PART 803—MEDICAL DEVICE REPORTING

1. In § 803.24 by adding the number "0910–0201" at the end of the parenthetical statement appearing at the end of the section and by adding new paragraph (f), to read as follows:

§ 803.24 Reports by manufacturers and importers.

* * * * *

(f) A report or information submitted by a manufacturer or importer under this section (and any release by FDA of that report or information) does not necessarily reflect a conclusion by the manufacturer, importer, or FDA that the report or information constitutes an admission that the device caused or contributed to a death or serious injury or malfunctioned. A manufacturer or importer need not admit, and may deny, that the report or information submitted under this section constitutes an admission that the device caused or contributed to a death or serious injury or malfunctioned.

* * * * *

§ 803.31 [Amended]

2. In § 803.31 *Complaint files* by adding the number "0910–0201" at the end of the parenthetical statement appearing at the end of the section.

Effective date. December 13, 1984.

(Secs. 502(t), 510, 519, 701(a), 704 (a) and (e), 52 Stat. 1055, 76 Stat. 792–795 as amended, 90 Stat. 564–565, 578, 581 (21 U.S.C. 352(t), 360, 360i, 371(a), 374 (a) and (e)))

Dated: December 4, 1984.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 84-32230 Filed 12-11-84; 8:45 am]

BILLING CODE 4160-01-M

UNITED STATES INFORMATION AGENCY

22 CFR Part 501

Appointment of Foreign Service Information Officers

AGENCY: United States Information Agency.

ACTION: Final rule.

SUMMARY: This document amends 22 CFR 501.13 by correcting a typographical error.

EFFECTIVE DATE: December 3, 1984.

FOR FURTHER INFORMATION CONTACT: Charles N. Canestro, United States Information Agency, Management Plans and Analysis Staff, Room 818, 301 Fourth Street, SW., Washington, D.C. 20547, telephone (202) 485–8676.

SUPPLEMENTARY INFORMATION: The text of this CFR part describes the process leading to lateral entry appointment of Foreign Service Information Officers to the United States Information Agency.

E.O. 12291 Federal Regulation

USIA has determined that this is not a major rule for the purpose of E.O. 12291, Federal Regulation, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based industries to compete with foreign-based enterprises in domestic or foreign markets.

List of Subjects in 22 CFR Part 501

Foreign service.

PART 501—[AMENDED]

22 CFR Part 501 is amended by revising § 501.13(f)(5)(vi)(*a*) to read as follows:

§ 501.13 Lateral entry appointment of Foreign Service information officers.

* * * * *

(f) * * *

(5) * * *

(vi) *Oral Examination.* (*a*) Candidates recommended for further consideration after completion of the qualification review and evaluation outlined in paragraphs (f)(1) and (f)(5)(iii) are given oral examinations by a panel of deputy examiners appointed by the Board of Examiners.

* * * * *

(22 U.S.C. 1221 et seq.; E.O. 11434 of Nov. 8, 1968 (33 FR 16485))

Dated: December 3, 1984.

Charles N. Canestro,

Federal Register Liaison.

[FR Doc. 84-31881 Filed 12-11-84; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 7994]

Income Tax; Taxable Years Beginning After December 31, 1953; Foreign Management and Foreign Economic Processes Requirements of a Foreign Sales Corporation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary Regulations.

SUMMARY: This document provides temporary Income Tax Regulations relating to foreign management and foreign economic processes requirements of a foreign sales corporation (FSC) The temporary regulations provide rules for determining whether a FSC will be treated as having foreign trading gross receipts through satisfaction of the requirements of section 924. In addition, the temporary regulations provide rules for determining eligibility to use administrative pricing rules in computing taxable income of a FSC, and rules for grouping transactions for purposes of the foreign economic processes tests. These temporary regulations provide immediate necessary guidance to FSC's and their shareholders with respect to qualification for benefits under Title VIII of the Tax Reform Act of 1984 (Foreign Sales Corporations). The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the Federal Register.

DATES: The temporary regulations apply to taxable years beginning after December 31, 1984, and are effective after December 31, 1984.

FOR FURTHER INFORMATION CONTACT: David J. Dean of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3289, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary Income Tax Regulations (26 CFR Part 1) under sections 924, 925, and 927 of the Internal Revenue Code of 1954. The temporary regulations are issued under the authority contained in sections 924(d)(4), 925(b), 927(d)(2)(B), and 7805 of the Internal Revenue Code of 1954 (98 Stat. 989, 26 U.S.C. 924(d)(4); 98 Stat. 990, 26 U.S.C. 925(b); 98 Stat. 993, 26 U.S.C. 927 (d) (2)(B); and 68A Stat. 917, 26 U.S.C. 7805).

Need for Temporary Regulations

Sections 924, 925, and 927 are generally effective for transactions after December 31, 1984, in tax years ending after that date. The proper application of those sections is dependent upon the Service's detailed specification of the manner in which the requirements of the statute will be administered. Because of the need for immediate guidance in this regard, the Internal Revenue Service has found it to be impractical to issue these temporary regulations either with notice and public comment procedure under section 553(b) of title 5 of the United States Code, or under the effective date limitation of section 533(d) of title 5.

Explanation of Provisions

Foreign Management

Section 924(c)(1) provides that a FSC must hold all meetings of shareholders and all meetings of directors outside the United States. In addition, the temporary regulations provide that all such meetings must comply with the local laws of the jurisdiction in which the FSC is created or organized. The local law determines whether a meeting must be held, where it must be held, quorum requirements, use of proxies, and so forth. Therefore, if local law permits a shareholders' or directors' meeting outside its jurisdication, any meeting held outside the United States will satisfy the requirements of section 924(c)(1). Also, if the participants in a meeting are not all present in the same location, the location of the meeting is the place where the persons exercising a majority of the voting power are located. Section 924(c)(2) requires that the principal bank account of a FSC must be maintained outside the United States, and section 924(c)(3) requires that all dividends, legal and accounting fees, and salaries of officers and directors must be disbursed from bank accounts of the FSC maintained outside the United States. The temporary regulations adopt the approach taken in the Conference Report (H.R. Rept. No. 98-861, at 973), and link these two requirements together by defining the account that is to be regarded as the principal bank account of the FSC as the account from which the disbursements of dividends, legal and accounting fees, and salaries of officers and directors are made. The temporary regulations also require the account that is to be treated as the principal bank account of the FSC to be maintained in an eligible possession or a country which meets the exchange of information requirements of section 927(e)(3), that is, a country under the laws of which a FSC may be created or organized.

Foreign Economic Processes

Subsections (d) and (e) of section 924 require that certain activities take place outside the United States in order to treat the proceeds from a transaction as foreign trading gross receipts. These activities include: (1) Certain sales activities, and (2) certain activities relating to the disposition of export property or the performance of export services. The FSC may perform the activities itself, or contract with another person (related or unrelated) to have the activities performed on behalf of the FSC. Under the first part of this two-pronged test, the FSC must participate outside the United States in one of the following sales activities: The solicitation (other than advertising), the negotiation, or the making of the contract relating to the transaction. Under the second part of the test, the foreign direct costs of five categories of disposition activities related to the transaction must comprise at least 50 percent of the total direct costs of the transaction (or the FSC may satisfy an alternate test based on 85 percent of two categories of activities). The temporary regulations explain what activities are included in the economic processes tests, explain how the tests are applied, and provide rules for substantiating performance of the activities by a person other than the FSC.

Participation in the sales portion of the transaction requires performance of one of the sales activities listed previously. For purposes of this rule, transactions may be grouped on the basis of contracts or customers so that, for example, performance of "solicitation" by the FSC with respect to a particular customer will be sufficient to satisfy this requirement for all transactions with that customer during the FSC's taxable year. Alternatively, performance of "solicitation" with respect to a long term contract will satisfy this requirement for all transactions or shipments under that contract, even though the contract applies for more than one taxable year of the FSC. In defining the sales activities, the temporary regulations specifically clarify that performance of two or all three of these sales activities may occur at the same time.

This is intended to facilitate performance of all three activities by the FSC, and is specifically authorized because, under section 925(c), the FSC must participate in all three activities in order to use the administrative pricing rules provided in section 925(a).

The second part of the two-pronged test is satisfaction of either the 50-percent or the 85-percent foreign direct cost test. These tests look to five categories of activities relating to the disposition of export property that are listed in section 924(e). Under the 50-percent foreign direct cost test, for a transaction to produce foreign trading gross receipts, at least 50 percent of the total costs in all of the categories of activities, when aggregated, must be foreign costs. Only categories in which costs are actually incurred are taken into account, and the temporary regulations require that costs must actually be incurred in at least three of the five categories in order to use this test. Under the alternative 85-percent foreign direct cost test, at least 85 percent of the costs in each of two of the five categories of activities must be foreign costs. For this test, the costs are not aggregated, but rather the costs in each category are considered separately.

The categories of activities that apply for these tests are: (1) Advertising and sales promotion, (2) processing of customer orders and arranging for delivery of the export property, (3) transportation, (4) determination and transmittal of a final invoice or statement of account and receipt of payment, and (5) assumption of credit risk. These activities are described in the temporary regulations, and rules are provided for determining what costs are the direct costs used in the tests and what costs are not direct costs. Rules are also provided for determining the location of the activities.

Grouping of transactions is permitted in determining whether the foreign economic process tests are satisfied. A grouping rule that applies for both the sales participation test and the foreign direct cost tests permits groupings based on either recognized industry or trade usage or two-digit major groups (or inferior classifications thereof) of the Standard Industrial Classification (SIC code). In addition, groupings may be based on all transactions with a particular customer during a taxable year, or on all transactions under a particular contract. A FSC may use

different groupings for different activities within the same taxable year. The flexibility offered by these grouping rules is intended to facilitate the establishment of FSC's. However, these grouping rules apply only for purposes of section 924, and do not apply for any other purpose. They particularly do not apply for purposes of determining the FSC's foreign trade income, or for transfer pricing, and are not intended to imply whether grouping may be permitted for those other purposes, or, if grouping is permitted for those purposes, to what extent it may be permitted.

An exception from the foreign economic processes requirements is provided for sales of military property in cases where the tests cannot be satisifed because the activities are required to be performed in the United States or by the United States Government, or are directly related to such activities.

Commission FSC's

A FSC is permitted to act as a commission agent in an export transaction between the FSC's "supplier" and the transferee. In such cases, the FSC is generally required to satisfy the same requirements as a buy-sell FSC. In addition, the same rules apply to permit the commission FSC to have activities performed for the FSC by another contractor.

Requirements for Use of Administrative Pricing Rules

Section 925(c) requires that a FSC (or a person under contract with the FSC) perform all of the "sales" activities described in section 924(d)(1)(A), and all of the "disposition" activities described in section 924(e) that are attributable to the transaction, in order to use the administrative pricing rules of section 925(a) in computing taxable income of a FSC and its related supplier. The temporary regulations explain that those pricing rules may not be used if any of the specified activities with respect to the transaction are performed by a person related to the FSC but not under contract for performance on behalf of the FSC. In addition, any person, whether or not related, that performs the activities (other than services performed as an employee, officer, or director of the FSC) on behalf of the FSC must be paid by the FSC for performing the activities. Also, a special rule is provided for sales of military property, to permit such sales to qualify for use of the administrative pricing rules.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553(b) for temporary regulations. Accordingly, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply and no Regulatory Flexibility Analysis is required for this rule.

Executive Order 12291

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

Paperwork Reduction Act

These regulations were submitted to the Office of Management and Budget for review under the Paperwork Reduction Act and approved under OMB number 1545-0904.

Drafting Information

The principal author of these proposed regulations is David J. Dean of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR 1.861-1 Through 1.997-1

Income taxes, Aliens, Exports, DISC, Foreign investments in U.S., Foreign tax credit, FSC, Sources of income, United States investments abroad.

PART 1—[AMENDED]

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

New §§ 1.924(c)-1T, 1.924(d)-1T, 1.924(e)-1T, 1.925(b)-1T, 1.925(c)-1T, and 1.927-1T are added in the appropriate places to read as folllows:

§ 1.924(c)-1T Temporary Regulations; Requirement that a FSC be managed outside the United States.

(a) *In general.* Section 924(b)(1)(A) provides that a FSC shall be treated as having foreign trading gross receipts for the taxable year only if the management of the FSC during the year takes place outside the United States, as provided in section 924(c). Section 924(c) and this section set forth the management activities that must take place outside the United States in order to satisfy the requirement of section 924(b)(1)(A). Paragraph (b) of this section provides rules for determining whether the requirements of section 924(c)(1) have been met. Section 924(c)(1) requires that all meetings of the board of directors of the FSC during the taxable year and all meetings of the shareholders of the FSC during the taxable year take place outside the United States. Paragraph (c) of this section provides rules for maintaining the FSC's principal bank account outside the United States as provided in section 924(c)(2). Paragraph (d) of this section provides rules for disbursements required by section 924(c)(3) to be made from bank accounts of the FSC maintained outside the United States.

(b) *Meetings of board of directors and meetings of shareholders must be outside the United States.* All meetings of the board of directors of the FSC and all meetings of the shareholders of the FSC that take place during the taxable year must take place outside the United States to meet the requirements of section 924(c)(1). Only meetings that are formally convened as meetings of the board of directors or as shareholder meetings will be taken into account in determining whether those requirements have been met. In addition, all such meetings must comply with the local laws of the foreign country or possession of the United States in which the FSC was created or organized. The local laws determine whether a meeting must be held, when and where it must be held (if it is held at all), who must be present, quorum requirements, use of proxies, and so on. Where the local law permits action by the board of directors to be taken by written consent without a meeting, use of such procedure will not constitute a meeting for purposes of section 924(c)(1). Section 924(c)(1)and this section impose no other requirements except the requirement that meetings that are actually held take place outside the United States. If the participants in a meeting are not all physically present in the same location, the location of the meeting is determined by the location of the persons exercising a majority of the voting power participating in the meeting. For example, a FSC has five directors, and is organized in country A. Country A's law requires that a majority of the directors of a corporation must participate in a meeting to constitute a quorum (and, thus, a meeting), but there is no requirement that the meeting be held in country A or that the directors must be physically present to participate. One director is in country A, another director is in country B, and a third director is in the United States. These three directors convene a meeting by telephone that constitutes a meeting under the law of country A. Since the persons exercising a majority of the voting power participating in the meeting are located

outside the United States, the meeting occurs outside the United States.

(c) *Maintenance of the principal bank account outside the United States*—(1) *In general.* For purposes of section 924(c), the bank account that shall be regarded as the principal bank account of a FSC is the bank account from which the disbursements described in paragraph (d) of this section are made. The bank account that is regarded as the principal bank account must be maintained in a foreign country which meets the requirements of section 927(e)(3), or in any possession of the United States (as defined in section 927(d)(5)), and it must be so maintained at all times during the taxable year.

(2) *Maintenance of the account in a bank.* The bank account that is regarded as the principal bank account must be maintained in an institution that is engaged in the conduct of a banking, financing, or similar business, as defined in § 1.954–2(d)(2)(ii) (without regard to whether it is a controlled foreign corporation). The institution may be a U.S. bank, as long as the account is maintained in a branch outside the United States.

(3) *Maintenance of an account outside the United States.* Maintenance of the principal bank account outside the United States means that the account regarded as the principal bank account must be an account maintained on the books of the banking institution at an office outside the United States, but does not require that access to the account can only be made outside the United States. Instructions providing for deposits into or disbursements from the account may originate in the United States without affecting maintenance of the account outside the United States.

(4) *Maintenance of the account at all times during the taxable year.* The term "at all times during the taxable year" generally means for each day of the taxable year. However, an account will be treated as maintained at all times during the taxable year even though there are days during that year when there are no funds in the account. In the case of a newly organized FSC, thirty days may elapse between the time the FSC is created or organized and the time a bank account is opened without causing the FSC to fail the requirement that it maintain its principal bank account outside the United States at all times during the taxable year. Also, a FSC shall be treated as satisfying this requirement if the account that is regarded as its principal bank account is terminated during the taxable year, provided that (i) such termination is the result of circumstances beyond the FSC's control, and (ii) the FSC establishes a new principal bank account within thirty days after such termination. A FSC may close its principal bank account at any time as long as it is replaced with another account that qualifies under this paragraph (c) as a principal bank account without any lapse during which there is no principal bank account of the FSC.

(5) *Other accounts.* The FSC may maintain other bank accounts, in addition to its principal bank account. Such other accounts may be located anywhere, without limitation. The mere existence of such other accounts will not cause the FSC to fail to satisfy the requirements of section 924(c).

(d) *Disbursement of dividends, legal and accounting fees, and salaries of officers and directors out of the principal bank account of the FSC*—(1) *In general.* Section 924(c)(3) requires that all dividends, legal fees, accounting fees, salaries of officers of the FSC, and salaries or fees paid to members of the board of directors of the FSC that are disbursed during the taxable year must be disbursed out of bank accounts of the FSC maintained outside the United States. In addition, paragraph (c) of this section provides that the bank account from which those amounts are disbursed is regarded as the principal bank account of the FSC for purposes of section 924(c). Thus, those amounts must be paid from a single bank account, and that account must meet the requirements of the account that is regarded as the principal bank account of the FSC. Legal or accounting fees, salaries of officers, and salaries or fees of directors that are paid by a related person wholly or partially on behalf of a FSC are not considered disbursed by the FSC until the related person is reimbursed by the FSC. Any reimbusement for amounts paid on behalf of the FSC that is actually paid must be disbursed out of the FSC's principal bank account, as set forth in paragraph (c) of this section.

(2) *Dividends.* For purposes of section 924(c) and this section only, the term "dividends" is limited to cash dividends actually paid pursuant to a declaration or authorization by the FSC. Therefore, a constructive dividend that is deemed to be paid will not be included as a dividend under section 924(c), regardless of the source of such constructive dividend. Likewise, a distribution of property other than money that is a dividend under section 316 will not be included as a dividen under section 924(c).

(3) *Legal and accounting fees.* For purposes of this section, legal and accounting fees do not include salaries paid to legal and accounting employees of the FSC (or a related person). Legal and accounting fees only include fees paid to independent persons performing legal or accounting services for the FSC.

(4) *Salaries of officers and directors.* For purposes of this section, salaries of officers and salaries or fees of directors are only those salaries or fees paid for services as officers or directors of the FSC. If an individual officer, director, or employee of a related person is also an officer or director of a FSC and receives additional compensation for services performed for the FSC, the portion of the compensation paid to that individual that is for services performed for the FSC is required to be disbursed out of the FSC's principal bank account. For purposes of this section, the term "compensation" is defined as set forth in paragraphs (d) (1) and (2) of § 1.415–2.

§ 1.924(d)–1T Temporary regulations; requirement that economic processes take place outside the United States.

(a) *In general.* Section 924(b)(1)(B) provides that a FSC has foreign trading gross receipts from any transaction only if economic processes with respect to such transaction taken place outside the United States as provided in section 924(d). Section 924(d) and this section set forth the rules for determining whether a sufficient amount of the economic processes of a transaction take place outside the United States. Generally, a transaction will qualify if the FSC satisfies two different requirements: Participation outside the United States in the sales portion of the transaction, and satisfaction of either the 50-percent or the 85-percent foreign direct cost test. The activities comprising these economic processes may be performed by the FSC or by any other person acting under contract with the FSC (hereinafter referred to as "FSC (or other person)" or as "FSC"). The FSC (or other person) may act upon standing instructions from another person in the performance of any activity, whether a sales activity under paragraph (c) of this section or an activity relating to the disposition of export property under paragraph (d) of this section and § 1.924(e)–1T. Except as otherwise provided, the location of any activity is determined by the place where the activity is initiated by the FSC (or other person), and not by the location of any person transmitting instructions to the FSC (or other person).

(b) *Activities performed by another person.* Any person, whether domestic or foreign, and whether or not related to the FSC, may perform any activity required to satisfy this section, provided the activity is performed pursuant to a

contract for the performance of that activity on behalf of the FSC. Such a contract may be any oral or written agreement which constitutes a contract at law. The person performing the activity is not required to have a contract directly with the FSC, and, thus, may be a subcontractor of a person under contract with the FSC. If the FSC does not perform the activity itself, it must maintain records adequate to establish, with respect to each transaction or group of transactions, that the activity was performed and that the performance of such activity took place outside the United States. If the person performing the activity on behalf of the FSC is an independent contractor, the FSC may relay on a written declaration from that person stating that the activities are actually performed by that person on behalf of the FSC, and are performed outside the United States. An invoice or a receipt for payment will be considered as such a written declaration if it specifies that the activities were performed outside the United States or specifies a particular place outside the United States where the activities were performed. If the person performing the activity on behalf of the FSC is a related person, the FSC must maintain other records adequate to establish that the activities were actually performed and where the activities were performed, in the same manner as if the FSC performed the activities itself.

(c) *Participation outside the United States in the sales portion of the transaction)*—(1) *In general.* The requirement of section 924(d)(1)(A) is met with respect to the gross receipts of a FSC derived from any transaction if the FSC (or other person) has participated outside the United States in the solicitation (other than advertising), the negotiation, or the making of the contract relating to such transaction (hereinafter described as "sales activities"), as provided in this paragraph (c). If any sales activity occurs with respect to a single contract for more than one transaction (or for items grouped separately for other purposes), that sales activity will apply to each transaction (or item), regardless of the fact that the transactions (or items), are grouped separately for other purposes (such as satisfying the foreign direct cost tests). Transactions may also be grouped according to transactions with a single customer during the FSC's taxable year for purposes of determining performance of any sales activity. For example a FSC performs one or more sales activities with respect to a contract for several shipments of each of two different products. Each shipment is considered a separate transaction for billing purposes. Each product is grouped separately for purposes of determining foreign direct costs of advertising with respect to sales of that product. The FSC is considered to have performed the sales activities with respect to each transaction, regardless of its groupings of products or transactions for other purposes.

(2) *Solicitation (other than advertising).* For purposes of this paragraph (c), "solicitation (other than advertising)" refers to any communication (by any method, including, but not limited to, telephone, telegraph, mail, or in person) by the FSC (or other person), at any time during the 12 month period immediately preceding the execution of a contract relating to the transaction, to a specific, targeted customer or potential customer, that specifically addresses the customer's attention to the product or service covered by the transaction. Activities that would otherwise constitute advertising (such as sending sales literature to a customer or potential customer) will be considered solicitation (other than advertising) if the activities are directed at a specific, targeted customer, and the costs of the activity are not taken into account as advertising under the foreign direct cost tests. Solicitation (other than advertising) may take place at the same time as, and in conjunction with, another sales activity.

(3) *Negotiation.* For purposes of this paragraph (c), "negotiation" refers to any communication by the FSC (or other person) to a customer or potential customer of one or more of the terms of a transaction, including, but not limited to, price, credit terms, quantity, or time or manner of delivery. Negotiation does not include the mere receipt of a communication from a customer (such as an order) that includes terms of a sale. Negotiation may take place at the same time as, and in conjunction with, another sales activity.

(4) *Making of a contract.* For purposes of this paragraph (c), "making of a contract" refers to performance by the FSC (or other person) of any of the elements necessary to complete a sale, such as making an offer or accepting an offer. Acceptance of an unsolicited bid or order is considered the "making of a contract" even if no solicitation or negotiation occurred with respect to the transaction. The written confirmation by the FSC (or other person) to the customer of an oral or written agreement which confirms variable contract terms or specifies (directly or by cross-reference) additional contract terms will be considered the making of a contract. A written confirmation is any confirmation expressed in writing, including a telegram, telex, or other similar written communication. The making of a contract may take place at the same time as, and in conjunction with, another sales activity.

(d) *Satisfaction of either the 50-percent or the 85-percent foreign direct cost test*—(1) *In general.* Section 924(d)(1)(B) requires, for the gross receipts of a transaction to qualify as foreign trading gross receipts, that the foreign direct costs incurred by the FSC attributable to the transaction equal or exceed 50 percent of the total direct costs incurred by the FSC attributable to the transaction. The direct costs referred to are those costs attributable to activities described in the five categories of section 924(e). Section 924(d)(2) provides that, instead of satisfying the 50-percent foreign direct cost test of section 924(d)(1)(B), the FSC may incur foreign direct costs attributable to activities described in each of two of those categories that equal or exceed 85 percent of the total direct costs attributable to the activity described in that category. If no direct costs are incurred by the FSC in a particular category, that category shall not be taken into account for purposes of determining satisfaction of either the 50-percent or the 85-percent foreign direct cost test. However, if any amount of direct costs, no matter how small, is incurred in a particular category, that category shall be taken into account for purposes of the foreign direct cost tests.

(2) *Direct costs*—(i) *Definition of direct costs.* For purposes of section 924(d), direct costs are those costs which are incident to and necessary for the performance of any activity described in section 924(e). Direct costs include the cost of materials which are consumed in the performance of the activity, and the cost of labor which can be identified or associated directly with the performance of the activity (but only to the extent of wages, salaries, fees for professional services, and other amounts paid for personal services actually rendered, such as bonuses or compensation paid for services on the basis of a percentage of profits). Direct costs also include the cost of equipment or facilities (or the use thereof) that can be specifically identified or associated with the activity, as well as the contract price of an activity performed on behalf of the FSC by a contractor. If costs of services or the use of facilities are only incidentally related to the performance of an activity described in section

924(e), only the incremental cost is considered to be identified directly with the activity. For example, supervisory, administrative, and general overhead expenses, such as telephone service, are not normally identified directly with particular activities described in section 924(e), but the cost of a long distance telephone call made to arrange for delivery of export property is identified directly with the activities described in section 924(e)(2). Direct costs of any activity may be more specifically defined or limited in connection with the definition of the specific activity. Direct costs for purposes of section 924(d) do not necessarily include all of the expenses taken into account for purposes of determining the taxable income of the FSC or the combined taxable income of the FSC and its related supplier.

(ii) *Allocation of direct costs.* For purposes of this section only, if costs are identified with more than one activity (whether or not all of the activities are described in section 924(e)), the portion of the costs attributable to each activity shall be determined by allocating the costs among the activities in any manner that is consistently applied and that reasonably reflects relative costs that would be incurred by performing each activity independently. If costs of an activity are attributable to more than one transaction or group of transactions, the portion of the costs attributable to each transaction or grouping shall be determined by allocation the costs among the transactions or groupings in any manner that is consistently applied and that reasonably reflects relative costs that would be incurred by performing the activity independently with respect to each transaction or grouping.

(3) *Total direct costs.* The term "total direct costs" means all of the direct costs of any transaction attributable to activities described in any paragraph of section 924(e). For purposes of the 50-percent foreign direct cost test of section 924(d)(1)(B), total direct costs are determined based on the direct costs of all activities described in all of the paragraphs of section 924(e). For purposes of the 85-percent foreign direct cost test of section 924(d)(2), however, the total direct costs are determined separately for each paragraph of section 924(e).

(4) *Foreign direct costs.* The term "foreign direct costs" means the portion of the total direct costs of any transaction that is attributable to activities performed outside the United States. For purposes of the 50-percent foreign direct cost test, foreign direct costs are determined based on the direct costs of all activities described in all of the paragraphs of section 924(e). For purposes of the 85-percent foreign direct cost test, however, foreign direct costs are determined separately for each paragraph of section 924(e).

(5) *Fifty percent foreign direct cost test.* To satisfy the requirement of section 924(d)(1)(B), the foreign direct costs incurred by the FSC attributable to the transaction must equal or exceed 50 percent of the total direct costs attributable to the transaction. This test looks to the cost of the activities described in section 924(e) on an aggregate basis; therefore it is not necessary that the foreign direct costs of each activity, or of each paragraph of section 924(e), equal or exceed 50 percent of the total direct costs of that activity or paragraph. However, in order to use this test, the FSC must incur direct costs that are attributable to activities described in each of at least three of the five paragraphs of section 924(e). For example, for a given transaction, the direct costs attributable to activities described in each of two of the paragraphs of section 924(e) are $25, none of which are foreign direct costs. There are no direct costs attributable to activities described in two other paragraphs of section 924(e), and there are $50 of direct costs attributable to activities described in the fifth paragraph, all of which are foreign direct costs. The 50-percent foreign direct cost test is satisfied with respect to that transaction because there are $50 of foreign direct costs out of $100 of total direct costs. However, if no direct costs were incurred with respect to activities described in three paragraphs of section 924(e), the 50-percent foreign direct cost test would not be satisfied, regardless of the portion of the total direct costs of the other two paragraphs that were foreign direct costs. In that case, the transaction must be analyzed under the 85-percent foreign direct cost test if it is to qualify as producing foreign trading gross receipts.

(6) *Eighty-five percent foreign direct cost test.* To satisfy the requirement of section 924(d)(2), the foreign direct costs of a transaction incurred by the FSC attributable to activities described in each of at least two paragraphs of section 924(e) must equal or exceed 85 percent of the total direct costs attributable to activities described in that paragraph. This test looks to costs of the activities on a paragraph-by-paragraph basis (but not on an activity-by-activity basis), so, for example, the foreign direct costs of advertising and sales promotion are aggregated with each other for this purpose, but they are not aggregated with the foreign direct costs of transportation. For example, RS, a related supplier, receives payment for a sale of export property in its United States bank account on behalf of its FSC. The payment is received in foreign currency. RS incurs $10X of direct costs of maintaining a bank account that are attributable to the receipt of payment for the transaction, and these costs are not foreign direct costs. RS also incurs $90X of direct costs in fees for converting the foreign currency into U.S. dollars. The currency conversion costs are foreign direct costs attributable to the transaction under § 1.924(e)–1T(d)(2). RS has a contract with FSC to perform the activities of receiving payment with respect to the transaction on behalf of FSC. Under these circumstances, FSC has satisfied the 85-percent foreign direct cost test for receipt of payment with respect to the transaction. However, if FSC also contracted with RS to perform all activities of the determination and transmittal of a final invoice or statement of account with respect to the transaction, and in performing those activities RS incurred $20X of direct costs, none of which were foreign direct costs, FSC would fail the 85-percent foreign direct cost test for the activities described in paragraph (4) of section 924(e) because the direct costs of all the activities described in that paragraph are aggregated for purposes of this test.

(e) *Special rules for grouping of transactions.* For purposes of section 924 and this section only, the taxpayer may elect, on an annual basis, to apply any rule which, but for this paragraph (e), would be applied on a transaction-by-transaction basis, on the basis of groups as set forth in this paragraph (e). However, any groupings used must be supported by adequate documentation of performance of activities, or costs of activities, relating to the groupings used.

(1) *Standards for groups.* A determination by a taxpayer as to a grouping will be accepted by a district director if such determination conforms to any of the following standards:

(i) *Product or product line groupings.* A product or product line grouping may be based either on a recognized trade or industry usage, or on a two digit major group (or on any inferior classification or combination of inferior classifications within a major group) of the Standard Industrial Classification as prepared by the Statistical Policy Division of the Office of Management and Budget, Executive Office of the President.

(ii) *Customer groupings.* A customer grouping includes all transactions of the

FSC with a particular customer during the FSC's taxable year.

(iii) *Contract groupings.* A contract grouping includes all transactions of the FSC under a particular contract. For purposes of the sales activities, satisfaction of the performance requirement for a contract grouping will apply to all transactions under a contract for the entire duration of the contract. For purposes of the foreign direct cost tests, the tests will be applied to all transactions within a contract grouping during each taxable year of the FSC; however, at the choice of the taxpayer, all transactions under a contract that occur in the first or the last year of the contract may be included with, respectively, the next succeeding or the immediately preceding taxable year in applying these tests.

(iv) *Product or product line groupings within customer or contract groupings.* Groupings may be based on product or product line groupings within customer or contract groupings.

(2) *Transactions included in a grouping.* A choice by the taxpayer to group transactions shall generally apply to all transactions within the scope of that grouping. However, the choice of a grouping applies only to transactions covered by the grouping and, as to transactions not encompassed by the grouping, the determinations are made on a transaction-by-transaction basis. For example, the taxpayer may choose a product grouping with respect to one product and use the transaction-by-transaction method for another product within the same taxable year. In addition, if a taxpayer is permitted to apply certain rules on the basis of other types of groupings, such as all sales to a particular customer, transactions included in those other groupings shall be excluded from product groupings.

(3) *Different groupings allowed for different purposes.* A choice by the taxpayer to group transactions may be made separately for each of the sales activities under section 924(d)(1)(A) and for each of the activities relating to the disposition of export property under section 924(d)(1)(B) or section 924(d)(2). Groupings used for purposes of section 924 will have no bearing on the availability (or unavailability) of groupings for other purposes. This paragraph (e) does not apply for purposes of section 925 or for any purposes other than the foreign economic processes requirements of section 924.

(f) *Exception for military property.* The requirements of this section do not apply to any activities performed in connection with the sale of military property if the activities are required by law or regulation to be performed in the United States, by the United States Government, or in conjunction with the United States Government. In addition, activities directed related to activities described in the previous sentence are not subject to the requirements of this section if they cannot reasonably be performed outside the United States. The expenses incurred by the FSC in connection with such activities are not taken into account in determining whether the FSC has satisfied the requirements of section 924(d) and this section.

§ 1.924(e)–1T Temporary Regulations; Activities relating to the disposition of export property.

(a) *Advertising and sales promotion.* For purposes of section 924(e), advertising and sales promotion are defined as follows.

(1) *Advertising*—(i) *Advertising defined.* Advertising means the announcement or description of property or services described in section 924(a), in some medium of mass communication (such as radio, television, mass mailings, or billboards), in order to induce multiple potential customers to buy or rent the property or services. Advertising is not required to be directed to the general public, but may be focused toward any group of potential export customers. Advertising not related to one or more specific products or product lines (or services), such as advertising intended solely to build a favorable image of a company or group of companies, is not included in this definition of advertising. Advertising primarily directed at customers in the United States is not included in this definition of advertising, nor is advertising related to property or services not described in section 924(a).

(ii) *Direct costs of advertising.* Direct costs of advertising include costs of transmitting or distributing the advertising to potential customers, but do not include costs of preparing the announcement or description for potential use as advertising. Direct costs of sending sales literature to customers or potential customers may be taken into account as advertising costs as long as the activity does not constitute solicitation (other than advertising), and is not taken into account for purposes of the sales activity requirements of § 1.924(d)–1T(c).

(iii) *Location of advertising.* The location of advertising activity is the place to which the advertising is transmitted, displayed, distributed, mailed, or otherwise conveyed to the potential customers. The FSC may rely on the distribution statistics of the publisher of print media or the broadcaster of broadcast media through which the advertising is distributed. For example, a television advertisement that is broadcast to a foreign country constitutes advertising activity outside the United States even though the broadcast signal originates in the United States; therefore the cost of that advertising activity is a foreign cost.

(2) *Sales promotion*—(i) *Sales promotion defined.* Sales promotion means an appeal made in person to a potential export customer for the sale or rental of property or services described in section 924(a), made in the context of a trade show or customer meeting. Sales promotion does not include an appeal made in the context of any show or event primarily aimed at U.S. customers or an appeal for the sale or rental of property or services not described in section 924(a). However, a show or event in the United States that is primarily aimed at the export of goods or services described in section 924(a) constitutes sales promotion.

(ii) *Direct costs of sales promotion.* Direct costs of sales promotion include costs such as rental of space at trade shows, payments to organizers or other persons hired for the event, and rental of display equipment and decorations for the event. However, direct costs of sales promotion do not include the cost of salaries and commissions of direct sales people or the cost of printed advertising materials that are used for general advertising as well as sales promotion.

(iii) *Location of sales promotion.* The location of sales promotion activity is the place at which the trade show or customer meeting is held.

(b) *Processing of customer orders and arranging for delivery of the export property.* For purposes of section 924(e), the processing of customer orders and the arranging for delivery of the export property are defined as follows.

(1) *Processing of customer orders*—(i) *Processing of customer orders defined.* The processing of customer orders means notification by the FSC to the related supplier of the order and of the requirements for delivery. The related supplier may have independent knowledge of the order and requirements for delivery. Once the related supplier has been notified of the order and requirements for delivery, subsequent communications about an order (such as changes in quantity or prospective delivery date) are not included in the definition of processing of customer orders.

(ii) *Location of processing of customer orders.* The location of this activity is

the place at which the communication is initiated.

(2) *Arranging for delivery*—(i) *Arranging for delivery defined.* The arranging for delivery of export property means taking necessary steps to have the export property delivered to the customer in accordance with the requirements of the order. Arranging for delivery does not include preparation of the property for shipment (i.e., packaging or crating) or shipment of the property (i.e., transportation). Arranging for delivery does include communications with a carrier or freight forwarder to provide transportation for the export property from the related supplier to the place where the customer takes possession of the property. Arranging for delivery also includes communications with the customer to notify the customer of the time and place of delivery.

(ii) *Direct costs of arranging for delivery.* The direct costs of arranging for delivery include salaries of clerical personnel and costs of telephone, telegraph, mail, and other communications media, but do not include any actual shipping costs.

(iii) *Location of arranging for delivery.* The location of arranging for delivery activity is the place at which the activity is initiated.

(c) *Transportation*—(1) *Transportation defined.* For purposes of section 924(e), transportation means moving or shipping the export property during the period when the FSC owns the property, or during the period after the commission relationship for purposes of transportation begins.

(2) *Direct costs of transportation.* The direct costs of transportation include the expenses of shipping, such as fees paid to carriers and freight forwarders, costs of freight insurance, and documentation fees. With respect to fungible commodities, direct costs include only those costs incurred after the goods have been identified to a contract. Transportation costs do not include any of the costs of arranging for delivery. The FSC is considered to engage in transportation activity whenever it pays the costs of shipping the export property and the property is shipped during the period when the FSC is responsible for the property. If the customer pays the shipping costs directly, the FSC is not considered to engage in transportation activity. However, if the FSC pays the shipping costs, the ultimate transfer of those costs to the customer will not disqualify the FSC from engaging in transportation activity, regardless of whether the costs are included in the sale price of the export property or separately stated.

(3) *Location of transportation.* The location of transportation activity is the area over which the property is transported; thus, the portion of total direct costs of transportation treated as foreign direct costs is the portion attributable to transportation outside the United States, determined on the basis of the ratio of mileage outside the U.S. customs territory to total mileage of transportation. For purposes of determining transportation mileage outside U.S. customs territory, goods are treated as leaving U.S. customs territory when they have been tendered to an international carrier for shipment to a foreign location, as long as they are not removed from the custody of the carrier before they reach a point outside U.S. customs territory.

(d) *Determination and transmittal of a final invoice or statement of account and receipt of payment.* For purposes of section 924(e), the determination and transmittal of a final invoice or statement of account and the receipt of payment are defined as follows:

(1) *Determination and transmittal of a final invoice or statement of account*—(i) *Determination and transmittal of a final invoice or statement of account defined.* The determination and transmittal of a final invoice or statement of account means the assembly of a final invoice or statement of account and the forwarding of that document to the customer. A final invoice is an invoice upon which payment is made by the customer. An invoice forwarded to the customer after payment has been tendered, as a receipt for payment, satisfies this definition. A statement of account is any summary statement forwarded to a customer to inform of, or confirm, the status of transactions occuring within an accounting period that does not exceed one taxable year. A single final invoice or statement of account can cover more than one transaction with one customer.

(ii) *Direct costs of determination and transmittal of a final invoice or statement of account.* Direct costs of this activity include costs of office supplies, office equipment, clerical salaries and mail or other delivery services, if the costs can be identified or associated directly with the assembly and transmittal of a final invoice or statement of account. Costs of establishing a price, or of communicating prices or other billing information between the FSC and a related supplier, are not direct costs of this activity.

(iii) *Location of determination and transmittal of a final invoice or statement of account.* The location of this activity is the place at which the final invoice or statement of account is assembled for forwarding to the customer or the place from which it is forwarded to the customer.

(2) *Receipt of payment*—(i) *Receipt of payment defined.* The receipt of payment means the crediting of the FSC's bank account by the amount of proceeds or commission associated with the transaction.

(ii) *Direct costs of receipt of payment.* Direct costs of receiving payment include the expenses of maintaining a bank account of the FSC in which payment is deposited. If payment is received in foreign currency, any fees or service charges incurred for converting the payment into U.S. currency are considered to be foreign direct costs of receiving payment; however, exchange losses (or gains) are not costs of receiving payment.

(iii) *Location of receipt of payment.* The location of this activity is the office of the banking institution at which the account is maintained. If payment is made by the purchaser directly to the related supplier in the United States, and the related supplier transfers the funds to a bank account of the FSC outside the United States within 5 business days after receipt of good funds by the related supplier's bank, the FSC is considered to have received payment outside the United States.

(e) *Assumption of credit risk*—(1) *Assumption of credit risk defined.* For purposes of section 924(e), the assumption of credit risk means bearing the economic risk of nonpayment with respect to a transaction. If the FSC is acting as a commission agent for the related supplier, this risk is borne by the FSC if the commission contract transfers the economic risk of nonpayment with respect to the transaction from the related supplier to the FSC.

(2) *Direct costs of assumption of credit risk.* Direct costs of the assumption of credit risk include debts that become uncollectible and additions to bad debt reserves of the FSC that are allowed as deductions under section 166. Other direct costs of the assumption of credit risk are:

(i) Costs of obtaining insurance against the risk of nonpayment (such insurance must be obtained from an unrelated insurer and must cover the risk of nonpayment due to default by the purchaser—insurance obtained from a related insurer, or insurance that covers risks of war or political unrest but does not cover ordinary default or bankruptcy, is not sufficient);

(ii) Costs of investigating and approving credit for potential customers.

including costs of membership in a credit association for that purpose;

(iii) Costs of factoring trade receivables; and

(iv) Cost of letters of credit and documentary collection costs.

(3) *Location of assumption of credit risk.* The location of the activity of assumption of credit risk is generally the location of the customer or obligor whose payment is at risk; however, the location of investigating and approving credit is the location of the credit agency or association performing the investigation.

(4) *Special grouping rules.* (i) If the FSC chooses to group transactions, and is actually assuming the risk of loss (either by owning the property sold or contracting to assume the risk of loss for property for which it is a commission agent), it is considered to have performed this activity for all transactions within the group during each of three consecutive years if it incurs an actual loss (or is allowed to deduct an addition to a bad debt reserve under section 166) on any transaction within that group in at least one of those three years. If, however, the FSC does not incur a loss (or add to a bad debt reserve) in either of two consecutive years, and then fails to satisfy the requirement of assumption of credit risk in the third consecutive year because it does not incur a loss (or add to a bad debt reserve) in that third year, the FSC will be deemed to have satisfied the requirement of assumption of credit risk for the first two consecutive years.

(ii) If the FSC chooses to group transactions, and does not actually assume the risk of loss with respect to each transaction within the group, but regularly insures against such loss or regularly factors all trade receivables from transactions within the group, paragraph (e)(4)(i) of this section shall not apply and the FSC must satisfy the requirement of assumption of credit risk by incurring foreign direct costs through insurance, factoring, and so forth, in each year in which that requirement is used for purposes of sections 924 and 925 with respect to the group of transactions. Thus, no actual loss need be incurred by a FSC to satisfy the requirement of assumption of credit risk if the FSC does not actually bear a risk of loss.

§ 1.925(b)–1T Temporary Regulations; Commission FSC.

Except as otherwise provided, a commission FSC is required to satisfy the requirements of section 924(c) (relating to management outside the United States), section 924(d) (relating to economic processes taking place outside the United States), and section 925(c) (relating to activities that must be performed in order to use administrative pricing rules), in the same manner as a buy-sell FSC. However, the requirements of sections 924(d) and 925(c) may be performed either by the FSC or by any person (whether or not related to the FSC) acting under a contract with the FSC for the performance of the required activities on behalf of the FSC. Thus, for example, the commission FSC may satisfy both the requirement of receipt of payment for purposes of section 925(c) and the requirement of receipt of payment outside the United States for purposes of section 924(d) if the FSC receives the payment from a sale of export property in its foreign bank account and remits the proceeds to its related supplier. Alternatively, the FSC may satisfy both of these requirements if the related supplier, acting under a contract with the FSC, receives the payment on behalf of the FSC in a foreign bank account of the related supplier, and later pays the FSC the commission allowable under section 925(b) with respect to the sale less the fee to which the related supplier is entitled for performing the activity of receiving payment on behalf of the FSC. Another alternative is that the related supplier is not acting under contract with the FSC for purposes of receiving payment, and it receives the proceeds of the transaction in its domestic bank account. In this case, the commission FSC may satisfy the receipt of payment requirement by receiving the commission from the related supplier, in accordance with the rules of § 1.924(e)–1T(d)(2)(iii), rather than by receiving the entire proceeds from the transaction.

§ 1.925(c)–1T Temporary Regulations; Requirements for use of administrative pricing rules in computer taxable income of a FSC.

(a) *In general.* Section 925(c) requires that a FSC perform all of the activities described in section 924(d)(1)(A), and all of the activities described in section 924(e) that are attributable to a particular sale (or group of sales transactions), in order to use the pricing rules of section 925(a) (1) and (2) to determine the FSC's taxable income attributable to that sale (or group of sales transactions). This means that all three of the sales activities in section 924(d)(1)(A) must be performed. However, only those activities listed in section 924(e) that occur with respect to a transaction must be performed by the FSC (or another person acting under a contract to perform the activity for the FSC), but the activities do not have to be performed merely to comply with section 925(c). For example, if a FSC sells export property to a related foreign distributor, or if a FSC sells export property to an unrelated foreign purchaser in exchange for payment in cash, there may be no credit risk with respect to the transaction so there can be no assumption of credit risk by the FSC; this will not prevent the FSC from satisfying the requirements of section 925(c) if the FSC (or its contractor or subcontractor) performs all of the specified activities that actually occur with respect to the transaction. If any activities are performed by a person related to the FSC, and would be activities described in section 925(c) except for the fact that the activities were not performed pursuant to a contract for the performance of the activities on behalf of the FSC, the FSC may not use the pricing rules of section 925(a) (1) and (2) to determine the FSC's taxable income attributable to the sale to which the activities relate.

(b) *Compensation of a person related to the FSC for performance of activities specified in section 925(c).* Section 925(c) permits the required activities to be performed by either the FSC or another person acting under a contract with the FSC. If the FSC contracts with a related person (whether or not that person is the related supplier) to perform any activities on behalf of the FSC, that related person must be compensated for the performance of the activities. The amount of the compensation will be determined generally in accordance with the rules under section 482, and in particular in accordance with § 1.482–2(b). Such compensation will be taken into account as expenses in the determination of combined taxable income for the transaction or transactions to which the activity is related if the activity is performed by a person other than the related supplier.

(c) *Activities performed by the FSC in connection with sales of military property.* Any activities that must be performed by the FSC (or by another person acting under a contract with the FSC) to meet the requirements of section 925(c) are taken into account for that purpose, regardless of whether the costs of those activities are not taken into account for purposes of section 924(d) because the activities are required by law or regulation to be performed in the United States or by the United States Government. All such activities that are performed in connection with the transaction are considered to be performed by the FSC or under a contract with the FSC, even if they are performed by the United States

Government and are not performed pursuant to a contract for the performance of the activities on behalf of the FSC. All actual costs incurred by the FSC in connection with the performance of such activities must be taken into account in determining the combined taxable income of the FSC and its related supplier.

§ 1.927–1T Temporary Regulations; Definitions and special rules relating to Foreign Sales Corporations.

(a) *Definition of related supplier.* For purposes of sections 921 through 927 and the regulations thereunder, the term "related supplier" means a related party which directly supplies to a FSC any property or services which the FSC disposes of in a transaction producing foreign trading gross receipts, or a related party which uses the FSC as a commission agent in the disposition of any property or services producing foreign trading gross receipts. A FSC may have different related suppliers with respect to different transactions. If, for example, X owns all the stock of Y, a corporation, and of Z, a FSC, and X sells a product to Y which is resold to Z, only Y is the related supplier of Z. If, however, X sells directly to Z and Y also sells directly to Z, then, as to the transactions involving direct sales to Z, each of X and Y is a related supplier of Z.

(b) *Definition of related party.* The term "related party" means a person which is owned or controlled directly or indirectly by the same interests as the FSC within the meaning of section 482 and § 1.482–1(a).

(Approved by the Office of Management and Budget under control number 1545–0904)

This Treasury decision is issued under the authority contained in section 924(d)(4) (98 Stat. 989; 26 U.S.C. 924(d)(4)), section 925(b) (98 Stat. 990; 26 U.S.C. 925(b)), section 927(d)(2)(B) (98 Stat. 993; 26 U.S.C. 927(d)(2)(B), and section 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954. Approved by the Office of Management and Budget under control number 1545–0904.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: December 6, 1984.

Ronald A. Pearlman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 84–32300 Filed 12–7–84; 9:45 am]

BILLING CODE 4830–01–M

26 CFR Part 1

[T.D. 7992]

Income Tax; Taxable Years Beginning After December 31, 1953; Installment Treatment of Certain Deemed Distributions to DISC Shareholders

AGENCY: Internal Revenue Service, Treasury.

ACTION: Amendment of Temporary Income Tax Regulations.

SUMMARY: This document contains an amendment to Treasury decision 7983, 49 FR 40011, October 12, 1984, which provided temporary regulations relating to the transitional rules for Domestic International Sales Corporations (DISCs), DISC shareholders, and Foreign Sales Corporations (FSCs), under Title VIII of the Tax Reform Act of 1984. These amendments to the temporary regulations affect the above described persons and provide them with guidance necessary to comply with the Tax Reform Act of 1984.

DATES: This amendment to the temporary regulations is effective on October 12, 1984, and applies to certain computations and an election which can only be made after December 31, 1984, with respect to certain taxable years ending on or after December 31, 1984.

FOR FURTHER INFORMATION CONTACT: Jacob Feldman of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (202–566–3289, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On October 12, 1984 (49 FR 40011), the **Federal Register** published amendments to the Temporary Income Tax Regulations under the Tax Reform Act of 1984. The amendments were made to conform the regulations to certain provisions of Title VIII, sections 801 through 805 of the Tax Reform Act of 1984 (Pub. L. 98–369, 98 Stat. 494, 985). Section 1.921–1T(a)(10), Question and Answer–12, of those temporary regulations relates to section 805(b)(3) of the Tax Reform Act of 1984.

Section 805(b)(3) of the Tax Reform Act of 1984 provides a special 10-year installment treatment for certain deemed distributions to DISC shareholders applicable only in certain situations where the DISC and the shareholder have non-conforming 1984 taxable years. See section 805(b)(3)(B) of the Tax Reform Act of 1984.

As issued and published in Treasury decision 7983, Question and Answer-12 does not limit the availability of the special 10-year installment treatment to those cses where the DISC and the DISC shareholder have non-conforming 1984 taxable years described in section 805(b)(3)(B)(ii). The failure of Question and Answer-12 to reflect fully the limitation contained in section 805(b)(3)(B)(ii) was not intended.

This Treasury decision amends T.D. 7983, § 1.921–1T(a)(10), Question and Answer-12, by amending Answer-12 to reflect the non-conforming taxable year requirement and to clarify that, for estimated tax purposes, any deemed distribution under the special 10-year installment treatment shall be treated as received by the shareholder on the last day of any taxable year in which the shareholder is required to include such a deemed distribution in income.

This Treasury decision also amends Question and Answer-12 by changing the taxable year for which the DISC shareholder must elect the application of the 10-year installment treatment. Under Question and Answer-12, as issued and published in Treasury decision 7983, the DISC shareholder was required to make the election by attaching a statement to its tax return for the first taxable year for which an installment is treated as received. The amended Question and Answer-12 contained in this Treasury decision requires that the DISC shareholder must make the election for its taxable year which includes December 31, 1984. To make the election, the DISC shareholder must attach a statement to its timely filed tax return (including extensions) for its taxable year which includes December 31, 1984, indicating the total amount of the DISC's deemed distribution for 1984, and the number of equal installments, if less than 10, over which the shareholder wishes to spread the deemed distribution for 1984. If the election is made, it may not be changed or revoked.

The amended Question and Answer-12 contained in this Treasury decision is not intended to address comprehensively all issues raised by section 805(b)(3) of the Tax Reform Act of 1984. Taxpayers may rely for guidance on Question and Answer-12, as amended, which the Internal Revenue Service will follow in resolving issues arising under section 805(b)(3) of the Tax Reform Act of 1984. No inference, however, should be drawn regarding questions not expressly raised and answered.

Non-Applicability of Executive Order 12291

The Treasury Department has determined that this amendment to the

temporary regulations is not subject to review under Executive Order 12291 or the Treasury and OBM implementation of the Order dated April 20, 1983. Accordingly, a Regulatory Impact Analysis is not required.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply and no Regulatory Flexibility Analysis is required for this rule.

Drafting Information

The principal author of these regulations is Jacob Feldman of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and the Treasury Department participated in developing these regulations, both on matters of substance and style.

List of Subjects in 26 CFR 1.861–1 Through 1.997–1

Income taxes, Aliens, Exports, DISC, FSC, Foreign investments in the U.S., Foreign tax credit, Source of income, United States investments abroad.

Amendment to Treasury Decision 7983 and the Temporary Regulations

The Temporary Income Tax Regulations provided by Treasury decision 7983, 49 FR 40011, FR Doc. 84–26886, October 12, 1984, are amended as follows:

PART 1—[AMENDED]

Section 1.921–1T(a)(10) (Question and Answer-12) is revised to read as follows:

§ 1.921–1T Temporary regulations providing transition rules for DISCs and FSCs.

(a) *Termination of a DISC* * * *

(10) *Deemed distribution for 1984.*

Question 12: How is the deemed distribution to a shareholder for the DISC's taxable year ending December 31, 1984, taken into account?

Answer 12 (i) If the taxable year of the DISC ending on December 31, 1984, (A) is the first taxable year of the DISC which begins in 1984, (B) begins after the date in 1984 on which the taxable year of the DISC's shareholder begins, and (C) if the DISC's shareholder makes an election under section 805(b)(3) of the Tax Reform Act of 1984, the deemed distribution under section 995(b) with respect to income derived by the DISC for such taxable year of the DISC shall be treated as received by the shareholder in 10 equal installments (unless the shareholder elects to be treated as receiving the deemed distribution in income over a smaller number of equal installments). The first installment shall be treated as received by the shareholder on the last day of the shareholder's second taxable year beginning in 1984 (if any), or if the shareholder had only one taxable year which began in 1984, on the last day of the shareholder's first taxable year beginning in 1985. One installment shall be treated as received by the shareholder on the last day of each succeeding taxable year of the shareholder until the entire amount of the DISC's 1984 deemed distribution has been included in the shareholder's taxable income. To make the election under section 805(b)(3) of the Tax Reform Act of 1984, the DISC shareholder must attach a statement to its timely filed tax return (including extensions) for its taxable year which includes December 31, 1984, indicating the total amount of the shareholder's pro rata share of the DISC's deemed distribution for 1984 (determined under section 995(b) of the Code without regard to the election under section 805(b)(3) of the Tax Reform Act of 1984), and the number of equal installments, if less than 10, over which the shareholder wishes to spread its pro rata share of the deemed distribution for 1984. If the election under section 805(b)(3) of the Tax Reform Act of 1984 is made, it may not be changed or revoked. In determining estimated tax payments, the portion of the deemed distribution includible in the shareholder's taxable income for any taxable year under this subdivision—

(i) Shall be treated as received by the shareholder on the last day of such taxable year.

(ii) Except as provided in subdivision (i), the deemed distribution under section 995(b) with respect to income derived by the DISC for its taxable year ending on December 31, 1984, shall be included in the shareholder's taxable income for its taxable year which includes December 31, 1984. Thus, if the taxable year of the DISC and the DISC's shareholder both begin on January 1, 1984, and end on December 31, 1984 (or, if the taxable year of the DISC beginning in 1984 begins before the taxable year of the DISC's shareholder), the deemed distribution with respect to the DISC's taxable year ending on December 31, 1984, will be included in the DISC shareholder's taxable year ending on (or including) December 31, 1984, and the election described in subdivision (i) may not be made.

(iii) The provisions of this Question and Answer-12 apply without regard to any existence of the DISC after December 31, 1984, as an interest charge DISC.

* * * * *

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. Publication of this Question and Answer is necessary for DISC shareholders to account properly for the deemed distribution under section 995(b) of the Code for the taxable year of a DISC ending on December 31, 1984. For this reason, it is impractical to issue this Treasury decision with notice and public procedure under section 553(b) of Title 5 of the United States Code, or subject to the effective date limitations of subsection (d) of that section.

This Treasury decision is issued under the authority contained in section 805(b)(3) (C) and (D) of the Tax Reform Act of 1984 (98 Stat. 1002), and section 7805 of the Code (68A Stat. 917; 26 U.S.C. 7805).

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: December 5, 1984.

Ronald A. Pearlman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 84–32297 Filed 12–6–84; 5:02 pm]

BILLING CODE 4830–01–M

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26 CFR Part 1

[T.D. 7993]

FSC General Rules, Requirements, Definitions, and Special Rules

AGENCY: Internal Revenue Service, Treasury.

ACTION: Tempory Regulations.

SUMMARY: This document provides temporary Income Tax Regulations concerning the general rules regarding the requirements that a corporation must meet to be a foreign sales corporation (FSC) (or a small FSC) and the tax treatment of a FSC (or a small FSC) and the specific rules regarding the requirements for FSC and small FSC status, the methods of electing and terminating FSC status, and the definition of and computation of carrying charges on sales of property by a FSC. This document also provides temporary Income Tax Regulations concerning the amendment of question and answer 6 of § 1.921–1T(a)(6) and question and answer 7 of § 1.921–1T(b)(7). These temporary regulations provide immediate necessary guidance to FSCs and their shareholders with

respect to FSC qualification under Title VIII of the Tax Reform Act of 1984 (Foreign Sales Corporations). The text of the temporary regulations set forth in this document in Paragraph 1 also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the proposed rules section of this issue of the **Federal Register.**

DATE: The regulations are effective for taxable years beginning after December 31, 1984.

FOR FURTHER INFORMATION CONTACT: P. Ann Fisher of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3289, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary Income Tax Regulations (26 CFR Part 1). These amendments provide regulations under new sections 921, 922, and 927, which were added to the Code by section 801 of the Tax Reform Act of 1984 (Pub. L. 98–69, 98 Stat. 985), under section 805 of the Tax Reform Act of 1984 (Pub. L. 98–69, 98 Stat. 1000), and under section 131 of the Tax Reform Act of 1984 (Pub. L. 98–69, 98 Stat. 662). These amendments are issued under the authority contained in sections 367(a)(3)(B), 367(d), 927(d)(1), 927(f), and 7805 of the Internal Revenue Code of 1954 (98 Stat. 662, 26 U.S.C. 367(a)(3)(b); 98 Stat. 663, 26 U.S.C. 367(d); 98 Stat. 993, 26 U.S.C. 927(d)(1); 98 Stat. 994, 26 U.S.C. 927(f); and 68A Stat. 917, 26 U.S.C. 7805) and under the authority contained in section 805 of the Tax Reform Act of 1984 (Pub. L. 98–69, 98 Stat. 1000).

These temporary regulations are presented in the form of questions and answers. The questions and answers are not intended to address comprehensively the issues raised by sections 801, 805 and 131 of the Tax Reform Act of 1984. Taxpayers may rely for guidance on these questions and answers, which the Internal Revenue Service will follow in resolving issues arising under sections 801, 805 and 131 of the Tax Reform Act of 1984. No inference, however, should be drawn regarding questions not expressly raised and answered.

Need for Temporary Regulations

Sections 921, 922 and 927 are generally effective for transactions after December 31, 1984, in years ending after December 31, 1984. The proper application of these sections is dependent upon the Service's specification of the manner in which the requirements of the statute will be administered. Because of the need for immediate guidance in this regard, the Internal Revenue Service has found it to be impractical to issue these temporary regulations either with notice and public comment procedure under section 553(b) of title 5 of the United States Code or under the effective date limitation of section 553(d) of title 5.

Discussion

Statutory Provisions

The Tax Reform Act of 1984 added sections 921–927 to the Internal Revenue Code to provide for the establishment of Foreign Sales Corporations (FSCs). Section 921 describes the tax treatment of the income of a FSC (or a small FSC). Section 922 states the requirements that a corporation must meet to be considered a FSC (or a small FSC). Section 927 provides other definitions, including the definitions of investment income and carrying charges, and provides special rules, including rules for electing and terminating FSC (or small FSC) status.

Description of Temporary Regulations

This regulation deals with general rules, requirements, definitions, and special rules for Foreign Sales Corporations with amendments to two questions and answers under § 1.921–1T of the regulations. The first paragraph of this regulation concerning general rules, requirements, definitions and special rules is divided into four parts. Section 1.921–2T provides the general rules regarding the requirements that a corporation must meet to be a FSC (or a small FSC) and the tax treatment of a FSC (or a small FSC) including the tax treatment of a FSC's foreign trade income, investment income and carrying charges. Section 1.922–1T provides specific rules with respect to the requirements for FSC (or small FSC) status, including the meaning of the "office" that a FSC must maintain under section 922(a)(1)(D)(i). Section 1.927(d)–1T provides rules for computing carrying charges that are considered to be included in the price of property sold by a FSC. Section 1.927(f)–1T provides rules for electing and terminating FSC status.

Section 922(a)(1)(D)(i) requires that a FSC maintain an office located outside the United States in a qualifying country or eligible possession. The regulations explain the meaning of an office for purposes of meeting this requirement. The regulations define an office as a place for the transaction of the business of the corporation and provide that a place is an office if certain requirements are met. To be an office a place must: (1) Have a fixed location; (2) be a building or a portion of a building consisting of at least one room; (3) be equipped for the performance of the corporation's business; (4) be regularly used for some corporate business; and (5) be operated, and owned or leased, by the corporation or by the corporation's dependent or independent agent. Corporate business includes the solicitation, the negotiation, or the making of contracts with respect to sales of export property by the corporation or a related supplier and the preparatory or ancillary activities of the corporation such as the maintenance of a set of permanent books of account (including invoices).

Under sections 921(d), and 924(f)(2), investment income and carrying charges are not foreign trading gross receipts. They are includable in the taxable income of FSC and are treated as income effectively connected with a trade or business conducted through a permanent establishment within the United States. The source of investment income is determined under sections 861, 862, and 863 of the Code. The regulations define and describe the tax treatment of investment income and carrying charges. Under section 927(d) carrying charges include not only stated carrying charges but also any amount in excess of the price for an immediate cash sale and any other unstated interest. The regulations provide rules for determining whether the price of property or services sold by a FSC or a related supplier includes any amount in excess of the price for an immediate cash sale and explain how such amount will be computed. The regulations provide that carrying charges are not imputed under section 927(d) if the sales price of property or services is fully paid before the end of the normal payment period, which is 60 days from the date of the sale or exchange of property under the contract or from the date services under the contract are completed.

The second paragraph of this regulation amends § 1.921–1T(a)(6), question and answer 6. This question and answer relates to the distribution of accumulated DISC income by a former DISC after December 31, 1984 and provides that such a distribution shall be treated as made first out of current earnings and profits and then out of previously taxed income to the extent thereof. This has been amended to provide that, if amounts are distributed before July 1, 1985, such amounts will be treated as made first out of previously taxed income.

The third paragraph of this regulation amends Section 1.921–1T(b)(7), question and answer 7, to clarify that the transfer applies only to a transfer of qualified assets as defined in section 993(b). In addition, a rule is provided to exempt the transfer of the right to use a corporate name to a FSC from the application of section 367 (a) and (d) provided that the corporate name is used only by the FSC and not licensed or made available to other persons by the FSC.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553(b) for temporary regulations. Accordingly, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply and no Regulatory Flexibility Analysis is required for this rule.

Executive Order 12291

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

Paperwork Reduction Act

These regulations were submitted to the Office of Management and Budget for review under the Paperwork Reduction Act and approved under OMB number 1545–0884.

Drafting Information

The principal author of these proposed regulations is P. Ann Fisher of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. Personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR 1.861–1 Through 1.997–1

Income taxes, Aliens, Exports, DISC, FSC, Foreign investments in U.S., Foreign tax credit, Sources of income, United States investments abroad.

Adoption of Amendments to the Regulations

The Income Tax Regulations (26 CFR Part 1) are amended as follows:

Paragraph 1. New §§ 1.921–2T, 1.922–1T, 1.927(d)–1T, and 1.927(f)–1T are added at the appropriate places to read as follows:

§ 1.921–2T Temporary Regulations; Foreign Sales Corporation—General Rules.

(a) *Definition of a FSC and the Effect of a FSC Election.*

Q–1. What is the definition of a Foreign Sales Corporation (hereinafter referred to as a "FSC")?

A–1. As defined in section 922(a), an FSC must satisfy the following eight requirements.

(i) The FSC must be a corporation organized or created under the laws of a foreign country that meets the requirements of section 927(e)(3) (a "qualifying foreign country") or a U.S. possession other than Puerto Rico (an "eligible possession"). See Q&As 3, 4, and 5 of § 1.922–1T.

(ii) A FSC may not have more than 25 shareholders at any time during the taxable year. See Q&A 6 of § 1.922–1T.

(iii) A FSC may not have any preferred stock outstanding during the taxable year. See Q&As 7 and 8 of § 1.922–1T.

(iv) A FSC must maintain an office outside of the United States in a qualifying foreign country or an eligible possession and maintain a set of permanent books of account (including invoices) at such office. See Q&As 9, 10, 11, 12, 13, 14, and 15 of § 1.922–1T.

(v) A FSC must maintain within the United States the records required under section 6001. See Q&A 16 of § 1.922–1T.

(vi) The FSC must have a board of directors which includes at least one individual who is not a resident of the United States at all times during the taxable year. See Q&As 17, 18, 19 and 20 of § 1.922–1T.

(vii) A FSC may not be a member, at any time during the taxable year, of any controlled group of corporations of which an interest charge DISC is a member. See Q&A 3 of this section and Q&A 13, of § 1.921–1T(b)(13).

(viii) A FSC must have made an election under section 927(f)(1) which is in effect for the taxable year. See Q&A 1 of § 1.921–1T(b)(1) and § 1.927(f)–1T.

In addition, under section 441(h), the taxable year of a FSC must conform to the taxable year of its principal shareholder. See Q&A 4 of § 1.921–1T(b)(4).

Q–2. What is the effect of a FSC election?

A–2. If a corporation qualifies as a FSC and satisfies the foreign management and economic processes tests under section 924, a FSC may earn foreign trading gross receipts and a portion of the FSC's foreign trade income will be exempt from U.S. tax. In addition, a 100 percent dividends-received deduction will be allowed on repatriation of exempt foreign trade income and of certain non-exempt foreign trade income. If a FSC performs all of the activities described in section 924(e) and section 924(d)(1)(A), it will be eligible to use the administrative pricing rules described in section 925(a) (1) and (2) in determining its foreign trading gross receipts.

Q–3. Does the reference to a DISC under section 922(a)(1)(F) which provides that a FSC cannot be a member, at any time during the taxable year, of any controlled group of corporations of which a DISC is a member refer solely to an interest charge DISC?

A–3. Yes.

(b) *Small FSC.*

Q–4. What is a small FSC?

A–4. A small FSC is a Foreign Sales Corporation which meets the requirements of section 922(a)(1) enumerated in Q&A 1 of this section as well as the requirements of section 922(b). Section 922(b) requires that a small FSC make a separate election to be treated as a small FSC. See Q&A 1 of § 1.921–1T(b) and § 1.927(f)–1T. In addition, section 922(b) requires that the small FSC not be a member, at any time during the taxable year, of a controlled group of corporations which includes a FSC unless such FSC is a small FSC.

Q–5. What is the effect of an election as a small FSC?

A–5. Under section 924(b)(2), a small FSC need not meet the foreign management and economic processes tests of section 924(b)(1) in order to have foreign trading gross receipts. However, in determining the exempt foreign trade income of a small FSC, any foreign trading gross receipts for the taxable year in excess of $5 million are not taken into account. If the foreign trading gross receipts of a small FSC for the taxable year exceed the $5 million limitation, the FSC may select the gross receipts to which the limitation is allocated. In order to use the administrative pricing rules under section 925(a), a small FSC must satisfy the activities test under section 925(c). In addition, under section 441(h), the taxable year of a small FSC must conform to the taxable year of its principal shareholder (defined in Q&A 4 of § 1.921–1T(b)(4) as the shareholder with the highest percentage of its voting power).

(c) *Comparison of FSC to DISC.*

Q–6. How does a FSC differ from a DISC?

A–6. A DISC is a domestic corporation which is not itself taxable while a FSC must be created or organized under the laws of a jurisdiction which is outside of the United States (including certain U.S. possessions) and is taxable on its income except for its exempt foreign trade income. The DISC provisions enable a shareholder to obtain a partial deferral of tax on income from export

sales and certain services, if 95 percent of its receipts and assets are export related. The FSC provisions contain no assets test, but a portion of income for export sales and certain services is exempt from U.S. taxes if the FSC satisfies certain foreign presence, foreign management, and foreign economic processes tests.

(d) *Organization of a FSC.*

Q–7. Under the laws of what countries may a FSC be organized?

A–7. A FSC may not be created or organized under the laws of the United States, a state, or other political subdivision. However, a FSC may be created or organized under the laws of a possession of the United States, including Guam, American Samoa, the Commonwealth of the Northern Mariana Islands and the Virgin Islands of the United States, but not Puerto Rico. These eligible possessions are located outside the U.S. customs territory. In addition, a FSC may incorporate under the laws of a foreign country that is a party to (i) an exchange of information agreement that meets the standards of the Caribbean Basin Economic Recovery Act of 1983 (Code section 274(h)(6)(C)), or (ii) a bilaterial income tax treaty with the United States if the Secretary certifies that the exchange of information program under the treaty carries out the purpose of the exchange of information requirements of the FSC legislation as set forth in section 927(e)(3), if the company is covered under the exchange of information program under subdivision (i) or (ii).

(e) *Foreign Trade Income.*

Q–8. How is foreign trade income defined?

A–8. Foreign trade income, defined in section 923(b), is gross income of a FSC attributable to foreign trading gross receipts. It includes both the profits earned by the FSC itself from exports and commissions earned by the FSC from products and services exported by others.

(f) *Foreign Trading Gross Receipts.*

Q–9. What are foreign trading gross receipts?

A–9. Foreign trading gross receipts, defined in section 924, are receipts of a FSC attributable to the export of goods and the performance of certain services. Specifically, they include gross receipts (i) from the sale, exchange or other disposition of export property, (ii) from the lease or rental of export property for use by the lessee outside of the United States, (iii) for services related and subsidiary to such sales and leases, (iv) for engineering and architectural services for construction projects located outside the United States, and (v) for the performance of managerial services for an unrelated FSC or DISC in furtherance of the production of other foreign trading gross receipts or qualified export receipts of the unrelated FSC or DISC (if at least 50 percent of the FSC's gross receipts for the taxable year are receipts described in (i), (ii) or (iii) above). A FSC (other than a small FSC) will not be treated as having foreign trading gross receipts for a taxable year unless the FSC satisfies the foreign management requirement (defined in section 924(c) for the taxable year and the foreign economic processes requirement (defined in section 924(d)) for the transaction giving rise to the gross receipts. The foreign management and foreign economic processes requirements are the subject of a separate regulations project.

Q–10. What receipts are excluded from foreign trading gross receipts?

A–10. Receipts from a transaction are excluded from foreign trading gross receipts if (i) the property or service is for ultimate use in the United States (See § 1.993–1(j)(2)), (ii) if a sale or lease or export property, or the furnishing of engineering or architectural services, is for use by the United States or an instrumentality thereof and any United States law or regulation requires, with respect to a sale or lease of export property, that the property be manufactured, produced, grown or extracted in the United States or, with respect to the furnishing of engineering or architectural services, that such service be performed by a United States person (See § 1.993–1(j)(4)), (iii) the transaction is accomplished by a United States Government subsidy, (iv) the receipts are from another FSC which is a member of the same controlled group, or (v) the receipts consist of investment income or carrying charges. In addition, certain property is excluded because it is not considered export property. For purposes of determining whether a transaction is accomplished by a United States Government subsidy, a sale pursuant to any of the programs set forth in § 1.993–1(j)(3) is considered accomplished by a United States Government subsidy. For purposes of determining whether receipts are from another FSC which is a member of the same controlled group, receipts are considered received from another FSC if received directly from the FSC or indirectly as described in Rev. Rul. 76–127, 1976–1 C.B. 212. See also § 1.993–1(j)(6).

(g) *Export Property.*

Q–11. What is export property?

A–11. Export property, as defined in section 927(a)(1), has the same meaning for a FSC as it has for a DISC under section 993(c)(1) except that, for FSC purposes, the term "United States" does not include the possessions of the United States (other than Puerto Rico). Property that is excluded from the category of export property under section 993(c) (2) and (3) for a DISC is also excluded from the category of export property for a FSC with one exception. While all products subject to the depletion deduction under section 613 or 613A are excluded from export property of a DISC, only oil or gas (or any primary product of either) is excluded from export property of a FSC.

(h) *Administrative Pricing.*

Q–12. How is foreign trade income of a FSC determined in a transaction in which export property is purchased by a FSC from a related supplier (as defined in § 1.927–1T(a))?

A–12. Foreign trade income may be determined using a transfer price that allows the FSC to derive taxable income attributable to the transaction in an amount which does not exceed the greatest of (i) 1.83 percent of the foreign trading gross receipts derived from the sale of such property by such FSC (the "gross receipts method"); (ii) 23 percent of the combined taxable income of the FSC and its related supplier which is attributable to foreign trading gross receipts derived from the sale of the property by the FSC (the "combined taxable income method"); or (iii) taxable income based upon the sales price actually charged but subject to the rules provided in section 482 (the "section 482 method"). However, foreign trade income determined using the gross receipts method shall not with respect to any transaction exceed twice the amount which would be determined under the combined taxable income method. If either the gross receipts or combined taxable income method is used, then the FSC (or any person acting under a contract with the FSC) must perform all activities described in section 924(e) that are attributable to the transaction (relating to activities with respect to which the direct cost tests are applied) and all the activities relating to the solicitation, negotiation, and making of the contract for such sale, although not all of these activities need be performed outside of the United States. In the case of a small FSC, none of these activities need be performed outside of the United States.

Q–13. What portion of foreign trade income is treated as exempt foreign trade income?

A–13. (i) If either the gross receipts or combined taxable income method of administrative transfer pricing is used in determining the taxable income of a FSC and a related party, then 1 $\frac{8}{23}$ of the

foreign trade income derived from the transaction is treated as exempt foreign trade income (1 %23 to the extent that a FSC has non-corporate shareholders). If the amount of income earned by the FSC is based on the section 482 method, then exempt foreign trade income is 30 percent of foreign trade income derived from the transaction (32 percent to the extent that a FSC has noncorporate shareholders). See section 923(a) and section 291(a)(4). Special rules are provided under section 923 for determining the exempt foreign trade income of a cooperative and the exempt foreign trade income of a FSC attributable to the disposition of, or services related to, military property.

(ii) In determining the exempt foreign trade income of a small FSC under section 924(b)(2)(B), foreign trading gross receipts for the taxable year which exceed $5,000,000 are not taken into account. The limitation of $5,000,000 is determined by treating all FSCs in the same controlled group as a single corporation. If the foreign trading gross receipts of a small FSC for the taxable year exceed the $5 million limitation, the FSC may select the gross receipts to which the limitation is allocated. With respect to applying the limitation to a short taxable year, see Q&A 5 of § 1.921–1T(b)(5).

(i) *Exempt Foreign Trade Income.*

Q–14. How is exempt foreign trade income treated?

A–14. Exempt foreign trade income is treated as foreign source income not effectively connected with the conduct of a trade or business in the United States. Exempt foreign trade income is not taxable to the FSC.

Q–15. How are deductions attributed to foreign trade income and exempt foreign trade income?

A–15. Deductions shall be allocated and apportioned under the applicable rules of § 1.861–8, to foreign trade income derived by a FSC from a transaction. The deductions so allocated and apportioned to foreign trade income shall be divided on a proportionate basis between the exempt foreign trade income derived from the transaction and the non-exempt foreign trade income derived from the transaction.

(j) *Non-exempt Foreign Trade Income.*

Q–16. How is non-exempt foreign trade income treated?

A–16. Non-exempt foreign trade income is %23 of foreign trade income if the gross receipts or combined taxable income method of administrative transfer pricing is used (7%23 to the extent that a FSC has noncorporate shareholders) and 70 percent of foreign trade income if the § 482 method is used (68 percent to the extent that a FSC has noncorporate shareholders). Non-exempt foreign trade income is includable in the taxable income of the FSC. If either the gross receipts or combined taxable income method of adminstrative transfer pricing is used, the non-exempt foreign trade income is treated as income effectively connected with the conduct of a trade or business conducted through a permanent establishment in the United States and as income from sources within the United States. However, if the § 482 method is used to determine the foreign trade income of the FSC, the source and taxation of the non-exempt foreign trade income will be determined in the same manner and to the same extent as a foreign corporation that is not a FSC.

(k) *Investment Income and Carrying Charges.*

Q–17. What do the terms "investment income" and "carrying charges" mean?

A–17. (i) Investment income means:

(A) Dividends,

(B) Interest,

(C) Royalties,

(D) Annuities,

(E) Rents (other than rents from the lease or rental of export property for use by the lessee outside of the United States);

(F) Gains from the sale of stock or securities,

(G) Gains from futures transactions in any commodity on, or subject to the rules of, a board of trade or commodity exchange (other than gains which arise out of a bona fide hedging transaction reasonably necessary to conduct the business of the FSC in the manner in which such business is customarily conducted by others),

(H) Amounts includable in computing the taxable income of the corporation under part I of subchapter J, and

(I) Gains from the sale or other disposition of any interest in an estate or trust.

(ii) Carrying charges means:

(A) Charges that are imposed by a FSC or a related supplier and that are identified as carrying charges, ("stated carrying charges") and

(B) (*1*) Charges that are considered to be included in the price of the property or services sold by a FSC or a related supplier, as provided under Q&As 1 and 2 of § 1.927(d)–1T, and (*2*) any other unstated interest.

Q–18. How are investment income and carrying charges treated?

A–18. Investment income and carrying charges are not foreign trading gross receipts. Investment income and carrying charges are includable in the taxable income of a FSC and are treated as income effectively connected with a trade or business conducted through a permanent establishment withing the United States. The source of investment income and carrying charges is determined under sections 861, 862, and 863 of the Code.

(l) *Foreign Tax Credit.*

Q–19. Is a foreign tax credit or a deduction allowable with respect to foreign taxes paid with respect to foreign trade income?

A–19. Generally a foreign tax credit will not be available to a FSC or to a shareholder of a FSC for foreign taxes paid or accrued with respect to foreign trade income. However, if the § 482 method is used, the creditability of any tax imposed on non-exempt foreign trade income will be determined without regard to the preceding sentence, and taxable income attributable to foreign trade income and distributions out of earnings and profits attributable to such foreign trade income will each be subject to separate foreign tax credit limitations.

(m) *Distributions of a FSC.*

Q–20. How is a distribution from a FSC to its shareholders treated?

A–20. Unlike a DISC, no deemed distributions are required. Actual distributions are treated as made first out of foreign trade income. A FSC's domestic corporate shareholders will be allowed a 100-percent dividends-received deduction under section 245(c) with respect to dividends attributable to exempt foreign trade income. The same rule generally applies to non-exempt foreign trade income. However, the dividends-received deduction under section 245(c) does not apply to a dividend attributable to (i) non-exempt foreign trade income that is determined without reference to the administrative pricing rules ("section 923(a)(2) non-exempt income"), (ii) exempt foreign trade income that would not be treated as exempt but for a special rule applicable to a cooperative, or (iii) investment income including carrying charges. With respect to a dividend to which section 245(c) does not apply, a dividends-received deduction is permitted to the extent that section 245(a) applies. A distribution by a FSC to a foreign shareholder out of foreign trade income is treated as a distribution which is effectively connected with the conduct of a trade or business conducted through a permanent establishment in the United States and as income from United States sources. Therefore, such a distribution is subject to United States tax.

(n) *Subpart F Application.*

Q–21. Is any income of a FSC subject to the Subpart F provisions?

A–21. Subpart F (sections 951 through 964) does not apply to a FSC's foreign trade income other than section 923(a)(2) non-exempt income. Subpart F may apply to other income of a FSC. However, for purposes of subpart F, income described in sections 921(d)(2) (relating to investment income) and 921(d)(3) (relating to carrying charges) is considered U.S. source.

(o) *Small Businesses.*

Q–22. What options are available to small businesses engaged in exporting?

A–22. Small businesses may elect to be treated as either a small FSC or an interest charge DISC. See Q&As 4 & 5 of § 1.921–2T relating to a small FSC. Rules with respect to interest charge DISCs are the subject of another regulations project.

§ 1.922–1T Temporary regulations; Requirements that a corporation must satisfy to be a FSC or a small FSC.

(a) *FSC requirements.*

Q–1. What are the requirements that a corporation must satisfy to be a FSC?

A–1. A corporation must satisfy all of the requirements of section 922(a).

(b) *Small FSC requirements.*

Q–2. What are the requirements that a corporation must satisfy to be a small FSC?

A–2. A corporation must satisfy all of the requirements of sections 922 (a)(1) and (b).

(c) *Definition of corporation.*

Q–3. What type of entity is considered a corporation for purposes of qualifying as a FSC or a small FSC under section 922?

A–3. A foreign entity that is classified as a corporation under section 7701(a)(3) (other than an insurance company) is considered a corporation for purposes of this requirement.

(d) *Eligible possessions.*

Q–4. For purposes of meeting the place of incorporation requirement of section 922(a)(1)(A), what is a possession of the United States?

A–4. For purposes of section 922(a)(1)(A), the possessions of the United States are Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands of the United States ("eligible possessions"). Puerto Rico, although a possession for certain tax purposes, does not qualify as a jurisdiction in which a FSC or small FSC may be incorporated.

(e) *Qualifying countries.*

Q–5. For purposes of meeting the place of incorporation requirement of section 922(a)(1)(A), what is a foreign country and which foreign countries meet the requirements of section 927(e)(3)?

A–5. (i) A foreign country is a jurisdiction outside the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States. (ii) A list of the foreign countries that meet the requirements of section 927(e)(3) ("qualifying countries") will be published from time to time in the **Federal Register** and the Internal Revenue Bulletin. A company is considered to be created or organized under the laws of a foreign country that meets the requirements of section 927(e)(3) only if the foreign country is a party to (A) an exchange of information agreement under the Caribbean Basin Economic Recovery Act (Code section 274(h)((6)(C)), or (B) a bilateral income tax treaty with the United States if the Secretary certifies that the exchange of information program under the treaty carries out the purposes of the exchange of information requirements of the FSC legislation as set forth in Code section 927(e)(3) and if the company is covered under exchange of information program under subdivision (A) or (B).

(f) *Number of shareholders.*

Q–6. Who is counted as a shareholder of a corporation for purposes of determining whether a corporation meets the limitation on the number of shareholders to no more than 25 under section 922(a)(1)(B)?

A–6. Solely for purposes of the limitation on the number of shareholders, the following rules apply:

(i) In general, an individual who owns an interest in stock of the corporation is counted as a shareholder. In the case of joint owners, each joint owner is counted as a shareholder. A member of a corporation's board of directors who holds qualifying shares that are required to be owned by a resident of the country of incorporation is not counted as a shareholder.

(ii) A corporation that owns an interest in stock of the corporation is counted as a single shareholder.

(iii) An estate that owns an interest in stock of the corporation is counted as a single shareholder. If the limitation on number of shareholders is not satisfied by reason of the closing of an estate, the FSC will continue to qualify for the taxable year of the FSC in which the estate is closed.

(iv) A trust is not counted as a shareholder. In the case of a trust all of which is treated as owned by one or more persons under sections 671–679, those persons are counted as shareholders. In the case of all other trusts, a beneficiary is counted as a shareholder.

(v) A partnership is not counted as a shareholder. A general or limited partner is counted as a shareholder if it is a corporation, an individual, or an estate, under the rules contained in subdivisions (i) through (iii). A general or limited partner is not counted as a shareholder if it is a partnership or a trust; the rules contained subdivision (iv) and this subdivision (v) apply to the determination of who is counted as a shareholder.

(g) *Class of stock.*

Q–7. What is preferred stock for purposes of determining whether a corporation satisfies the requirement under section 922(a)(1)(C) that no preferred stock be outstanding?

A–7. Preferred stock is stock that is limited and preferred as to dividends or distributions in liquidation.

Q–8. Can a corporation have outstanding more than one class of common stock?

A–8. Yes. However, the rights of a class of stock will be disregarded if the right has the effect of avoidance of federal income tax. For instance, dividend rights may not be used to direct dividends from exempt foreign trade income to shareholders that have taxable income and to direct other dividends to shareholders that have net operating loss carryovers.

(h) *Office.*

Q–9. What is an office for purposes of determining whether a corporation satisfies the requirement of section 922(a)(1)(D)(i)?

A–9. An office is a place for the transaction of the business of the corporation. To be an offfice a place must meet all of the following requirements:

(i) *It must have a fixed location.*

A transient location is not a fixed location.

(ii) *It must be a building or a portion of a building consisting of at least one room.*

A room is a partitioned part of the inside of a building. The building or portion thereof used as the corporation's office must be large enough to accommodate the equipment required in subdivision (iii) of this answer 9 and the activity required in subdivision (iv) of this answer 9.

(iii) *It must be equipped for the performance of the corporation's business.*

An office must be equipped for the communication and retention of information and must be supplied with communication services.

(iv) *It must be regularly used for some business activity of the corporation.*

A corporation's business activities include (A) the solicitation, the negotiation, or the making of contracts

with respect to sales of export property by the corporation or a related supplier, and (B) the preparatory or ancillary activities of the corporation as, for example, the maintenance of the documentation described in Q&A 12 of this section. Such business activity may be performed by a dependent or independent agent of the corporation as defined in § 1.864-7(d).

(v) *It must be operated, and owned or leased, by the corporation or by the corporation's dependent or independent agent.*

A place that meets the requirements in subdivision (i) through (v) of this answer 9 can also be used for activities that are unrelated to the business activity of the corporation.

Q-10. Can a corporation locate an office in any foreign country if it has at least one office in a U.S. possession or in a foreign country that meets the requirements of section 9237(e)(3) as provided Q&A 5 of this section?

A-10. Yes.

Q-11. Must a corporation locate the office that is required under section 922(a)(1)(D)(i) in the country or possession of its incorporation?

A-11. No.

(i) *Documentation.*

Q-12. What documentation must be maintained at the corporation's office for purposes of section 922(a)(1)(D)(ii)?

A-12. At least the following documentation must be maintained at the corporation's office under section 922(a)(1)(D)(ii):

(i) The quarterly income statements and a year-end balance sheet of the FSC; and

(ii) All final invoices (or a summary of them) or statements of account with respect to (A) sales by the FSC, and (B) sales by a related person if the FSC realizes income with respect to such sales. A summary of final invoices may be in any reasonable form provided that the summary contains all substantive information from the invoices.

Q-13. In what form must the documentation required under section 922(a)(1)(D)(ii) be maintained?

A-13. The documentation required to be maintained by the office may be originals or duplicates and may be in any form that qualifies as a record under Rev. Rul. 71-20, 1971-1 C.B.392. Therefore, documentation may be maintained in the form of punch cards, magnetic tapes, disks, and other machine-sensible media used for recording, consolidating, and summarizing accounting transactions and records within a taxpayer's automatic data processing system.

Q-14. How long the documentation required under section 922(a)(1)(D)(ii) be maintained?

A-14. The documentation required under section 922(a)(1)(D)(ii) for a taxable year must be maintained at the FSC's office described in section 922(a)(1)(D)(i) until the period of limitations for assessment of tax for the taxable year has expired under section 6501.

Q-15. Under what circumstances will a corporation be considered to satisfy the requirement of section 922(a))(1)(D)(iii) that it maintain the records it is required to keep under section 6001 at a location within the United States?

A-15. A corporation will be considered to satisfy this requirement if the records required under section 6001 are kept by any person at any location in the United States provided that the records are retained in accordance with section 6001 and the regulations thereunder.

(j) *Board of directors.*

Q-16. What is a corporation's "board of directors" for purposes of the requirement under section 922(a)(1)(E) that, at all times during the taxable year, the corporation must have a board of directors which includes at least one individual who is not a resident of the United States?

A-16. The "board of directors" is the body that manages and directs the corporation according to the law of the qualifying country or eligible possession under the laws of which the corporation was created or organized.

Q-17. Can the member of the board of directors who is a nonresident of the United States be a citizen of the United States?

A-17. Yes. For purposes of meeting the requirement under section 922(a)(1)(E), the member of the board who cannot be a United States resident can be a United States citizen.

Q-18. If the only member of the board of directors who is not a resident of the United States dies or resigns, will the corporation be considered to fail the requirement under section 922(a)(1)(E)?

A-18. If the corporation appoints a new member who is a nonresident of the United States to the board within 30 days after the death or resignation of the former nonresident member, the corporation will be considered to satisfy the requirement under section 922(a)(1)(E).

Q-19. Is a nonresident alien individual who elects to be treated as a resident of the United States for a taxable year under section 6013(g) considered a nonresident of the United States for purposes of the requirement under section 922(a)(1)(E)?

A-19. Yes.

§ 1.927(d)-1T Temporary Regulations; Other Definitions.

(a) *Carrying Charges.*

Q-1. Under what circumstances is the sales price of property or services sold by a FSC or a related supplier considered to include carrying charges as defined in subdivision (ii)(B)(*1*) of Q&A 17 of § 1.921-2T?

A-1. (i) The price of property or services sold by a FSC or a related supplier (as defined in § 1.927-1T(a)] is considered to include carrying charges if any part of the sales price is paid after the end of the normal payment period unless the FSC makes the election under subdivision (ii) of this answer. The normal payment period is 60 days from the earlier of the date of the sale or exchange of property under the contract or from the date services under the contract are completed. The sales price of property or services is not considered to include any carrying charges if the entire sales price is paid within the normal payment period. If the entire sales price is not paid within the normal payment period, the carrying charges are based on the amount of the sales price that is unpaid at the end of the normal payment period.

(ii) The carrying charges are computed for the period beginning with the first day after the end of the normal payment period and ending with the date on which payment is required. The date on which payment is required is the actual date of payment. However, a FSC may elect to treat the final date of payment stated in the contract as the date on which payment is required if—

(1) the required date of payment is determined by the contract for all sales made during the taxable year of the sale, even if the actual date of payment is earlier, and (2) no more than 20% of transactions for which final payment is received in the taxable year involve payment after the end of the normal payment period.

Q-2. How are carrying charges as defined in subdivision (ii)(B)(*1*) of Q&A 17 of § 1.921-2T computed?

A-2. If carrying charges as defined in subdivision (ii)(B)(*1*) of Q&A 17 of § 1.921-2T are considered to be included in the sales price of property or services, the amount of the carrying charges is equal to the excess of—

(i) The amount of the sales price of property or services that is unpaid on the day after the end of the normal payment period, over

(ii) The present value, as of the day after the end of the normal payment period, of all payments that are required to be made under the contract and that are unpaid on the day after the end of the normal payment period.

The amount of the sales price of property or services is the sales price under the contract determined as of the actual payment date unless a FSC makes the election provided under subdivision (ii) of Q&A 1. If a FSC makes the election provided under subdivision (ii), the amount of the sales price is the sales price under the contract determined as of the final payment date stated in the contract.

All payments that are required to be made under the contract include the stated sales price as well as stated amounts of interest and carrying charges. The discount rate for the present value computation is simple interest at the short-term monthly Federal rate published in the Internal Revenue Bulletin, determined for the period within which the sale occurs.

The present value of a payment is calculated as follows:

$$P = S \frac{1}{(1+(i \times t))}$$

P = present value of a payment that is required and unpaid after the end of the normal payment period
S = amount of a payment that is required and unpaid after the end of the normal payment period
i = the short-term monthly Federal rate
t = the number of days after the end of the normal payment period and before a payment is required divided by 365.

If a sale is made in a taxable year and the required date of payment is in a later taxable year, carrying charges for the taxable year of the sale are computed for the number of days after the end of the normal payment period and before the end of the taxable year. For the following taxable year, carrying charges are computed for the number of days after the beginning of the taxable year and before the date of payment.

The computation of carrying charges under this answer 2 applies only to the determination of carrying charges under subdivision (ii)(B)(*1*) of Q&A 17 of § 1.921–2 and does not apply to the determination of any other unstated interest or for any other purpose.

The following examples illustrate the computation of carrying charges with respect to a sale of property by a FSC:

Example (1). On January 1, 1985, a FSC sells property for $10,000. The terms of the contract require payment within 90 days after sale. The normal payment period is 60 days. The FSC does not make an election under subdivision (ii) of Q&A 1. Therefore, the required payment period is the actual payment period. The contract does not require the payment of any interest or carrying charges. The purchaser pays the entire sales price within 60 days. The sales price is not considered to include any carrying charges because the purchaser paid the entire sales price within the normal payment period.

Example (2). The facts are the same as in example (1) except that the purchaser does not pay the entire sales price within 60 days, the normal payment period. The purchaser pays the entire sales price 96 days after delivery. Therefore, the sales price is considered to include carrying charges computed as follows:

Step 1: Determine the short-term monthly Federal rate as of the date of sale. For purposes of this example, the rate is 10%.

Step 2: Determine the fraction of the year represented by the number of days after 60 days and before payment is required. In this example, the number of days beyond 60 is 96–60 = 36, which is divided by 365

$$\frac{36 \text{ days}}{365 \text{ days}} = .099 \text{ fraction of the year}$$

Step 3: Using the short-term monthly Federal rate and the fraction of the year, compute the present value of the payment.

$$P = S \frac{1}{(1+(i \times t))}$$

$$P = \$10{,}000 \frac{1}{(1+(.10 \times .099))}$$

P = $10,000 (.99)
P = $9,900

Step 4: Using the present value of all payments, compute the carrying charges.

Carrying Charges = Sales Price Less Present Value.

$10,000	Sales Price
−9,900	Present Value
$100	Carrying charges

Q–3. Is a discount from the sales price of property or services for prompt payment considered to be stated carrying charges as defined in subdivision (ii)(A) of Q&A 17 of § 1.921–2T?

A–3. No.

§ 1.927(f)–1T Temporary regulations; Election and termination of status as a Foreign Sales Corporation.

(a) *Election of status as a FSC or a small FSC.*

Q–1. What is the effect of an election by a corporation to be treated as a FSC or small FSC?

A–1. A valid election to be treated as a FSC or a small FSC applies to the taxable year of the corporation for which made and remains in effect for all succeeding taxable years in which the corporation qualifies to be a FSC unless revoked by the corporation or unless the corporation fails for five consecutive years to qualify as a FSC (in case of a FSC election) or as a small FSC (in case of a small FSC election).

Q–2. Can a corporation established prior to January 1, 1984 be treated as a FSC or a small FSC prior to making a FSC or a small FSC election?

A–2. A corporation cannot be treated as a FSC or a small FSC until it has made a FSC or a small FSC election. An election made within the first 90 days of 1985 relates back to January 1, 1985 unless the taxpayer indicates otherwise.

Q–3. If a shareholder who has not consented to a FSC or small FSC election transfers some or all of its shares before or during the first taxable year for which the election is made, may the holder of the transferred shares consent to the election?

A–3. A holder of the transferred shares may consent to a FSC or small FSC election under the circumstances described in § 1.992–2(c)(1). The rules contained in § 1.992–2)(c) shall apply to the consent by a holder of transferred shares.

Q–4. If a shareholder who has consented to a FSC or a small FSC election transfers some or all of its shares before the first taxable year for which the election is made, must the holder of the transferred shares consent to the election?

A–4. Yes. Consent must be made by any recipient of such shares on or before the 90th day after the first day of such first taxable year. If such recipient fails to file his consent on or before such 90th day, an extension of time for filing such consent may be granted in the manner, and subject to the conditions, described in paragraph (b)(3) of § 1.992–2.

Q–5. May an election of a corporation to be a FSC or a small FSC be effective as of a time other than the start of the corporation's taxable year?

A–5. No.

Q–6. What is the effect of an election to be treated as a FSC or as a small FSC if the corporation or any other member of the controlled group has in effect an election to be treated as an interest charge DISC?

A–6. The interest charge DISC election shall be treated as revoked for all purposes under the Code as of the effective date of the election to be treated as a FSC or a small FSC. An affirmative revocation of the DISC election is unnecessary. The FSC election shall take effect. As long as the FSC election remains in effect, neither the corporation nor any other member of the controlled group is permitted to elect to be treated as an interest charge DISC for any taxable year including any part

of a taxable year during which the corporation's FSC election continues to be effective.

Q–7. What is the effect of an election to be treated as a small FSC if the corporation or any other member of the controlled group has in effect an election to be treated as a FSC?

A–7. As long as a FSC election remains in effect, neither the corporation nor any other member of the controlled group is permitted to elect to be treated as a small FSC for any taxable year including any part of a taxable year during which a FSC election continues to be effective. Any FSC within the controlled group must affirmatively revoke its FSC election for a taxable year including any part of a taxable year for which small FSC status is elected.

Q–8. What is the effect of an election to be treated as a FSC if the corporation or any other member of the controlled group has in effect an election to be treated as a small FSC?

A–8. As long as a small FSC election remains in effect, neither the corporation nor any other member of the controlled group is permitted to elect to be treated as a FSC for any taxable year including any part of the taxable year during which a small FSC election continues to be effective. Any small FSC within the controlled group must affirmatively revoke its small FSC election for a taxable year including any part of a taxable year for which FSC status is elected. An election to be treated as a small FSC is permitted if the corporation or any other member of the controlled group has in effect an election to be treated as a small FSC.

(b) *Termination of election of status as a FSC or a small FSC.*

Q–9. How is the status of a corporation as a FSC or as a small FSC terminated?

A–9. The status of a corporation as a FSC or as a small FSC is terminated through revocation or by its continued failure to be a FSC.

Q–10. For what taxable year may a corporation revoke its election to be treated as a FSC or as a small FSC?

A–10. A corporation may revoke its election to be treated as a FSC or as a small FSC for any taxable year of the corporation after the first taxable year for which the election is effective.

Q–11. When must a corporation revoke a FSC or a small FSC election if revocation is to be effective for the taxable year in which revocation takes place?

A–11. If a corporation files a statement revoking its election to be treated as a FSC or as a small FSC during the first 90 days of a taxable year (other than the first taxable year for which such election is effective), such revocation will be effective for such taxable year and all taxable years thereafter. If the corporation files a statement revoking its election to be treated as a FSC or a small FSC after the first 90 days of a taxable year, the revocation will be effective for all taxable years following such taxable year.

Q–12. Can a FSC change its status to a small FSC, or can a small FSC change its status to a FSC as of a date other than the first day of a taxable year?

A–12. No. Since a revocation of an election to be a FSC or a small FSC is effective only for entire taxable year, a corporation's change between FSC and small FSC status is effective as of the first day of a taxable year.

Q–13. How may a corporation revoke an election by a corporation to be treated as a FSC or a small FSC?

A–13. A corporation may revoke its election by filing a statement that the corporation revokes its election under section 922(a) to be treated as a FSC or under section 922(b) to be treated as a small FSC. Such statement shall indicate the corporation's name, address, employer identification number, and the first taxable year of the corporation for which the revocation is to be effective. The statement shall be signed by any person authorized to sign a corporate return under section 6062. Such revocation shall be filed with the Service Center with which the corporation filed its return.

Q–14. What is the effect if a corporation that has elected to be treated as a FSC or a small FSC fails to qualify as a FSC because it does not meet the requirements of § 922 for a taxable year?

A–14. If a corporation that has elected to be treated as a FSC or a small FSC does not qualify as a FSC or a small FSC for a taxable year, the corporation will not be treated as a FSC or a small FSC for the taxable year. However, the failure or a corporation to qualify to be treated as a FSC or a small FSC for a taxable year does not terminate the election of the corporation to be treated as FSC or a small FSC unless the corporation does not qualify under section 922 for each of 5 consecutive taxable years, as provided in Q&A 15 of this section.

Q–15. Under what circumstances is the FSC or small FSC election terminated for continued failure to be a FSC?

A–15. If a corporation that has elected to be treated as a FSC or a small FSC does not qualify under section 922 to be treated as a FSC or small FSC for each of 5 consecutive taxable years, such election terminates and will not be effective for any taxable year after such fifth taxable year. Such termination will be effective automatically without notice to such corporation or to the Internal Revenue Service.

Par. 2. § 1.921–1T(a)(6) is amended by revising question and answer 6 to read as follows:

§ 1.921–1T Temporary regulations providing transition rules for DISCs and FSCs.

(a) *Termination of a DISC.* * * *

(6) *Accumulated DISC income.*

Q–6. Under what circumstances is any remaining accumulated DISC income treated as previously taxed income (and not taxed)?

A–6. The accumulated DISC income of a DISC (but not a DISC described in section 992(a)(3)) as of December 31, 1984, is teated as previously taxed income when actually distributed after December 31, 1984. Any amounts distributed by the former DISC (including a DISC which has elected to be an interest charge DISC) after December 31, 1984, shall be treated as made first out of current earnings and profits and then out of previously taxed income to the extent thereof. For purposes of the preceding sentence, amounts distributed before July 1, 1985 shall be treated as made first out of previously taxed income to the extent thereof. If property other than money is distributed and if such property was a qualified export asset within the meaning of section 993(b) on December 31, 1984, then for purposes of section 311, no gain or loss will be recognized on the distribution and the distributee will have the same basis in the property as the distributor.

Par. 3. Section 1.912–1T(b)(7) is amended by revising question and answer 7 to read as follows:

§ 1.921–1T Temporary regulations providing transition rules for DISCs and FSCs.

* * * * *

(b) *Establishing and electing status as a FSC, small FSC or interest charge DISC* * * *

(7) *Transition transfers.*

Q–7. Under what circumstances may a DISC or former DISC transfer its assets to a FSC or small FSC without incurring any tax liability on the transfer?

A–7. A DISC or former DISC will recognize no income, gain, or loss on a transfer of its qualified assets (as defined in section 993(b)) to a FSC or small FSC if all of the following conditions are met:

(1) The assets transferred were held by the DISC on August 4, 1983, and were transferred by the DISC or former DISC to the FSC or small FSC in a transfer completed before January 1, 1986; and

(2) The assets are transferred in a transaction which would qualify for nonrecognition under subchapter C of Chapter 1 of the Code, or would so qualify but for section 367 of the Code.

In such case, section 367 shall not apply to the transfer.

In addition, other provisions of subchapter C will apply to the transfer, such as section 358 (basis to shareholders), section 362 (basis to corporations), and section 381 (carryovers in corporate acquisitions). In determining whether a transfer by a DISC to a FSC or small FSC qualifies for nonrecognition under subchapter C, a liquidation of the assets of the DISC into a parent corporation followed by a transfer by the parent of those assets to the FSC or small FSC will be treated as a transaction described in section 368(a)(1)(D).

Notwithstanding the foregoing answer, a taxpayer which transfers a right to use its corporate name to a FSC in a transaction described in sections 332, 351, 354, 356 and 361 shall not be treated as having sold that right under section 367(d) or as having transferred that right to an entity that is not a corporation under section 367(a) provided that the corporate name is used only by the FSC and is not licensed or otherwise made available to others by the FSC.

(Approved by the Office Management and Budget under control number 1545-0884)

This Treasury decision is issued under the authority contained in section 367(a)(3)(B), 367(d), 927(d)(1), 927(f), and 7805 of the Internal Revenue Code of 1954 (98 Stat. 662, 26 U.S.C. 367(a)(3)(B); 98 Stat. 663, 26 U.S.C. 367(d); 98 Stat. 993, 26 U.S.C. 927(d)(1); 98 Stat. 994, 26 U.S.C. 927(f); and 68A Stat. 917, 26 U.S.C. 7805) and under the authority contained in section 805 of the Tax Reform Act of 1984 (Pub. L. 98-69, 98 Stat. 1000).

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: December 6, 1984.

Ronald A. Pearlman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 84-32298 Filed 12-7-84; 9:45 am]

BILLING CODE 4830-01-M

26 CFR Part 6a

[T.D. 7995]

Income Tax; Temporary Regulations Under Title II of the Omnibus Reconciliation Act of 1980; Mortgage Subsidy Bonds

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary income tax regulations relating to the tax exempt status of interest on mortgage subsidy bonds. This action is necessary because of changes to the applicable tax law made by the Tax Reform Act of 1984. These regulations affect all purchasers and governmental issuers of mortgage subsidy bonds.

DATES: The temporary regulations relating to qualified mortgage bonds are effective for governmental obligations issued after December 31, 1984, except that the amendments to the regulations in § 6a.103A-2(a)(2) are effective for obligations issued after December 31, 1983. The temporary regulations relating to qualified veterans' mortgage bonds (including the requirement that qualified veterans' mortgage bonds satisfy the requirements of section 103A(j)(3)) are effective for obligations issued after July 18, 1984, except that the volume limitation provided in § 6a.103A-3(g) applies to obligations issued after June 22, 1984.

FOR FURTHER INFORMATION CONTACT: Mitchell H. Rapaport of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202-566-3740).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the temporary regulations relating to mortgage subsidy bonds under section 103A of the Internal Revenue Code of 1954 as amended by section 611 of the Tax Reform Act of 1984 ("the Act") (Pub. L. 98-369; 98 Stat. 901). The temporary regulations provided by this document will remain in effect until superseded by final regulations on this subject.

Explanation of Provisions

Section 103A of the Internal Revenue Code provides that a mortgage subsidy bond shall be treated as an obligation not described in section 103(a). Thus, the interest on a mortgage subsidy bond is not excludable from gross income. However, qualified mortgage bonds and qualified veterans' mortgage bonds are not treated as mortgage subsidy bonds.

Section 611 of the Act amended section 103A in several respects. The amendments made by this document conform the temporary regulations to those amendments and provide guidance to issuers and purchasers of qualified mortgage bonds and qualified veterans' mortgage bonds.

Section 6a.103A-2(a)(2) is amended to provide that the term "qualified mortgage bond" does not include obligations issued after December 31, 1987.

The Act added three new requirements that must be met by any issue in order to be treated as an issue of qualified mortgage bonds. Section 6a.103A-2(k) provides that an obligation is not a qualified mortgage bond unless the issue of which the obligation is a part complies with the information reporting requirement. Generally, this requirement will be met if the issuer submits on Form 8038 the information required therein and files an annual report containing information regarding the extent to which the proceeds of an issue have been made available to low-income individuals. For any issue, the Form 8038 must be filed not later than the 15th day of the 2nd calendar month after the close of the calendar quarter in which the obligations are issued. The annual report regarding the use of proceeds is to be filed not later than February 15 of each year.

Section 6a.103A-2(l) provides that an issue of obligations will not constitute qualified mortgage bonds unless the applicable elected representative of the governmental unit publishes, after a public hearing following reasonable public notice, an annual policy statement. The policy statement must include a statement of the policies with respect to housing, development, and low-income housing assistance which such governmental unit is to follow in issuing qualified mortgage bonds and mortgage credit certificates and an assessment of the governmental unit's compliance with (i) the statement of the governmental unit's policies as set forth in its previous policy statement (if any) and (ii) the intent of Congress that State and local governments are expected to use their authority under section 103A and section 25, relating to mortgage credit certificates, to the greatest extent feasible to assist lower income families before assisting higher income families. Section 6a.103A-2(l) (4) through (6) provides the requirements with respect to the public hearing that must be held prior to the publication of a policy statement.

Section 6a.103A–2(m) provides that in order for an issue to meet the requirements of § 6a.103A–2 the applicable State official must certify that the issue meets the requirements of § 6a.103A–2(g), relating to the limitation on the aggregate amount of qualified mortgage bonds issued during any calendar year. The temporary regulations provide procedures for certifying officials to follow in making certifications. In order to prevent unreasonable delays in the issuance of qualified mortgage bonds, § 6a.103A–2(m)(3) provides that if the certification is not provided within 30 days of the date that the issuing authority files a request for certification the issuing authority may, instead, submit an affidavit stating that the issue meets the requirements of § 6a.103A–2(g) and that the State did not provide the requested certification. The certification does not ensure that the issue meets the requirements of § 6a.103A–2(g).

Although the requirements of § 6a.103A–2 (k), (l), and (m) also apply to qualified mortgage credit certificate programs under section 25, these regulations do not provide specific rules relating to mortgage credit certificates. Regulations to be issued under section 25 will contain such rules.

Section 6a.103A–3 has been amended to reflect the changes made by the Act to the requirements applicable to qualified veterans' mortgage bonds. Section 6a.103A–3(b) provides that substantially all of the proceeds of a qualified veterans' mortgage bond must be used to provide financing for qualified veterans. The term "qualified veteran" is defined in § 6a.103A–3(c).

Section 103A(c)(3) requires that qualified veterans' mortgage bonds issued after July 18, 1984, satisfy the information reporting requirement of section 103A(j)(3). With respect to obligations issued prior to January 1, 1985, § 6a.103A–2(k)(3)(iv) provides issuers with additional time to file Form 8038; in addition, the annual report concerning use of the proceeds need not be filed with respect to such issues.

Section 6a.103A–3(g) places a limit on the aggregate amount of qualified veterans' mortgage bonds that a State may issue in a calendar year. A State's limit is determined by dividing the aggregate amount of bonds that it issued during the period January 1, 1979, through June 22, 1984 (not including the amount of qualified veterans' mortgage bonds issued during the calendar year or applicable portion of 1984 for which the amount of bonds was the lowest), by the number of years (not to exceed five) that the State issued bonds during that period. The regulations provide that the year in which the amount of bonds was the lowest may be a year in which the State did not issue qualified veterans' mortgage bonds. A State that did not issue qualified veterans' mortgage bonds during the period January 1, 1979, through June 22, 1984, may not issue qualified veterans' mortgage bonds after June 22, 1984.

Finally, § 6a.103A–3(h) provides good faith compliance rules for qualified veterans' mortgage bonds. These rules are similar to those provided in § 6a.103A–2(c).

Non-Applicability of Executive Order 12291

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis is not required.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, the temporary regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Paperwork Reduction Act

The collection of information requirements contained in these regulations has been submitted to the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB under control number 1545–0720.

Drafting Information

The principal author of these temporary regulations is Mitchell H. Rapaport of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, on matters of both substance and style.

List of Subjects in 26 CFR Part 6a

Bonds, Income taxes, Mortgages, Veterans, Foreign investment in United States real property interests.

Amendments to the Regulations

Sections 6a.103A–2 and 6a.103A–3 of Part 6a of Title 26 of the Code of Federal Regulations are amended as follows:

PART 6a—[AMENDED]

Paragraph 1. Section 6a.103–2 is amended by revising paragraph (a)(2) and by adding new paragraphs (k), (l), and (m). These revised and added provisions read as follows:

§ 6a.103A–2 Qualified mortgage bond.

(a) *In general.* * * *

(2) *Termination date.* No obligation issued after December 31, 1987, shall be treated as part of a qualified mortgage bond issue.

* * * * *

(k) *Information reporting requirement*—(1) *In general.* An issue meets the requirements of this paragraph only if the issuer substantially satisfies the information reporting requirement of this paragraph with respect to the issue. Except as otherwise provided in paragraph (k)(3)(iv), the requirements of this paragraph apply to qualified veterans' mortgage bonds issued after July 18, 1984, and to qualified mortgage bonds issued after December 31, 1984.

(2) *Information required.* (i) The issuer must, based on information and reasonable expectations determined as of the date of issue, submit on Form 8038 the information required therein, including—

(A) The name, address, and employer identification number of the issuer,

(B) The date of issue,

(C) The face amount of each obligation which is part of the issue,

(D) The total purchase price of the issue,

(E) The amount allocated to a reasonably required reserve or replacement fund,

(F) The amount of lendable proceeds,

(G) The stated interest rate of each maturity,

(H) The term of each maturity,

(I) In the case of an issue of qualified mortgage bonds, whether the issuer has elected under § 6a.103A–2(i)(4)(v) to pay arbitrage to the United States,

(J) In the case of an issue of qualified mortgage bonds, the issuer's market limitation (as defined in § 6a.103A–2(g)), the amount of qualified mortgage bonds that the issuer has elected not to issue under section 25(c)(2) and the regulations thereunder, and the aggregate amount of qualified mortgage bonds issued by the issuer during the calendar year and prior to the date of issue of the issue for which the Form 8038 is being submitted, and

(K) In the case of an issue of qualified veterans' mortgage bonds, the issuer's State veterans limit (as defined in section 103A(o)(3)(B) and § 6a.103A–3(g)) and the aggregate amount of qualified veterans' mortgage bonds issued by the issuer during the calendar year and prior to the date of issue of the

issue for which the Form 8038 is being submitted.

(ii) The issuer must submit a report compiled on a calendar year basis containing information on the beneficiaries of the proceeds of the issue. The report must be filed for each year in which the proceeds of the issue are used to provide mortgages. The information must be submitted in the format prescribed by the Internal Revenue Service. The information required to be submitted shall be submitted on magnetic media in accordance with applicable revenue procedures. The consent of the Commissioner (or other authorized officer or employee of the Internal Revenue Service) to the magnetic medium on which the issuer intends to submit the information shall be obtained prior to submitting such information on magnetic media. An application for consent shall be in writing and must be filed with the Magnetic Media Coordinator of the Internal Revenue Service Center at which the report is required to be filed at least 90 days before the due date of the first report for which consent is requested. If an issuer reasonably expects to submit information with respect to fewer than 50 beneficiaries for a calendar year, then the issuer may submit such information for that calendar year on machine-readable paper instead of magnetic media if the applicable revenue procedures provide a machine-readable paper form. If no such machine-readable paper form is provided, the issuer may submit such information on paper form that is not machine readable. The Commissioner may waive the requirement that information be submitted on magnetic media if hardship is shown on the issuer's application. The report must include the following information:

(A) For each issue of qualified mortgage bonds and qualified veterans' mortgage bonds—

(*1*) The name, address, and TIN of the issuer,

(*2*) The date of issue, and

(*3*) The face amount of the issue; and

(B) For each beneficiary of the proceeds of the issue (*i.e.*, each recipient of a mortgage provided with the proceeds of the issue)—

(*1*) The name and TIN of the beneficiary,

(*2*) The date, amount, and term of the mortgage,

(*3*) The effective interest rate of the mortgage (as defined in § 6a.103A–2(i)(2)(ii)),

(*4*) Whether the mortgage is a qualified home improvement loan or a qualified rehabilitation loan (as defined in § 6a.103A–2(b) (9) and (10)),

(*5*) Whether the residence being financed is a previously occupied residence,

(*6*) Whether the residence being financed is a targeted area residence (as defined in § 6a.103A–2(b)(3)),

(*7*) Whether the residence being financed is a one-, two-, three-, or four-family residence,

(*8*) The acquisition cost (as defined in § 6a.103A–2(b)(8)) of the residence being financed,

(*9*) The average area purchase price applicable to such residence (as defined in § 6a.103A–2(f)(3) without adjustments for the number of residences),

(*10*) Whether the mortgagor had a present ownership interest in a principal residence at any time during the 3-year period prior to the date on which the mortgage is executed,

(*11*) The number of the mortgagor's family members that occupy the residence being financed,

(*12*) The adjusted income (as defined in § 1.167 (k)–3 (b)(3)) of the mortgagor's family for the previous calendar year, and

(*13*) The adjusted income of the mortgagor's family for the previous calendar year as a percentage of the median income for the area, as determined under section 8 of the United States Housing Act of 1937, as amended, with adjustments for smaller and larger families (or, in the event programs under section 8(f) of the Housing Act of 1937, as amended, are terminated, the applicable method of determining adjusted income and median income in effect immediately prior to the date of such termination).

(3) *Time for filing.* (i) The statement required by subparagraph (2)(i) of this paragraph shall be filed not later than the 15th day of the 2nd calendar month after the close of the calendar quarter in which the obligation is issued. The statement may be filed at any time before such date but must be complete based on facts and reasonable expectations as of the date of issue. The statement need not be amended to report information learned subsequent to the date of issue.

(ii) The report required by subparagraph (2)(ii) of this paragraph (relating to use of proceeds) shall be filed by February 15th of the year following the calendar year to which the report relates.

(iii) The Commissioner may grant an extension of time for the filing of a report required by subparagraph (2) if there is reasonable cause for the failure to file such report in a timely fashion.

(iv) An issue of qualified veterans' mortgage bonds issued after July 18, 1984, and prior to January 1, 1985, will be treated as satisfying the information reporting requirement of this paragraph if a Form 8038 with respect to the issue is properly filed not later than February 15, 1985; the report described in paragraph (k)(2)(ii) need not be filed with respect to such issues.

(4) *Place for filing.* Form 8038 and the report required by paragraph (k)(2)(ii) are to be filed at the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

(5) *Definitions.* (i) See the regulations under section 103(l) for the definitions of the terms "date of issue", "maturity", and "term of an issue".

(ii) The term "family" means two or more persons related by blood, marriage, or operation of law.

(l) *Policy statement*—(1) *In general.* (i) For obligations issued after December 31, 1984, an issue meets the requirements of this paragraph only if the applicable elected representative of the governmental unit which is the issuer (or on behalf of which the issuing authority is empowered to issue qualified mortgage bonds) has published (after a public hearing following reasonable public notice) the report described in paragraph (l)(3) by the last day of the year preceding the year in which such issue is issued and a copy of such report has been submitted to the Commissioner on or before such last day. The Commissioner may grant an extension of time for publishing and filing the report if there is reasonable cause for the failure to publish and file such report in a timely fashion. The requirements of this paragraph will be treated as met if the issuer substantially satisfies such requirements.

(ii) With respect to reports required by paragraph (l)(1)(i) to be published and submitted to the Commissioner not later than December 31, 1984, the Commissioner has determined that there is reasonable cause for the failure to publish and file such reports in a timely fashion; such a report will be considered published and filed in a timely fashion if, not later than March 11, 1985, the report is published (after a public hearing following reasonable public notice) and a copy is submitted to the Commissioner.

(2) *Definitions and special rules.* (i) In the case of an issuer that issues qualified mortgage bonds on behalf of two or more governmental units, a single report may be filed provided that such report is signed (A) by the applicable elected representative of each governmental unit on whose behalf

obligations have been issued during any preceding calendar year or (B) by the Governor of the State in which the issuer is located.

(ii) See section 103(k)(2)(E) and the regulations thereunder for the definition of the term "applicable elected representative".

(iii) In the case of qualified mortgage bonds issued by, or on behalf of, a governmental unit that did not—

(A) Issue, or have issued on its behalf, qualified mortgage bonds during the preceding calendar year, and

(B) Reasonably expect during the preceding calendar year to issue (or have issued on its behalf) qualified mortgage bonds during the current calendar year,

the requirements of this paragraph will be treated as met if the applicable governmental unit which is the issuer (or on behalf of which the issuing authority is empowered to issue qualified mortgage bonds) has published (after a public hearing following reasonable public notice) the report described in paragraph (l)(3) prior to the issuance of any qualified mortgage bonds and a copy of such report has been submitted to the Commissioner prior to such issuance.

(iv) For purposes of this paragraph a report will be considered to be "published" when the applicable elected representative of the governmental unit has made copies of the report available for distribution to the public. Reasonable public notice of the manner in which copies of the report may be obtained must be provided; such notice may be included as part of the public notice required by paragraph (l)(4).

(3) *Report.* (i) A report is described in this subparagraph only if it contains the following:

(A) The issuer's name, TIN, and the title "Policy Report Under Section 103A" stated on the cover page of the report;

(B) A specific statement of the policies and goals with respect to housing, development, and low-income housing assistance which the issuer is to follow in issuing qualified mortgage bonds and mortgage credit certificates, including a statement as to—

(*1*) With respect to housing policies and goals, (*i*) whether the proceeds will be used to provide financing for the acquisition of residences, to provide qualified home improvement loans, or to provide qualified rehabilitation loans; (*ii*) whether all or a portion of the proceeds will be targeted to new, existing, or any other particular class or type of housing; (*iii*) how the existence of a need or absence of a need for such targeting has been determined; (*iv*) the method by which the proceeds will be targeted; (*v*) any other pertinent information relating to the issuer's housing policies; and (*vi*) how the housing policies relate to the issuer's development and low-income housing assistance policies;

(*2*) With respect to development policies and goals, (*i*) whether all or a portion of the proceeds will be targeted to specific areas (including targeted areas as described in § 6a.103A–2(b)(3)); (*ii*) a description of the areas to which the proceeds will be targeted; (*iii*) the reasons for selecting such areas; (*iv*) whether proceeds targeted to each area are to be used to finance redevelopment of existing housing or new construction; (*v*) any other pertinent information relating to the issuer's development policies; and (*vi*) how the development policies relate to the issuer's housing and low-income housing assistance policies; and

(*3*) With respect to low-income housing assistance policies and goals, (*i*) whether all or a portion of the proceeds will be targeted to low-income (*i.e.*, 50 percent of median income), moderate-income (*i.e.*, 80 percent of median income), and median income (*i.e.*, 100 percent of median income), families; (*ii*) the method by which the proceeds will be targeted to such families; (*iii*) any other pertinent information relating to the issuer's low-income housing assistance policies; and (*iv*) how the low-income housing assistance policies relate to the issuer's housing and development policies (see § 6a.103A–2(k)(5) for the definition of the term "family" and § 1.167(k)–3(b)(2) for the definition of the term "median income");

(C) An assessment of the compliance of the governmental unit or issuing authority during the twelve-month period ending with the date of the report (as defined in paragraph (l)(3)(ii)) with the statement of housing, development, and low-income housing assistance policies with respect to qualified mortgage bonds and mortgage credit certificates that were set forth in the report, if any, published in the preceding year with respect to such governmental unit, including a statement as to whether the governmental unit or issuing authority successfully implemented its policies and achieved its goals and, if not, an analysis of the reasons for such failure;

(D) An assessment of the compliance of the governmental unit or issuing authority during the twelve-month period ending with the date of the report (as defined in paragraph (l)(3)(ii)) with the intent of Congress that State and local governments are expected to use their authority to issue qualified mortgage bonds and mortgage credit certificates to the greatest extent feasible (taking into account prevailing interest rates and conditions in the housing market) to assist lower income families to afford home ownership before assisting higher income families, including a description of (*1*) the method used by the governmental unit or issuing authority to distribute proceeds, (*2*) whether and how that method enabled the governmental unit or issuing authority to assist lower income families before higher income families, and (*3*) any income levels that have been defined and used by the governmental unit or issuing authority in connection with distribution of the proceeds (no specific definition of lower income and higher income is imposed on governmental units or issuing authorities); and

(E) A summary of the comments on the proposed report received at the public hearing required by subparagraph (4).

(ii) For purposes of the assessments of compliance required by paragraph (l)(3)(i) (C) and (D) to be included in the report, the "date of the report" means the last day of the twelve-month period for which such assessments of compliance are to be made. The date of the report must be the last day of September, October, or November; an issuer must use the same date of the report each year. The date of the report is not, for this purpose, the date that the report is published or filed.

(4) *Public hearing.* The public hearing required by subparagraph (1) of this paragraph means a forum providing a reasonable opportunity for interested individuals to express their views, both orally and in writing, on the report that the applicable representative proposes to publish to satisfy the requirements of this paragraph (l). In general, a governmental unit may select its own procedure for the hearing, provided that interested individuals have a reasonable opportunity to express their views. Thus, it may impose reasonable requirements on persons who wish to participate in the hearing, such as a requirement that persons desiring to speak at the hearing so request in writing at least 24 hours before the hearing or that they limit their oral remarks to 10 minutes. For purposes of this public hearing requirement, it is not necessary that the applicable elected representative who will publish the report be present at the hearing, that a report on the hearing be submitted to that official, or that State administrative procedural requirements for public hearings in general be observed.

However, compliance with such State procedural requirements (except those at variance with a specific requirement set forth in this paragraph) will generally assure that the hearing satisfies the requirements of this paragraph. The hearing may be conducted by any individual appointed or employed to perform such function by the governmental unit, its agencies, or by the issuer. Thus, for example, for a report to be issued by an issuing authority that acts on behalf of a county, the hearing may be conducted by the issuing authority, the county, or an appointee or employee of either.

(5) *Reasonable public notice.* (i) The reasonable public notice required by subparagraph (1) of this paragraph means published notice which is reasonably designed to inform residents of the geographical area within the jurisdiction of the governmental unit that will publish the report. The notice must state the time and place for the hearing and contain the information required by paragraph (l)(5)(ii) of this section. Notice is presumed reasonable if published no fewer than 14 days before the hearing. Notice is presumed reasonably designed to inform affected residents only if published in one or more newspapers of general circulation available to residents of that locality or if announced by radio or television broadcast to those residents.

(ii) The notice of hearing described in this subparagraph must state—

(A) The time and place for the hearing,

(B) Any applicable limitations regarding participation in such hearing,

(C) The manner in which affected residents may obtain copies of the proposed report prior to the hearing, and

(D) A description, in brief and summary terms, of the contents of the proposed report.

(6) *Procedure for public hearings of multiple jurisdiction issuers.* In the case of an issuer that issues qualified mortgage bonds on behalf of two or more governmental units, each governmental unit on whose behalf qualified mortgage bonds were issued during the preceding calendar year and each governmental unit on whose behalf the issuer reasonably expects to issue qualified mortgage bonds during the succeeding calendar year must hold a public hearing following reasonable public notice prior to the publication of the report required by this paragraph. A multiple jurisdiction issuer may hold a combined hearing as long as the combined hearing is a joint undertaking that provides all residents of the participating governmental units (*i.e.*, each governmental unit on whose behalf qualified mortgage bonds were issued by the authority and each governmental unit on whose behalf the authority reasonably expects to issue qualified mortgage bonds during the succeeding calendar year) a reasonable opportunity to be heard. The location of any combined hearing is presumed to provide a reasonable opportunity for all affected residents to be heard if it is no farther than 100 miles from the seat of government of each participating governmental unit beyond whose geographic jurisdiction the hearing is conducted.

(7) *Place for filing.* The report is to be filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

(m) *State certification requirements*—(1) *In general.* An issue meets the requirements of this paragraph only if the certification requirement of this paragraph is substantially satisfied. The requirements of this paragraph apply to obligations issued after December 31, 1984.

(2) *Certification.* (i) An issue satisfies the requirements of section 103A(j)(4) and this subparagraph only if the State official designated by law (or, if there is no State official, the Governor) certifies, following a request for such certification by the issuer, that the issue meets the requirements of section 103A(g) and § 6a.103A–2(g) (relating to volume limitation). In the case of any constitutional home rule city, the certification shall be made by the chief executive officer of the city.

(ii) The certifying official need not perform an independent investigation in order to determine whether the issue meets the requirements of section 103A(g). In determining the aggregate amount of qualified mortgage bonds issued by an issuer during a calendar year, the certifying official may rely on copies of the reports submitted by the issuer pursuant to section 103A(j)(3) for such year and copies of any elections made pursuant to section 25(c)(2) not to issue qualified mortgage bonds, together with an affidavit executed by an officer of the issuer responsible for issuing the bonds stating that the issuer did not issue any other qualified mortgage bonds during the calendar year, the amount, if any, of the issuer's market limitation that it surrendered to other issuing authorities during the calendar year, and that it did not make any other elections not to issue qualified mortgage bonds. If, based on such information, the certifying official determines that the issue will not exceed the issuer's market limitation for the year, the official may certify that the issue meets the requirements of section 103A(g).

(3) *Special rule.* If 30 days elapse after the issuer files a proper request for the certification described in paragraph (m)(2) and the issuer has not received from the State official designated by law (or, if there is no State official, the Governor) certification that the issue meets the requirements of section 103A(g) and § 6a.103A–2(g) or, in the alternative, a statement that the issue does not meet such requirements, the issuer may, instead, submit an affidavit executed by an officer of the issuer responsible for issuing the bonds stating that—

(i) The issue meets the requirements of section 103A(g) and § 6a.103A–2(g),

(ii) At least 30 days before the execution of the affidavit the issuer filed a proper request for the certification described in paragraph (m)(2), and

(iii) The State official designated by law (or, if there is no State official, the Governor) as not provided the certification described in paragraph (m)(2) of this section.

For purposes of this paragraph, a request for certification is proper if the request includes the reports and affidavits described in paragraph (m)(2)(ii) of this section.

(4) *Filing.* The certification (or affidavit) required by this paragraph shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The certification (or affidavit) shall be submitted with the Form 8038 required to be filed by section 103A(j)(3) and paragraph (k) of this § 6a.103A–2. The Commissioner may grant an extension of time for filing the certification (or affidavit) if there is a reasonable cause for the failure to file such statement in a timely fashion.

(5) *Effect of certification.* The fact that an issuer obtains the certification (or affidavit) described in this paragraph does not ensure that the requirements of paragraph (g) of this section are met. Obligations that do not meet the requirements of paragraph (g) of this section are not described in section 103(a).

[Approved by the Office of Management and Budget under OMB Control Number 1545–0720]

Par. 2. Section 6a.103A–3 is amended by revising paragraphs (b) and (c) and by adding new paragraphs (g) and (h). These revised and added provisions read as follows:

§ 6a.103A–3 Qualified veterans' mortgage bonds.

* * * * *

(b) *Qualified veterans' mortgage bond.* (1) With respect to obligations issued prior to July 19, 1984, the term "qualified veterans' mortgage bond" means any issue of obligations—

(i) Which meets the requirements of § 6a.103A–1, § 6a.103A–2(j) (1) and (2), and this section;

(ii) Substantially all of the proceeds of which are to be used to provide financing for single-family, owner-occupied residences (which meet the requirements of § 6a.103A–1(b)(6) and § 6a.103A–2(d)) for veterans; and

(iii) Payment of the principal and interest on which is secured by a pledge of the full faith and credit of the issuing State.

A qualified veterans' mortgage bond does not include any bond that is an industrial development bond under section 103(b).

(2) With respect to obligations issued after July 18, 1984, the term "qualified veterans' mortgage bond" means any issue of obligations—

(i) Which meets the requirements of § 6.103A–1, § 6a.103A–2(d) (relating to residence requirements), (j) (1) and (2) (relating to new mortgage requirement), and (k) (relating to information reporting requirement), and this section;

(ii) Substantially all of the proceeds of which are to be used to provide financing for qualified veterans; and

(iii) Payment of the principal and interest on which is secured by a pledge of the full faith and credit of the issuing State.

A qualified veterans' mortgage bond does not include any bond that is an industrial development bond under section 103(b).

(c) *Qualified veteran.* (1) An issue meets the requirements of this paragraph only if each of the mortgagors to whom owner financing is provided is a qualified veteran.

(2) With respect to obligations issued prior to July 19, 1984, the term "qualified veteran" means any veteran.

(3) With respect to obligations issued after July 18, 1984, the term "qualified veteran" means any veteran who—

(i) Served on active duty at some time before January 1, 1977, and

(ii) Applied for financing before the later of—

(A) The date 30 years after the date on which such veteran left active service, or

(B) January 1, 1985.

(4) The term "veteran" shall have the same meaning as in 38 U.S.C. 101(2), that is, a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

* * * * *

(g) *Volume limitation*—(1) *In general.* In the case of obligations issued after June 22, 1984, an issue meets the requirements of this paragraph only if the aggregate amount of obligations issued pursuant thereto, when added to the aggregate amount of qualified veterans' mortgage bonds previously issued by the State during the calendar year, does not exceed the State veterans limit for such calendar year. In determining the aggregate amount of qualified veterans' mortgage bonds issued in calendar year 1984, obligations issued prior to June 23, 1984, shall not be taken into account.

(2) *State veterans limit.* (i) The State veterans limit for any State is the amount equal to—

(A) The aggregate amount of qualified veterans' mortgage bonds issued by the State during the period beginning on January 1, 1979, and ending on June 22, 1984 (not including the amount of any qualified veterans' mortgage bonds actually issued during the calendar year, or the applicable portion of 1984, in such period for which the amount of such bonds was the lowest), divided by

(B) The number (not to exceed 5) of calendar years after 1978 and before 1985 during which the State issued qualified veterans' mortgage bonds.

In determining the number of calendar years after 1978 and before 1985 during which the State issued qualified veterans' mortgage bonds, any qualified veterans' mortgage bonds issued after June 22, 1984, shall not be taken into account. A State that did not issue qualified veterans' mortgage bonds during the period beginning on January 1, 1979, and ending on June 22, 1984, may not issue qualified veterans' mortgage bonds after June 22, 1984.

(ii) In the case of any obligation which has a term of 1 year or less and which was issued to provide financing for property taxes, the amount taken into account under this paragraph with respect to such obligation shall be 1/15 of its principal amount.

(3) *Examples.* The following examples illustrate the provisions of this paragraph:

Example (1). State R issued the following issues of qualified veterans' mortgage bonds: a $200 million issue on March 31, 1979, a $150 million issue on May 1, 1980, a $75 million issue on September 1, 1981, a $200 million issue on June 5, 1982, a $125 million issue on March 1, 1983, a $60 million issue on April 1, 1984, and a $100 million issue on September 1, 1984. R issued no other issues of qualified veterans' mortgage bonds during the period beginning January 1, 1979, and ending on December 31, 1984. The aggregate amount of qualified veterans' mortgage bonds issued during the period January 1, 1984, through June 22, 1984 ($60 million), is not taken into account in determining R's State veterans limit because that is the lowest aggregate amount of qualified veterans' mortgage bonds issued during the calendar year or the applicable portion of 1984, in the period beginning on January 1, 1979, and ending on June 22, 1984. Thus, R's State veterans limit is $150 million ($750 million (which is the sum of $200 million, $150 million, $75 million, $200 million, and $125 million) divided by 5). The September 1, 1984, issue is not included in determinig the State veterans limit because that issue was issued after June 22, 1984. The September 1, 1984, issue of qualified veterans' mortgage bonds meets the requirements of § 6a. 103A–3 (g) since the aggregate amount of qualified veterans' mortgage bonds issued in calendar year 1984 (not including obligations issued prior to June 23, 1984), does not exceed the State veterans limit.

Example (2). State S issued a $100 million issue of qualified veterans' mortgage bonds on March 31, 1984. S issued no other issues of qualified veterans' mortgage bonds during the period beginning on January 1, 1979, and ending on June 22, 1984. The aggregate amount of qualified veterans' mortgage bonds issued in the calendar year, or the applicable portion of 1984, in the period January 1, 1979, through June 22, 1984, for which the amount of bonds was the lowest is zero. Thus, the State veterans limit for S is $100 million (($100 million minus $0) divided by 1).

(h) *Good faith compliance efforts*—(1) *Mortgage eligibility requirements.* An issue of qualified veterans' mortgage bonds issued after July 18, 1984, which fails to meet the requirements of section 103A(o)(1), § 6a.103A–2(d) relating to residence requirements), and § 6a.103A–2(j) (1) and (2) (relating to new mortgage requirements) shall be treated as meeting such requirements if each of the following provisions is complied with:

(i) The issuer in good faith attempted to meet all such requirements before the mortgages were executed. Good faith requires that the trust indenture, participation agreements with loan originators, and other relevant instruments contain restrictions that permit the financing of residences only in accordance with such requirements. in addition, the issuer must establish reasonable procedures to ensure compliance with such requirements. Such procedures include reasonable investigations by the issuer to satisfy such requirements.

(ii) Ninety-five percent or more of the lendable proceeds (as defined in § 6a.103A–2(b)(1)) that were devoted to owner-financing were devoted to residences with respect to which, at the time the mortgages were executed, all such requirements were met. In

determining whether a person is a qualified veteran the issuer may rely on copies of the mortgagor's certificate of discharge indicating that the mortgagor served on active duty at some time before January 1, 1977, and stating the date on which the mortgagor left active service provided that neither the issuer nor its agent knows or has reason to believe that such affidavit is false. Where a particular mortgage fails to meet more than one of these requirements, the amount of the mortgage will be taken into account only once in determining whether the 95-percent requirement is met. However, all of the defects in the mortgage must be corrected pursuant to subdivision (iii).

(iii) Any failure to meet such requirements is corrected within a reasonable period after such failure is discovered. For example, failures can be corrected by calling the nonqualifying mortgage or by replacing the nonqualifying mortgage with a qualifying mortgage.

(2) *Nonmortgage eligibility requirements.* An issue of qualified veterans' mortgage bonds issued after July 18, 1984, which fails to meet the requirements of paragraph (g) of this section shall be treated as meeting such requirements if each of the requirements of § 6a.103A–2(c)(2) (i) and (ii) is met.

(Approved by the Office of Management and Budget under OMB Control Number 1545–0720)

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

This Treasury decision is issued under the authority contained in section 103A(j) (3) and (4) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 901, 26 U.S.C. 103A(j) (3) and (4); 68A Stat. 917, 26 U.S.C. 7805).

Roscoe L. Egger, Jr.,
Commission of Internal Revenue

Approved: December 4, 1984.

Ronald A. Pearlman,
Acting Assistant Secretary of the Treasury.

[FR Doc. 84–32292 Filed 12–7–84; 11:36 am]
BILLING CODE 4830–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 3F2937/R702; RL–2733–2]

Pesticide Programs; Tolerances and Exemptions From Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities; Flucythrinate

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a tolerance for residues of the insecticide flucythrinate in or on the raw agricultural commodity head lettuce. This regulation to establish a maximum permissible level for residues of the insecticide in or on the commodity was requested pursuant to a petition by the American Cyanamid Co.

EFFECTIVE DATE: Effective on December 12, 1984.

ADDRESS: Written objections may be submitted to the: Hearing Clerk (A–110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Timothy Gardner, Product Manager (PM) 17, Registration Division (TS–767C), Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm 207, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703–557–2690).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of September 7, 1983 (48 FR 40432), which announced that the American Cyanamid Co., P.O. Box 400, Princeton, NJ 08540, had submitted a pesticide petition (PF 3F2937) to EPA proposing to amend 40 CFR 180.400 by establishing tolerances for the residues of the insecticide flucythrinate ((±)cyano(3-phenoxyphenyl)methyl(+)–4–difluoromethoxy)–alpha–(1-methylethyl)benzeneacetate) in or on the raw agricultural commodity head lettuce at 2.0 parts per million (ppm).

There were no comments received in response to the notice of filing. EPA issued a second notice, published in the **Federal Register** of August 4, 1984 (49 FR 30789), announcing that the petition had been amended to propose a tolerance for head lettuce at 1.0 ppm. The petition was subsequently amended again to propose the tolerance at the initial 2.0 ppm.

The data submitted in the petition and other relevant material have been evaluated. The toxicology data considered in support of the tolerance include an acute oral rat toxicity study with a median lethal dose (LD_{50}) of 81 milligrams (mg)/kilogram (kg) for male rats and 67 mg/kg for female rats; a 21-day delayed hen neurotoxicity study with a no-observed-effect level (NOEL) of 5,000 mg/kg, the highest dose tested (HDT); teratology studies (in rats and rabbits), with a NOEL of 8.0 mg/kg/day (HDT) for rats and a NOEL of 60 mg/kg/day (HDT) for rabbits; a 3-generation rat reproduction study with a NOEL of 30 ppm; 90-day subchronic rat and dog feeding studies with a NOEL of 60 ppm for rats and 150 ppm (HDT) for dogs (HDT); a 24-month rat chronic-feeding/oncogenicity study that resulted in a systemic NOEL of 60 ppm in which no oncogenic effects were noted at dosage levels of 30, 60, and 120 ppm (120 ppm being the highest dosage level tested) under the conditions of the study; and 18-month mouse oncogenic study in which no oncogenic effects were noted at dosage levels of 30, 60, and 120 ppm (120 ppm being the highest dosage level tested) under the conditions of the study; and the following mutagenicity studies: an Ames test at 1,000 micrograms (μg)/Plate (HDT) and a rat dominant-lethal test at 10.0 mg/kg (HDT), both negative.

Data considered desirable but currently lacking are a 1-year or longer dog-feeding study and a second neurotoxicity study in hens at higher dosage levels.

Actions being taken to obtain the lacking information are as follows:

1. The 1-year or longer dog study is in progress and will be submitted to the Agency in the fourth quarter of 1984.

2. Rationale as to why the neurotoxicity study need not be repeated has been submitted and is undergoing review. If the Agency does not accept the rationale as to why the study should not be repeated, the company will be required to repeat the 21-day delayed neurotoxicity study in hens at higher dose levels and submit the results to the Agency.

The acceptable daily intake (ADI) is calculated to be 0.0150 mg/kg/day based on the 3-generation rat reproduction study and its NOEL of 30 ppm (1.50 mg/kg/day) using a 100-fold safety factor. The maximum permissible intake (MPI) is calculated to be 0.900 mg/day for a 60-kg person. Published and pending tolerances result in a theoretical maximum residue contribution (TMRC) of 0.1003 mg/day based on 1.5 kg diet and utilize 11.15

percent of the ADI. The establishment of these tolerances will increase the TMRC to 0.1396 mg/day resulting in a total utilization of 15.51 percent of the ADI.

The nature of the residues is adequately understood for this tolerance. An adequate analytical method, gas chromatography, is available for enforcement purposes. Because lettuce is not a significant feed item, there will be no problem of secondary residues in meat, milk, poultry, and eggs. There are currently no regulatory actions pending against continued registration of this pesticide, and there are no other relevant considerations in establishing this tolerance.

The pesticide is considered useful for the purpose for which the tolerance is sought. Based on the information cited above, the Agency has determined that the establishment of the tolerance for residues of the insecticide flucythrinate in or on the commodity will protect the public health. Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this notice in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346(a)(e)))

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: November 29, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

PART 180—[AMENDED]

Therefore, 40 CFR 180.400 is amended by adding, and alphabetically inserting, the raw agricultural commodity, to read as follows:

§ 180.400 Flucythrinate; tolerances for residues.

* * * * *

Commodities	Parts per million
* * * * *	
Lettuce, head	2.0
* * * * *	

[FR Doc. 84-31976 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 180

[PP 9E2259, 3E2924, 3E2886/R718 PH-FRL 2735-3]

Tolerances and Exemptions From Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities; Certain Pesticide Chemicals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: These rules establish tolerances for residues of certain pesticide chemicals in or on various raw agricultural commodities. These regulations to establish maximum permissible levels for residues of the pesticides in or on the commodities were requested in petitions by the Interregional Research Project No. 4 (IR–4).

EFFECTIVE DATE: Effective on December 12, 1984.

ADDRESS: Written objections, identified by the document control number [PP 9E2259, 3E2924, 3E2886/R718] may be submitted to the: Hearing Clerk (A–110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Donald Stubbs, Emergency Response and Minor Use Section (TS–767C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 716B, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703–557–1192).

SUPPLEMENTARY INFORMATION: EPA issued two proposed rules, published in the **Federal Register** of October 24, 1984, which announced that the Interregional Research Project No. 4 (IR–4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, submitted the following pesticide petitions (PP) on behalf of Dr. Robert Kupelian, National Director, IR–4 Project and the Agricultural Experiment Stations (AES) of the given states proposing to amend 40 CFR Part 180 by establishing tolerances for residues of certain pesticide chemicals in or on various raw agricultural commodities in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

1. *PP 9E2259, 3E2924.* Proposed (49 FR 42755) amending 40 CFR 180.294 on behalf of the AES of Georgia and North Carolina (PP 9E2259) and AES of Arkansas, California, Michigan, New York, and Oregon (PP 3E2924) by revising the commodity identification "turnip tops" to "turnip greens" and increasing the tolerance from "0.2 ppm" to "6.0 ppm" (PP 9E2259); and increasing the tolerance for Brussels sprouts from "0.2 ppm" to "15.0 ppm" (PP 3E2924) for the combined residues of the fungicide benomyl (methyl 1-(butylcarbamoyl)2-benzimidazolecarbamate) and its metabolites containing the benzimidazole moiety (calculated as benomyl).

2. *PP 3E2886.* Proposed (49 FR 42753) amending 40 CFR 180.342 on behalf of the AES of Delaware, Maryland, Michigan, and Pennsylvania and the U.S. Department of Agriculture by establishing tolerances for the combined residues of the insecticide chlorpyrifos [*O,O*-diethyl *O*(3,5,6-trichloro-2-pyridyl) phosphorothioate) and its metabolite 3,5,6-trichloro-2-pyridinol in or on the raw agricultural commodity mushrooms at 0.1 ppm.

There were no comments nor requests for referral to an advisory committee received in response to the proposed rules.

The toxicological data and other relevant material have been evaluated and discussed in the proposed rules.

The pesticides are considered useful for the purpose for which the tolerances are sought. The Agency has determined that the establishment of the tolerances will protect the public health and are established as set forth below.

Any person adversely affected by these regulations may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should

specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

(Sec. 408(d)(2), 68 Stat. 512 (21 U.S.C. 346a(d)(2)))

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: December 5, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. In § 180.294, by increasing the established tolerance for Brussels sprouts, deleting the tolerance for turnip tops, and adding and alphabetically inserting the raw agricultural commodity turnip greens to read as follows:

§ 180.294 Benomyl; tolerances for residues.

* * * * *

Commodities	Parts per million
* * * * *	
Brussels sprouts	15.0
* * * * *	
Turnip greens	6.0
Turnip tops	0.2 [Removed]
* * * * *	

2. In § 180.342, by adding and alphabetically inserting the raw agricultural commodity mushrooms to read as follows:

§ 180.342 Chlorpyrifos; tolerances for residues.

* * * * *

Commodities	Parts per million
* * * * *	
Mushrooms	0.1
* * * * *	

[FR Doc. 84-32349 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

40 CFR PART 271

[AW-6-FRL-2735-5]

Texas; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: EPA.

ACTION: Notice of Final Determination on Texas' application for Final Authorization.

SUMMARY: Texas has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) has reviewed Texas' application and has reached a final determination that Texas' Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program in Texas.

EFFECTIVE DATE: Final Authorization for Texas, for purposes of judicial review, shall be effective December 26, 1984.

FOR FURTHER INFORMATION CONTACT: H. J. Parr, State Programs Section (6AW-HP), Hazardous Materials Branch, U.S. Environmental Protection Agency, Region VI, 1201 Elm St., Dallas, Texas 75270, (214) 767-2645.

SUPPLEMENTARY INFORMATION: Section 3006 of RCRA allows the EPA to authorize State hazardous waste management programs to operate in the state in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other state programs and (3) provide for adequate enforcement. (Section 3006(b) of RCRA, 42 U.S.C. 6226(b)).

On June 22, 1984, Texas submitted a complete application to obtain Final Authorization to administer a RCRA program. On September 10, 1984, EPA published a tentative decision announcing its intent to grant Texas Final Authorization.

Further background on the tentative decision appears at 49 FR 35608, September 10, 1984.

Along with the tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application and EPA's tentative determination. The public hearing was held on October 10, 1984, at 7:30 p.m. in Austin, Texas.

The State of Texas received Phase I, Interim Authorization on December 24, 1980, Phase II, Components A and B Interim Authorization on March 23, 1982, and Component C of Phase II Interim Authorization on September 1, 1983. Therefore, there will be no change in the status of permits or permitting authority on the effective date of this Final Determination.

Texas is not authorized by the Federal government to operate the RCRA program on Indian Lands and this authority will remain with EPA.

Responsiveness summary

In addition to the **Federal Register** notice of tentative determination cited above, EPA publicized the notice of determination, the availability of the State's application for review and comment, and the public hearing by providing for publication of the notice in enough newspapers of general circulation to ensure State wide coverage and by mailing notices to persons on the State and EPA mailing lists. Approximately one (1) week prior to the hearing EPA mailed a follow-up notice to the major media outlets in the State.

By the close of the public hearing, EPA received comments from ten (10) persons on the Tentative Decision to grant Final Authorization to Texas. Comments are summarized and responded to below. The comments are grouped, to the extent possible, according to common areas for ease of response. This grouping is not meant to indicate any special significance or lack of significance of any comment. All comments have been carefully considered in reaching the decision to grant Final Authorization to the State of Texas.

1. *Comment:* Four commenters support, without reservation, authorization of the Texas program. A variety of reasons were given for this support including that the State has a long history of successfully regulating hazardous waste, that the State has the staff, training, and experience to administer the program, and that State administration of the program is more economical than federal administration.

Response: EPA appreciates these comments and has certainly taken these factors into consideration in reaching a decision. The primary standard against which EPA measures the Texas program are those set out in Section 3006(b) of RCRA; namely, that the State program is equivalent to the federal program, that the State program is consistent with the Federal or state programs applicable in other states, and that the State program provides adequate enforcement of compliance with program requirements.

Additionally, the State must provide for the notices and hearing required by Section 7004(b)(2) of RCRA. Implementation of these requirements are found in 40 CFR Parts 271 and 124 of the federal regulations, particularly 40 CFR 271.4, CFR 271.16, 40 CFR 124.10 and 40 CFR 124.12.

2. *Comment:* One commenter opposes the authorization of Texas because of alleged conditions enumerated at a specific facility. The commenter stated that there are unauthorized discharges from the facility, that containment dikes are not sufficient to contain extraordinary rainfall events, that there are strong odors, and that there is groundwater contamination at the site and possibly off-site that have not been properly addressed.The commenter feels that the State has not done an adequate job of regulating this facility, that it is not inspected frequently enough, that it should be shut down or at the very least penalized, and it should not accept further wastes.

Response: EPA appreciates and solicits comments concerning the administration of a State's program either as relating to an individual facility or as to its effectiveness throughout the State. EPA considers these comments both in reaching the decision to grant authorization and in the continuing process of overviewing the authorized State's implementation of its program. Specific complaints regarding an individual facility are investigated and responses are provided directly to the complaintant. EPA feels that the authorization process is not the proper forum for responding to complaints regarding individual facilities except as the complaints may reflect on the State's overall implementation of the authorized program.

EPA is and has been aware of the problems at the facility mentioned by the commenter. The State has been engaged in enforcement actions with the facility since 1980, both before receiving Interim Authorization and under the Interim Authorized program. EPA has investigated the problems that exist at the facility and the State's actions to address these problems. EPA feels that the State has taken and is continuing to take appropriate actions regarding the facility.

In any event, EPA retains authority, under Sections 3008 and 7003 of RCRA, to take enforcement actions independent of an authorized State against this facility, where warranted. Additionally, any person may, under Section 7002 of RCRA, commence a civil action on his own behalf.

EPA, furthermore, is concerned that authorized State programs are operated according to the requirements of RCRA. EPA maintains constant oversight of State programs to ensure that they are properly operated. If EPA finds that a State program is not being properly operated, action is instituted pursuant to 40 CFR 271.22 and 40 CFR 271.23 to withdraw the State's authorization and implement the federal program in the State.

3. *Comment:* One commenter opposes authorization because the State may be involved in political manipulation of its water and waste programs to such a degree that the public has lost confidence in the programs.

Response: EPA appreciates the comment and is aware that a program as complex and critical as the hazardous waste program may be subject to political pressures at all levels. EPA and the States have addressed the issue of impacts by encouraging wide ranging public input into the development and implementation of the program, by basing regulations and standards on technical considerations, and by striving to maintain focus on the ultimate goal of protecting public health and the environment.

While credit must be given to the commenter's observation, EPA does not have evidence that the confidence of the public in the State of Texas' program has been shaken by political manipulations.

4. *Comment:* One commenter supports authorization with the observation that there appears to be confusion among State agencies regarding the exemption of oil and gas waste from being regulated as a hazardous waste. The commenter asserts that the Texas Department of Water Resources often attempts to regulate wastes which should be exempt as hazardous wastes.

Response: EPA has found that the Texas universe of hazardous waste is equivalent to the federal universe. Section 3009 of RCRA allows States to have requirements more stringent than federal requirements. Therefore, so long as the Texas universe of hazardous wastes includes at least those wastes included in the federal universe, EPA considers that aspect of the State program to be equivalent to the federal program. EPA recognizes that guidance is not yet available which would resolve the scope of the oil and gas exemption. When EPA does complete the study mandated by Section 8002(m) of RCRA and clearly defines how oil and gas will be regulated, this information will be provided to the State.

5. One commenter supported authorization with reservations. The commenter raised several concerns which are summarized below and responded to individually. The commenter did not see the concerns as so serious a problem to prevent Final Authorization but does see them as cause for serious doubt that Texas is complying with the spirit of the law.

Comment: The commenter doubts that the agencies have adequate resources to carry out their responsibilities.

Response: EPA and the State are committed to carrying out a quality RCRA program in Texas. EPA does not require a State to have a specific amount of resources in order to be authorized. A State, though, must have sufficient resources to carry out its responsibilities. EPA is concerned that Texas, and all States, have the resources and capabilities to implement the program. Resource needs and requirements are, as the commenter points out, subject to State Legislative constraints.

EPA has found that Texas has met its commitments under Interim Authorization. Changing emphases and increasing pressures, though, may place burdens on the State program not anticipated when the current workload needs were projected. Until the State can adjust its resources to meet additional demands and altered emphases, EPA is prepared, if necessary, to assist the State in meeting its commitments. However, if the State fails to maintain a program in compliance with Section 3006(b) of RCRA, EPA will institute proceedings pursuant to 40 CFR 271.22 and 40 CFR 271.23 to withdraw the authorization and implement the federal program in the State.

Comment: Another concern is that the Texas Department of Water Resources and the Texas Department of Health do not have authority to assess administrative penalties to achieve compliance.

Response: Requirements for authorization found in 40 CFR 271.16(a)(3) requires that a State have the authority "To assess *or* sue to recover in court civil penalties . . ." (Emphasis added). Therefore, authority to assess administrative penalties is not necessary in order to receive Final Authorization as long as the agencies have authority to sue in court for penalties.

EPA however, does feel that the ability to assess administrative penalties is a major tool which can enhance the states' enforcement capabilities. EPA has urged all states to

seek such authority from their Legislatures if they do not have it. EPA, however, cannot deny or delay authorization because of such lack of authority.

Comment: Another concern is that State enforcement efforts are still less than adequate.

Response: EPA has found that nationwide enforcement efforts have been less productive than would be expected. In an effort to improve enforcement, EPA has redoubled efforts to improve capabilities including developing aggressive enforcement procedures and entering into Memoranda of Understanding (MOU) with the states which spell out the explicit responsibilities of the states and EPA with regard to enforcement and oversight.

Both TDWR and TDH have committed to adopting EPA's aggressive enforcement procedures and have entered into MOU's with EPA.

These documents are designed to provide an aggressive response to instances of non-compliance which serve both as a deterrent to future non-compliance and serve to return the violator to compliance at the earliest possible moment. At any rate, should the State fail to provide adequate enforcement, EPA is prepared to take independent enforcement actions and to institute withdrawal procedures and implement the federal program in the State.

Comment: The commenter also expressed a concern that additional personnel may be needed to process permits.

Response: EPA has had serious concerns over TDWR's ability to provide timely processing of permit application, given the large number of permits that must be processed within a short time. EPA feels that it is imperative that RCRA permits be issued as rapidly as possible while maintaining a quality program and issuing quality permits.

TDWR and EPA have been investigating ways to improve the time frames for processing permit applications. As the commenter suggests, additional personnel may be a way in which to provide this timely, quality process. Other avenues are available which also are being pursued. Such possibilities as contractor assistance and direct EPA assistance are examples.

The addition of personnel for permitting is under the ultimate control of the Texas Legislature. EPA, though, intends to ensure that the permitting process in all states, including Texas, proceeds expeditiously and that it will result in quality permits.

6. One Commenter opposes authorization under current conditions. The commenter had several concerns which are presented below along with responses.

Comment: The commenter asserts that small generators are left relatively unsupervised, unadvised, uninspected and at the mercy of the expensive out-of-state disposal corporations.

Response: Under present federal regulations found in 40 CFR 261.5, a person generating less than 1000 kilograms of hazardous waste per month is generally exempt from federal regulations with certain restrictions. The State of Texas has a similar exemption.

While there is no specific requirement that the State provide special programs for small quantity generators, it is usually the State's burden to deal with problems arising from the small quantity generator exemption. EPA has reviewed the Texas small quantity generator exemption and has found that it is equivalent to the federal program.

Recent amendments to RCRA will have an impact on small quantity generators. Essentially, the exemption has been lowered to 100 kilograms of hazardous waste per month. EPA is required to promulgate rules regulating small quantity generators by March 31, 1986. All persons generating 100 kilograms per month or more are required to use the Uniform National Manifest for shipments of hazardous waste after August 8, 1985. EPA will be providing additional guidance to the States and the regulated community.

Comment: Administration of the responsibilities of the Texas statute is fragmented between TDWR and TDH. TDH is further divided into the regulation of radioactive waste and hazardous waste. Such divisions lead to inefficiency and delay in the disposal of these materials. In many instances, two decisions must be made by three separate departments regarding one disposal operation. It is faster and more efficient to send waste out of State than to process if in Texas.

Response: First, under RCRA, the regulation of radioactive hazards in waste is not a subject of concern in Final Authorization because wastes are not classified or defined in terms of radioactivity.

Secondly, the division of responsibility between TDH and TSWR has been addressed many times in the past by the State and EPA. EPA is aware that there has been confusion in the past regarding jurisdiction of the two agencies. However, EPA feels that such confusion has not led to any failure to operate an acceptable program.

Comment: The State agencies have been shirking their responsibilities in providing for adequate disposal capacity. The commenter stated that 22 of 44 applicants gave up pursuit of a permit, most likely because of the prodigious documentation necessary and the endless answering of questions not relevant to the permit.

Response: EPA has reviewed the State procedures, regulations and process for permitting and found that the program is equivalent to the federal program. The federal program, and the equivalent State program, is necessarily time consuming and exact in order to ensure the protection of the public health and the environment. While EPA is concerned that there be adequate capacity to manage hazardous waste, EPA is not prepared to allow for this capacity at the expense of environmental protection. EPA feels that the State of Texas shares this concern and is proceeding as expeditiously as possible to process permits.

Comment: The commenter stated that there are insufficient guidelines for the qualifications of those individuals responsible for issuing permits.

Response: The specific qualifications of individual employees are the concern of the State of Texas. EPA is concerned that the State have a sufficient skills mix and number of personnel to carry out an effective hazardous waste program. In the Program Description submitted with the application for final authorization the State of Texas had demonstrated that there is a sufficient number of skills mix of personnel to carry out the authorized program.

Comment: In many instances the goal of the State is to publicly punish companies with unjust fines or the prospect of lengthy legal procedures which serve only to frighten others away or out of the business altogether.

Response: EPA has reviewed the State's enforcement policy and penalty policy and has determined that the State responds to violations with actions and penalties in the same manner as provided for by EPA regulations. In reviewing specific actions, EPA has found that penalty amounts are generally appropriate to address harm or risk to the public health or environment. Part of the reason for assessing penalties is to provide a deterrent to future violations by the same facility or others.

Comment: The commenter states that there is a lack of communication between the State and business

accounting, banking and insurance industries.

The commenter states that he has found the banking and insurance industries baffled as to the specific requirements needed by the Department. Banking and insurance representatives are reluctant to provide verbatim contracts as required by TDH for a permit application.

Response: EPA agrees that the financial assurance and insurance requirements of the hazardous waste program are complicated. However, they do provide critical assurances for continued protection of the public health and environment. These mechanisms provide security and resources for the abatement and correction of hazardous waste problems. Federal regulations (40 CFR Part 264 and 265) specify the instruments that must be used in providing financial assurance and insurance. These regulations even specify the wording that must be used. Therefore, verbatim contracts are necessary. These regulations and the wording of the instruments contained therein were developed with the advice and cooperation of the banking and insurance industries. The State of Texas has developed and implemented financial assurance and insurance regulations which are equivalent to the federal regulations. EPA has received no indication from the banking and insurance industries in Texas that they are "baffled" by the specific requirement of the Department. As part of the continuing overview process, EPA solicits and would welcome communications from these industries regarding Department requirements.

Comment: The commenter expresses concern over the procedures used by TDH to notify persons of meetings, hearings, etc., regarding regulatory development. As an example, the commenter cited a meeting that was held on proposed regulations that would affect the commenter and the commenter was not provided notice of the meeting.

Response: TDH public participation and notification procedures are found in the Program Description (page TDH-18) submitted with the application for Final Authorization. The agency maintains extensive mailing lists used to provide notice of hearings, meetings, etc. In the particular instance the commenter cites, it is possible that he did not receive a notice of the hearing. However, EPA feels that the State undertakes all appropriate actions possible to provide proper notification.

Comment: The commenter stated that the goals of those in charge of implementing the hazardous waste program at TDH is to decide where there is not to be hazardous waste and postpone the real decision of where to really dispose of this material.

Response: EPA has had past concerns with the amount of time taken by TDH to process permit applications. The Department, however, has improved recently and in order to assure the timely processing of all permit applications, the Department and EPA have developed, as part of the annual grant funding under Section 3011 of RCRA, a permit decision schedule.

This permit decision schedule specifies target dates for the Department to meet for each of the critical activities in the processing of permit applications. The decision schedule calls for all high priority facilities (land disposal facilities) to have draft permits issued and/or final determinations made in fiscal year 1985. Final determinations will be made on all facilities by Fiscal Year 1988.

Comment: The commenter asserts that at present the State program lacks consistency, a necessary part of a State program as dictated by federal law. This inconsistent structure impedes the disposal of waste and toxic chemicals.

Response: Section 3006(b) of RCRA requires that, in order to receive Final Authorization, a State program must be consistent with the Federal program and State programs applicable in other States. EPA has implemented this requirement in 40 CFR Part 271.4. This regulation defines a state program as being inconsistent if: (1) Any aspect of the State program unreasonably restricts, impedes, or operates as a ban on the free movement across the state border of hazardous wastes from or to other states for treatment, storage, or disposal at facilities authorized to operate under the federal or an approved state program; (2) any aspect of state law or of the state program has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the state; and (3) the State manifest system does not meet the federal requirements.

EPA has found that the Texas program complies with the requirements of 40 CFR Part 271.4.

Comment: The commenter also states that Texas does not have an effective permit tracking system as required by federal law. This causes the issue of a company's permit status to never be clearly resolved. Thus legal actions are taken as a smoke screen for the deficiencies of this tracking system.

Response: EPA is aware of no federal statutory or regulatory requirement for a permit tracking system. Such a tracking system, though, is important in providing proper management of the program. The states are encouraged and assisted by EPA in developing and implementing such a system. Both TDH and TDWR have these tracking systems in place and, in reviewing the programs, EPA has found that they are used to good advantage.

Comment: The commenter also made several suggestions regarding the consolidation of state agencies and the establishment of a Scientific Advisory Board.

Response: EPA has noted these comments and has forwarded them to the State for consideration.

7. One commenter philosophically supports the Final Authorization of the Texas program but cannot presently support an EPA decision for final delegation of the RCRA program to the State until the present deficiencies and discrepancies in the State program are addressed effectively. The commenter made several specific comments summarized and responded to below.

Comment: EPA should prepare an Environmental Impact Statement (EIS) prior to any Final Authorization of the Texas program. Such approval is a major federal action significantly affecting the quality of the human environment. A properly prepared EIS will identify those issues most crucial to Final Authorization and assist EPA and the State in designing a program that can and should be a model for the nation.

Response: EPA has determined that activities undertaken pursuant to RCRA do not require the preparation of an Environmental Impact Statement (EIS). EPA has made this determination based on the belief that these activities are undertaken in such a manner so as to ensure performance of an analysis which is the functional equivalent to the EIS requirements. The procedures EPA follows in considering a State's application for Final Authorization provide the same analysis of issues and consideration of alternatives as would be contained in an EIS.

Comment: TDWR has failed to require hazardous waste permit applicants to submit evidence of financial assurance for closure/post-closure care, detailed closure plans, and self-inspection standards and schedules with permit applications.

Response: In reviewing early permit applications processed by the State, EPA noted that the State did not always require applicants to submit all necessary documents. EPA pointed out this discrepancy to the State and

immediate corrections were made. EPA notes that subsequent permit applications have contained proper documents.

Comment: TDWR is far behind in its review and final processing of Part B hazardous waste permit applications. Although EPA may have granted TDWR an extenson for calling in an acceptable number of Part B's, the commenter feels that the agency still lakes sufficient resources and personnel to insure that the large number of outstanding Part B applications can be thoroughly reviewed and permits issued or denied.

Response: TDWR has met all permitting commitments for fiscal years 1983 and 1984. The agency, at EPA's request, has accelerated the call-in of Part B permit applications in FY 84 and has exceeded those commitments. The agency has provided EPA a schedule of accelerating call-ins into FY 86.

Nevertheless, EPA is concerned that permits be called-in and processed in a timely manner and that quality reviews be completed. As discussed earlier in this responsiveness summary, EPA will overview and assist the State to ensure that quality permits are issued in a timely manner.

Comment: The State does not have the authority to assess administrative penalties.

Response: As discussed earlier, authority to assess administrative penalties is not a requirement for Final Authorization.

Comment: The State has failed to use enforcement tools effectively including effectively pursuing litigation and recovering civil penalties.

Response: As discussed earlier, the State and EPA have entered into an Enforcement Memorandum of Understanding in order to provide assurance that all enforcement tools will be used to best effect.

Comment: There are problems of coordination among State agencies in the pursuit of enforcement actions.

Response: As discussed earlier, EPA is aware of past problems of coordination. The State has worked closely with EPA to resolve these problems of coordination and to clarify jurisdictional questions.

Comment: There are questions about discrepancies between generator reports and disposal reports of quantities of waste shipped and received.

Response: EPA, as a matter of routine, frequently reviews reports submitted to the agencies from handlers of hazardous waste. Biennial reports submitted to the State were only recently due to EPA. EPA, in the continual and comprehensive overview role, will be evaluating these reports for inaccuracies and discrepancies.

In the meantime, EPA invites reports of specific instances of inaccuracies and discrepancies. Failure on the part of the State to manage reporting by handlers of hazardous waste in a manner equivalent to the way EPA would manage such reporting would be grounds for withdrawal of the authorized program from the State and the implementation of the federal program in Texas.

Comment: Texas does not have a citizen suit provision in its hazardous waste law.

Response: Citizen suit provisions of RCRA are found in Section 7002(a) (Subtitle G). Section 3006(b) requires that State programs be "equivalent to the Federal program *under this subtitle.*" (Emphasis added.) Section 3006 is in Subtitle C of RCRA.

EPA cannot require a State to provide for citizen suits as is contained in RCRA. However, it is EPA's position that the citizen suit provision of RCRA is available to all citizens whether or not a state is authorized.

Comment: Federal regulations (40 CFR Part 271.16) require that, in order to be authorized, states provide the right to intervene in civil enforcement actions in which citizens have interests that may be adversely affected. If a State does not provide for such intervention, the State must provide adequate assurances that the State will both investigate and provide written response to all citizen complaints; the State will not oppose intervention by any citizen when permissive intervention is authorized; and the State will publish notice of and provide at least 30 days for public comment on all proposed settlements of civil enforcement actions. Texas, since the right of intervention is not provided, has implemented the alternative through a Memorandum of Understanding (MOU) between the Texas Attorney General, the Texas Department of Health and the Texas Department of Water Resources.

The commenter argues that the MOU has no binding effect on the three agencies and asks EPA if this MOU is sufficiently binding to provide the long term assurances required by 40 CFR 271.16.

The commenter also states that the agreement has been ineffective in providing true public participation in the enforcement process. This assertion is made on three points: first, the commenter is unaware of any instances in which proposed settlements of hazardous waste suits have been published for 30 days in order to receive public comment and suggestions; second, the State has indicated that notices will be published only in the *Texas Register*, thus guaranteeing that no significant portion of the general public will be aware of the proposed settlement. The commenters suggests that a better practice would be publication both in the *Texas Register* and in newspapers of general circulation in the area(s) affected by the suit; and, third, the MOU provides neither a program nor enforceable rules and procedures for encouraging and responding to citizen complaints of hazardous waste violations.

Response: There is no requirement in 40 CFR 271.16 that assurances be made in the form of regulations. The Memorandum of Understanding is sufficient for providing the necessary assurances to EPA because failure to implement the provisions of the MOU would be grounds for EPA to withdraw the State's Authorization.

Publication of such notices in the *Texas Register* is legally sufficient because the *Texas Register* is the official publication of the State of Texas where such notices, rules and regulations are published. EPA has urged the State, however, to provide other notice, as suggested by the commenter, on proposed settlements.

Procedures implementing complaint investigation policies are found in the Program Description submitted with the application for Final Authorization. These procedures are found on pages TDWR–30 and TDH–24 and 25.

Further, EPA and the State note that notices of settlement have not been published as specified in the MOU which is referenced in the Attorney General's Statement. The State has reaffirmed the agreements in the MOU and the responsibility to provide notice of settlement. Future failure of the State to comply with the requirements of 40 CFR 271.16 would be grounds for action by EPA to withdraw the State's authorization.

* * * * *

During the public hearing the Hearing Officer extended the comment period because of the interest exhibited in the Tentative Decision to grant Texas Final Authorization. EPA received comments from three persons during the extended comment period which ended October 24, 1984.

1. *Comment:* The commenter cited a lack of financial competency and lack of staffing adequacy in the State's Attorney General's Office and enforcement agencies and requested that the State's request for Final Authorization be denied.

The commenter also stated that Final Authorization should not be granted

until: (1) The State passes a law giving citizens the right to sue both state agencies for failure of performance, and parties violating their permit conditions; and (2) EPA retains the right to sue state agencies or other parties for failure to have the required permits and/or perform according to permit conditions or in any other circumstances when the public is endangered by hazardous wastes.

Response: Comments regarding the financial competency of the State Agencies have been responded to earlier in this responsiveness summary. TDWR will grant federal funding to the Attorney General's Office to provide an increase in resources for the pursuit of hazardous waste cases.

EPA cannot delay authorization pending the receipt of those specific authorities mentioned by the commenter: (1) As discussed earlier, there is no requirement that the State have a citizen suit provision. The federal citizen suit provision, however, is available to citizens in an authorized state; and (2) EPA retains the right under Section 3008 of RCRA to take action against any person in violation of any requirements of the hazardous waste program. Additionally, EPA may take action under Section 7003 of RCRA against any activity that may present an imminent and substantial endangerment to health or to the environment. EPA may take this action without regard to the authorization status of the State or the permit status of the facility.

2. *Comment:* A commenter supports the authorization of the State citing the fact that the review of the commenter's permit application by the State has been "extremely diligent, competent, and thorough."

Response: EPA appreciates the comment and recognizes the support for the authorization. EPA notes, though, as discussed earlier, that the decision to grant Final Authorization is based on the standards found in Section 3006(b) of RCRA.

3. *Comment:* The commenter states that, based on his experience with Texas and EPA, and his understanding of the law, it seems clear that the hazardous waste management program of the State of Texas is equivalent to the federal program and that EPA should grant Final Authorization to the State.

The commenter also provides comments on the provision for citizen suits in the state. The commenter writes to support the concept that the citizen suit provisions of Section 7002 of RCRA is in force in authorized states.

Response: EPA has determined that the Texas Hazardous Waste Management program is equivalent to the federal program and is eligible for Final Authorization. EPA appreciates the support of the commenter for the decision. EPA also appreciates the support regarding the citizen suit provisions.

Decision

After reviewing the public comment, re-evaluating the State's submittal in light of those comments, and considering the performance of the State under Interim Authorization, it is my conclusion that Texas' application for Final Authorization meets all of the regulatory and statutory requirements established by RCRA.

Accordingly, Texas is granted Final Authorization to operate its hazardous waste management program in lieu of the federal program in Texas. This means that Texas now has responsibility for permitting treatment, storage and disposal facilities within its borders and for carrying out all other aspects of the RCRA program. Texas also has primary enforcement responsibility, although EPA retains the right to conduct inspections under Section 3007 of RCRA and to take enforcement action under Sections 3008, 3013, and 7003 of RCRA.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this Final Determination from the requirements of Section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of Texas' program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burden on small entities. This Final Determination therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous materials, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority

This Final Determination is issued under the authority of Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended (42 U.S.C. 2912(a), 6926, 6974(b)) and EPA delegation 8-7.

Dated: November 21, 1984.

Dick Whittington,

Regional Administrator.

[FR Doc. 84-32475 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15, 73, and 74

[RM-1709; RM-2894; Gen. Docket No. 83-114; FCC 84-521]

A Re-Examination of Technical Regulations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On February 17, 1983, the Commission adopted a *Notice of Inquiry* (NOI) *and Proposed Rule Making* (NPRM). The purpose of the NOI was to examine certain of the Commission's technical regulations with the intent of eliminating those that no longer serve useful purposes, replacing those that are overly burdensome with less constraining regulations or retaining those which are found to be acceptable, without undermining the Commission's responsibility under the Communications Act of 1934, as amended. In the NPRM we proposed to eliminate rules that specify minimum quality levels of service. This action adopts those proposed changes pertaining to AM, FM and TV station transmission system requirements and auditory assistance receivers.

DATE: Effective December 7, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT:

Michael J. Marcus, Office of Science and Technology, (202) 632-7040

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SUPPLEMENTARY INFORMATION:

List of Subjects

47 CFR Part 15

Communications equipment, Radio, Reporting requirements.

47 CFR Part 73

Radio broadcast, Television.

47 CFR Part 74

Television.

Report and Order (Proceeding Terminated)

In the Matter of: A Re-Examination of Technical Regulations: RM–1709, RM–2894, Gen. Docket No. 83–114.

Adopted: November 8, 1984.
Released: December 7, 1984.

By the Commission: Commissioner Quello concurring and issuing a statement.

Introduction

1. On February 17, 1983, the Commission adopted a *Notice of Inquiry and Proposed Rulemaking ("Notice")* in the above captioned matter requesting comments on the general concepts of technical regulation and proposing certain specific rule deletions in Parts 15 and 73.

2. This *Report and Order* (R&O) sets forth our analyses and conclusions on the general regulatory policies covered in the *Notice*, on the issues raised thereon in the comments and replies, and on the specific rule deletions proposed in the *Notice*. These general policies will help formulate additional deregulatory rulemaking proposals in related proceedings which will focus on particular categories of service and equipment.

3. We wish to emphasize that our principal objective in this and future proceedings of its kind is to eliminate unnecessary technical regulations and thereby create an environment that encourages innovation and avoids unnecessary and costly rulemaking. For several years the Commission has been examining all of its rules and policies and major deregulatory actions have resulted. It is our intention to extend our scrutiny to the area of technical regulation.

Procedural Matters

4. Four general points were expressed by the commenters dealing with nature and scope of this proceeding.[1] First, there were concerns that the *Notice* was either too broad in encompassing too many regulations, too narrow to achieve the Commission's goals, or ill-constructed to encourage commenters to respond to areas outside of their interests. Second, there were concerns that the regulations under consideration are intertwined, interdependent, and require complex assessment. Third, CBS and NAB, among others, believed there was the need for an advisory committee as a prerequisite for further action. Finally, several commenters argued for the retention of many technical regulations maintaining that section 303 of the Communications Act mandates that the Commission regulate technical quality, interoperability and interference.

Discussion

5. In the *Notice* we divided the technical regulations into categories according to their primary purpose. The categories were interference control, spectrum efficiency, interoperability and signal quality. Understanding that a rule can serve more than one purpose, we employed a basic classification scheme that would facilitate the deregulatory efforts. On balance we believe this approach will work. Other approaches to classification were mentioned in the *Notice*. For instance, the rules could be divided functionally, rather than by purpose, into performance, design and conduct regulation.

6. Commenters generally seemed less interested in our methodology than in what rules we proposed to eliminate. Many of the commenters complained that the *Notice* was too broad to allow adequate discussion of all major areas of technical regulation. Indeed, the Notice was very broad. Its purpose was to provide an overview of the Commission's technical standards as well as a reasonable scheme for their examination. It was a vehicle to stimulate thought and acquaint the public with our intentions. Many of the comments concerned only rather narrow issues of particular concern to one area of regulation.

7. Some commenters warned that some technical rules are so intertwined with others that too specific a proceeding will prove useless. In general we observed that within each rule part there can be an often complex relationship between rules. In fact some of the rules we are deleting today can be dispensed with largely because we are keeping others. This seems not to be the case, however, between the rule parts themselves. In a sense, the very organization of the rules suggests a part by part approach.

8. Some commenters claimed the need for an advisory committee as a prerequisite for further action.[2] We feel that we can address the technical needs of specific services on a case-by-case basis using the traditional notice and comment procedure that ensures industry participation. Industry groups need not wait for rulemakings, however. We urge industry to use existing associations and standards organizations to consider and suggest possible changes to regulations in advance of Commission action.

9. With respect to arguments about the Commission's mandate, we note that section 303 of the Act authorizes regulation over the external effects and the purity and sharpness of emissions of stations ". . . from time to time, as public convenience, interest or necessity requires." Clearly there is no requirement that we continue regulation in areas where we find such regulation is no longer in the public interest. We have the authority, if not an obligation, to review all of our technical regulations in light of changes that have occurred in telecommunications markets since these rules were adopted and to determine whether such regulations still serve the public interest.[3]

Interference Control

10. In the *Notice* we stated that "interference control is a valid, even essential, government function" and that existing technical regulations may be the most direct means of achieving interference control. Concern in the comments focused on the necessity to exercise caution in revising the present rule structure and the feasibility of specific types of rule changes.[4] We agree and reaffirm the key nature of our interference prevention role and we intend to use all deliberate caution in reexamining our present rule structure. However, the present structure of narrowly defined emissions has also had a serious impact on technical innovation. We feel that our statutory mandate under sections 1 and 303(g) of the Act requires us to consider new approaches to interference control. Any changes will be proposed in further rulemakings of a narrower scope than the Notice and will give all interested parties an opportunity to evaluate the effectiveness of the changes.

11. In the *Notice* we discussed the equivalent interference factor as an alternative to rigidly specified co-channel and adjacent channel separations and power limits. The concept of equivalent interference provides a mechanism by which a licensee would be able to use its transmitter, employing different forms of modulation, so long as no more interference would be caused than when operating with more conventional forms of transmission. To the extent this concept is employed, we will be able to eliminate the need for many rulemakings. Moreover, a licensee's or manufacturer's developmental plans

[1] See comment and reply comment lists in Appendices A and B.

[2] See Comments of CBS and NAB.

[3] See e.g., *HBO, Inc.* v. *FCC*, 567 F.2nd 9, 36 (D.C. Cir. 1977).

[4] See Comments of ABC, MIS, NAB, CBS, and Vincom.

would not have to be spread on a public record. Our staff is presently studying this approach in detail, and we expect to consider a more detailed proposal in further proceedings. We anticipate that it will be easier for the public to comment on a more detailed proposal limited to a single service category.

12. The *Notice* raised the possibility of relaxing frequency tolerance specifications where emission roll-off regulations were adequate to prevent adjacent channel interference. While one commenter supported this general concept, several others raised concerns of interference and a decrease in spectrum efficiency if more flexibility was allowed in this area. It was also pointed out that in services where AM and similar modulations with a strong carrier signal are used, frequency tolerance is essential to controlling interference from intercarrier beats. We recognize those concerns and will consider them in drafting any specific proposals in this area. We shall be especially careful in modifying stability rules in AM-like services susceptible to intercarrier beat.

Spectrum Efficiency

13. In the *Notice* we reasoned that ensuring technically efficient use of the spectrum justifies regulation in situations in which licensees lack incentives to voluntarily conserve spectrum and employ more spectrally efficient technologies. We also indicated that, where regulation of efficiency is warranted, it is less constraining to specify output or performance type standards, such as bits per second per hertz, rather than particular technologies, such as trunking or ACSB.

14. The comments generally confirmed the Commission's view that spectrum efficiency is a valid regulatory concern. Some also agreed that increasing licensee flexibility strengthens the incentive to use the spectrum efficiently. Some commenters felt that the Commission should take a more aggressive role in promoting and mandating spectrally efficient technologies, rather than relying on what those commenters perceived to be weak or non-existent marketplace incentives. Opinions were divided also on the most appropriate method of regulation. The general concept of regulating system output or performance rather than specifying a particular design or technology drew some support, although the complexities of defining and measuring spectrum efficiency were largely unaddressed.

15. Spectrum efficiency will be a valid reason for technical regulations as long as licensees incentives do not reflect the economic value of the spectrum and the corresponding incentive to be profligate in its use. Also the degree of regulatory control over efficiency will vary according to the particular service category. The same is true of the best method of regulation. We think, for example, that an output efficiency standard has little relevance in the context of the present television broadcasting service where technology is almost totally standardized to ensure interoperability goals. In other services, however, such a constraint may not apply. We are interested both generally and in this proceeding with all approaches to spectrum efficiency that rely on private incentives to use spectrum wisely.

Interoperability

16. In the *Notice* we defined interoperability regulations as technical rules that ensure that equipment owned by different entities are capable of operating together in the transfer of information. We pointed out that, where interoperability standards were desirable, they could be achieved by voluntary standards or mandatory regulations with different costs and benefits associated with each approach. However, in the case of interoperability mandated by law or treaty relating to emergency channels in the aeronautical and maritime mobile services, we clearly stated our intention of maintaining the *status quo.*[5]

17. Many parties argued the need for interoperability regulation in the broadcast services. Several parties raised issues of possible adverse impacts on national security/emergency preparedness (NSEP) if the present level of interoperability were to diminish greatly, but none stated specifically what level of interoperability they felt was essential. A possible NSEP impact would be a serious concern to us and will have to be considered on a case-by-case basis as specific proposals are made in future proceedings. We urge those agencies in the NSEP area to start considering interoperability requirements for specific services so that an overflow is available to guide us in this area in future notices.

18. Parties commenting on potential adverse effects of deleting the present broadcast interoperability requirements ranged from those who said that such regulation was essential for the interoperability of broadcasters and home receivers to those who said such regulation facilitated receiver design and lowered cost. Others argued that discontinuing the detailed regulation of broadcasting emissions would have little immediate effect on today's standards due to the interlocking nature of the system but would facilitate the introduction of evolutionary changes. It was noted also that the impediment to innovation could be alleviated by a liberal special temporary authority and waiver policy.

19. We are aware of the concerns about the cacophony that preceded the formal regulation of radio in the U.S. in 1927. While detailed regulation of broadcast emissions may have been helpful in introducing the services we have today, if is fair to question the continuance of this regulation in all cases. Between 1963 and 1983 there were thirteen R&O's modifying § 73.687, the broadcast transmitter standards for television. This is because the detailed nature of the present rules requires a rulemaking for any minor signal format change even if it is compatible with existing receivers. This rigidity thus tends to delay innovation which may be compatible with existing equipment and to increase the burden on the Commission and the public.

20. As was pointed out above, the interlocking nature of today's system of broadcast transmitters and receivers is likely to discourage radical changes that would obsolete receivers. Nevertheless, we recognize the concern of the commenters. In future proceedings which may explore the possibility of decreasing the detail of present interoperatibility standards, we shall proceed with caution, carefully considering both the power and the limitations of market forces and the use of voluntary standards to achieve the desired balance of interoperability and flexibility.

Technical Quality

21. In the *Notice* we stated that, in general, the existence or nonexistence of adequate competition and diversity in the supply of a service or equipment is the principal, if not the only, significant factor in deciding whether to regulate the technical quality of that service or equipment. The only clear exceptions

[5] Several commenters stated a need for interoperability standards in the Private Land Mobile Radio Service (PLMRS). However, the Commission has traditionally allowed PLMRS licensees a choice of a small number of enumerated modulation types; for example, we presently allow AM, FM, and digital modulation for these users (see § 90.207 of our Rules). Our experience has shown that licensees understand their own interoperability requirements and purchase the types of radio equipment necessary to maintain interoperability within their fleets. Those few licensees who require interfleet interoperability have also been able to select equipment to meet their requirements. Thus, we see no need at this time for initiating direct FCC regulation of modulation choices in order to mandate PLMRS interoperability.

discussed were certain services and equipment used by the public primarily for safety of life and property, such as aeronautical and maritime mobile, which we suggested may warrant regulation even if competitively supplied. We also stated the view that most services and equipment under our jurisdiction are sufficiently competitive to warrant deregulation of technical quality.

22. The comments raised several factors other than an absence of competition and diversity as reasons to regulate technical quality. One factor mentioned in several comments is the inability of purchasers to evaluate the quality of technically sophisticated products or to ensure they are getting the quality they want. There was concern that communications products are uniquely difficult for consumers because the devices owned or used by individuals are often only a part of a larger system about which the consumer has little information and over which he has no direct control. (For example, a television viewer experiencing poor quality reception may have difficulty determining whether the cause is the receiver or some other part of the system.) Regulating the quality of the transmitter, it is argued, eliminates one possible source of degradation and simplifies the problem for consumers.

23. This concern over system complexity will have to be considered in specific cases. However, we note that there are a wide variety of technologically complex systems sold today without federal quality regulations except in the safety area and that this nonregulation is generally successful. In some cases though, telecommunications systems do have the unique characteristic of being split ownership systems (*e.g.*, the broadcaster does not own the receiver) and this complicates the feasibility of identifying the source of a quality problem by the end user. However, in services where there is effective competition, there are still ways for the consumer to identify quality and choose the quality consistent with their needs.

24. Existing quality rules serve a useful function as engineering benchmarks for system designers. The regulation status of these standards also imposes a real cost in that it is time consuming and expensive to go through a formal notice and comment procedure to update them. Moving such quality rules to a nonregulatory status (e.g. voluntary standards) would facilitate their updating and in many respects accomplish the same benchmark function as today. Indeed voluntary quality standards already exist in many areas we do not regulate.[6]

25. Several parties expressed concern over the viability of competition in small broadcast markets and the possible need for continued quality regulation in such markets. We have addressed similar concerns in previous proceedings dealing with program deregulation in radio and television [7] and have found no need for a bifurcated approach. There is generally adequate competition between broadcasters and other suppliers of programming and entertainment.

26. Several commenters argued that, since broadcast licensees are trustees or stewards of the public airways, they should be required to maintain a minimum level of technical quality. While we agree that licensees have a responsibility to provide good quality service, we do not agree that such responsibility justifies direct regulation of technical quality. To the contrary, the pressure of competition and consumer choice have brought about a generally higher level of technical quality than required by our Rules.[8] The severe penalties imposed by the competitive marketplace on licensees who provide poor service make such behavior highly unlikely. Responsible conduct by broadcasters need not always be mandated by quantitative regulation.[9]

Guidelines

27. Based on the comments received and on our own long experience in the promulgation of technical regulations, we may reach some conclusions that should provide guidance in this and other proceedings. With respect to the broad categories of technical standards, our findings can be summarized in the following principles.

Interference—The control of harmful interference between users of telecommunications services and equipment is a valid regulatory function of the highest priority. Technical regulations deemed essential to interference control will be retained but will be carefully examined to ensure they are not unnecessarily restrictive in areas unrelated to interference control.

Spectrum Efficiency—Mechanisms to ensure spectrum efficiency are a high regulatory priority. However, explicit regulation of the spectrum efficiency of radio systems is not required where the following two conditions are both met: (1) licensees have an incentive to operate efficiently and (2) licensees are given the flexibility to choose the technical details of their system. Where significant flexibility is not possible and some regulatory control is necessary beyond merely setting the size of the channel assignment, the preferred type of regulation is one that specifies the required spectrum efficiency (*e.g.*, bits/second/Hertz) as opposed to a particular technology.

Interoperability—We attached a high priority to interoperability in many radio services, however, the priority of mandating specific interoperability through regulation varies depending on the service. Direct Commission regulation of interoperability is useful in several cases such as (1) in systems where instant communications between all stations is critical to safety (e.g. the maritime and aeronautical distress frequencies), (2) in systems where interoperability can be shown to be critical to national security/emergency preparedness concerns (e.g. the Emergency Broadcast Service), and (3) in helping the introduction of new services involving large public participation (e.g. cellular radio telephone service). In non-safety cases where we consider mandatory standards we will consider them on a case by case basis, and we will consider whether the benefits of standards outweighs the costs and time delay involved. We will seek to deregulate standards when (1) it can be determined that they are sufficiently well established to be maintained as voluntary standards and (2) enough equipment is installed to give manufacturers and service providers the incentive to make any new changes compatible with the original equipment. In these non-safety cases, we will also consider alternatives to mandatory standards that endorse or give a preference to a specific standard rather than requiring it.[10]

Technical Quality—While the Commission has the discretionary authority, in many cases, to regulate the technical quality of telecommunications services and equipment, we find that it

[6] EIA studio transmitter link (STL) and land mobile radio standards.

[7] *Deregulation of Radio*, 84 FCC 2d 968 (1981); *TV Deregulation*, 49 F.R.

[8] The Commission's technical quality rules were adopted some 40 years ago and established the absolute minimum quality standards that broadcasters are required to observe. Since then, state-of-the-art transmission facilities and technological innovations have exceeded, by far, many of the above requirements.

[9] *See Deregulation of Radio, Docket 79-219*, 84 FCC 2d at 97, and *Aural Power* Docket 83-117, —— F.C.C. 2d —— (adopted April 19, 1984) at para. 15. In both proceedings, the Commission found that licensees had adequate incentives to provide satisfactory signals and programming to their audiences without quantitative standards.

[10] See Multichannel TV Sound, See Second Report and Order, Docket 21323, (Adopted May 28, 1984), FCC 84-116.

is not generally in the public interest to do so. Exceptions to this are limited to cases where there are explicit statutory or treaty mandates or some other overriding factor such as safety of life and property. The provisions of most telecommunications equipment and services can be considered sufficiently competitive to consider deregulation of technical quality.

28. It must be emphasized that the principles we have just enunciated are intended to be understood not as dogma but as useful tools to help us in the future. It is not our desire to set adrift established industries and communications services. We intend an incremental approach to technical deregulation. We do not expect this deregulation to occur in a void. It can be assumed that responsible industry organizations will continue to develop and promulgate what they perceive to be useful voluntary standards. We anticipate that the Commission will coordinate this process with the appropriate industries and the standards organizations.

Specific Rule Changes

29. The *Notice* stated reasons for undertaking this review of the technical rules and regulations with the hope of modifying burdensome rules to stimulate technological innovation in communications and to create, to the maximum extent possible, an unregulated, competitive marketplace environment for the development of communications. The technical quality regulations are prime examples of rules that were needed at one time to foster the growth of an industry by providing common specifications for everyone. Indeed, especially in the broadcasting field where the transmitting and receiving equipment is designed and owned by different groups, the quality regulations provided standards for the development of compatible transmitting and receiving equipment. Today, the broadcasting industry is mature. We are confident that the quality of broadcast stations will remain high. Never before have so many sources of entertainment been vying in the marketplace to please the consumer. Cable television, digital audio disks, VCR's, satellite programming, computer games, and other alternate sources of entertainment will provide the necessary incentive for broadcasters. Taking these factors into consideration, in the NPRM we proposed the deletion of various broadcast quality regulations as well as certain quality standards in Part 15 of the Rules. We turn now to a discussion of these regulations.

Section 73.40—AM Transmission System Performance Requirements

30. NAB argues that subparagraph 73.40(a)(2) must be retained because of the potential for interference to adjacent channels that would result from its deletion. ABES and Robert Jones, P.E., believe these are minimum standards and should be required of all licensees. NRBA does not favor the deregulation of § 73.40 of the Commission's rules as proposed in the *Notice*. However, NRBA offers an alternative to the proposal, i.e., that a mere certification by the manufacturer that a broadcast transmitter meets the requirements of § 73.40 would be sufficient to protect the broadcast licensees.[11] Cox indicated that this Section covers requirements for the general design of AM broadcast equipment as well as for providing the standard for checking equipment performance and, therefore, should be retained. Jules Cohen and Associates, P.C., object to the deletion of this Section, believing it to be necessary from the interference control and spectrum efficiency viewpoints. Motorola submits that eliminating the quality standards specified in §§ 73.40 and 73.128 of the Commission's rules would cast a pall of uncertainty over AM stereo as broadcasters and receiver manufacturers grapple with revised regulations. This could only degrade the quality of AM stereo. Thus, Motorola requests the above rules be retained. On the other hand, Harris agrees with the Commission that marketplace competition has brought about higher standards and agrees with the proposed deletions. CBS, like Harris, also favors relaxed quality standards believing that the proposed rules are generally surpassed by present transmission equipment and should be deleted.

31. An analysis of those regulations proposed for deletion in § 73.40(a) is as follows: Subparagraph (1) describes the minimum level of modulation of which a transmitter must be capable. A broadcaster operating below this modulation level would experience a decrease in coverage area. Thus, there is an economic incentive for the broadcaster to continue to meet this specification, even without a quantitative requirement, and we feel that operation at a low modulation level is unlikely. Subparagraph (2) specifies the maximum permissible level of harmonic distortion, subparagraph (5) limits noise on the transmitted signal, and subparagraph (4) specifies the degree of carrier amplitude regulation for the transmitter. Some of the commenters argued that deletion of these rules would lead to interference to channels adjacent to the broadcaster whose signal did not comply. We believe that this will not happen because, first, we are retaining the provisions of § 73.44(a) which directly limit emissions on adjacent channels and, second, any transmission which is of such poor quality that it causes interference on adjacent channels will also appear to be of poor quality to the intended listeners and will affect the broadcasters own audience by making his signals virtually unusable.

32. Subparagraph (3) concerns the frequency response characteristics of the broadcast transmitter. This is a quality standard and variance from it has no potential for increasing the level of interference to other stations. It is believed that the marketplace incentives are sufficient for the broadcaster to determine the "flatness" of the frequency response absent regulation. Regardless, audio processing by the broadcaster could be used to change the frequency response under the existing regulations. This rule, therefore, can be deleted.

33. Accordingly, after review of the comments we still believe that the marketplace forces are sufficient to ensure that broadcasters will continue to meet high quality standards without Commission regulation. Therefore, subparagraphs 73.40 (a)(1) through (a)(5) will be deleted, as proposed. These deleted standards apply only to monophonic AM operation. Changes to the specifications relating to stereophonic AM operation were not proposed in the *Notice* but will be considered in a future proceeding.

Section 73.317—FM Transmission System Requirements

34. Except for CBS and Harris, the majority of commenters opposed the Commission's proposal to eliminate subparagraphs (a)(1) through (a)(5) of this Section. They believed that: (a) subparagraph 73.317(a)(1) should be retained because it directly affects interference to adjacent FM channels; (b) subparagraph 73.317(a)(2) deals with preemphasis standards which are required to ensure interoperability among various pieces of equipment and, therefore, should be retained; and (c) subparagraphs 73.317 (a)(3) through (a)(5) must be retained as guidelines in order to determine performance objectives. Harris and CBS believe that

[11] This form of "certification" has already been provided. Broadcast transmitters are now authorized by a grant of notification instead of type acceptance. See Report and Order, Gen. Docket No. 83-10, adopted January 10, 1984, FCC 84-21, 49 FR 3991 published February 1, 1984.

the above subparagraphs are generally surpassed by present transmission equipment and should be deleted. CBS regards as unclear the impact of removing subparagraph 73.317(a)(2) but concludes that its deletion would be preferable to its retention.

35. Under § 73.317(a), subparagraphs (1), (3), (4), and (5) deal with the transmitter characteristics of minimum level of modulation, harmonic distortion, frequency modulated noise, and amplitude modulated noise, respectively. For the same reasons as discussed for § 73.40, the broadcaster has an economic incentive to maintain these specifications without the need for Commission regulation. However, subparagraph (a)(2) deals with the pre-emphasis applied to the modulating signal with a corresponding de-emphasis contained in the receiver. This standard ensures interoperability between the receiver and the transmitter, and that portion related to pre-emphasis will be retained at this time. While the broadcaster can still use audio processing to change the characteristics of the received signal, the retention of this standard will ensure that the recovered signal will be the same as that processed audio supplied by the broadcaster. It is not necessary to retain the minimum frequency response requirement which is also contained within this regulation. Frequency response is clearly a quality standard that need not be mandated by the Commission. Accordingly, it is appropriate to delete subparagraphs (a)(1) and (a)(3) through (a)(5) and revise subparagraph (a)(2) of § 73.317 and defer to the marketplace. We will consider possible further modification of the pre-emphasis standard of subparagraph (a)(2) in a future proceeding which will review the FM service technical standards in depth. However, we are modifying the pre-emphasis requirements as per the attached appendix because we find that it is in the best interest of the broadcaster to adhere to the pre-emphasis characteristics as closely as possible.

Section 73.687—TV Transmission System Requirements

36. NAB argues that television transmission system performance regulations should be retained, and that subparagraphs 73.687 (a)(1) and (a)(2) are essential to the design of television transmission systems with possible interference control implications. NAB argues that subparagraph 73.687(a)(3) governs out-of-band radiation from television stations, and its purpose is to control interference; subparagraph 73.687(a)(4) provides measurement procedures to demonstrate compliance with the provisions of subparagraph 73.687(a)(3); subparagraph 73.687(a)(5), while not specifically related to interference to other stations, must be maintained as a guideline; subparagraphs 73.687(a)(6) indirectly controls interference to adjacent channels; subparagraphs 73.687 (a)(7) through (a)(9) assure compatibility between stations and receivers; subparagraph 73.687(b)(1) indirectly controls interference to upper adjacent televisions channels; and, subparagraph 73.687(b)(2) defines the audio pre-emphasis curve which is used as a design criterion by television transmitter and receiver manufacturers. Lastly, subparagraphs 73.687 (a)(3) through (a)(7) contain aural transmitter performance objectives and measurement procedures. Other commenters hold similar views and urge the Commission to retain these standards. The Association of Maximum Service Telecasters (AMST) holds a different view regarding subparagraphs 73.687(a) (1), (2) and 73.687(b) (1) and (3) through (9). AMST states that although these standards may not serve the goals of interference prevention, spectrum efficiency or interoperability, they are good indicators for judging station performance. CBS supports the proposed deletion of paragraphs 76.687 (a) and (b) as being either too loose to be of any real significance or too well established to be needed any longer.

37. Under § 73.687(a), subparagraphs (1) and (2) specify the shape of the demodulated video signal. While severe deviations from the existing regulations could adversely affect the television reception of the broadcaster involved, these subparagraphs are primarily concerned with signal quality. Any degradation of these signal specifications would affect the picture quality, providing the broadcaster with an economic incentive to maintain these standards without Commission regulation. Subparagraph (9) states that the video input signal and the transmitted video signal should have a linear relationship. Again, this is a matter of quality that need not be addressed by regulation.

38. Section 73.687(b) regulates the characteristics of the transmitted television aural signal. The subparagraphs are identical to those employed for the FM broadcast service under § 73.317(a) with the same interference or quality concerns. Accordingly, we will again defer to the marketplace for subparagraphs (a)(1), (a)(2), (a)(9), (b)(1), part of (b)(2), and (b)(3) through (b)(5) of § 73.687. On the other hand, our review of subparagraphs (a)(3) through (a)(8) and (b)(2) suggests that these rules, to one extent or another, are intended not only to improve quality but to prevent interference and promote interoperability. However, we are modifying the pre-emphasis requirement to be parallel to the change we are making in the FM service which we described in paragraph 35. These subparagraphs will be reviewed again in a future proceeding dealing with television technical regulations and will be retained in the interim.

Miscellaneous Broadcasting Matters

39. NAB and AMST suggested that the technical description of many quality regulations proposed for deletion should at least be maintained in some manner as guidelines or voluntary standards of good engineering practices that can serve as a reference for system designers. It would be preferable if the needed standards were eventually incorporated into existing or new publication by the voluntary standards development organizations (*e.g.*, EIA, IEEE, NAB, etc.). However, it may not be possible to do this at an early date, and the Commission may have to fill the void between the time when the technical standards are removed from the Regulations and the time that they appear in publications of the voluntary standards organizations. The Commission can make the standards available for the guidance of and use by the private sector. These standards would be issued in the form of Office of Science and Technology (OST) Bulletins and would contain the information removed from the rules. It is planned that publication of these Bulletins would continue only so long as the information was found to be needed and was not available from a private sector publication.

40. Consequent to our decision to delete the pertinent subparagraphs of §§ 73.40, 73.317, and 73.687 of the Commission's rules, as outlined above, we are also deleting as moot the licensee proof of performance requirements of § 73.1590(b)(1)(i), (ii), (iii), (iv); (b)(3) (i), (ii), (iii), (iv); (c)(1) and (c)(6). We are revising subparagraph (b)(3) of § 73.1570 of the Commission's rules to define the total modulation of the aural carrier for monophonic TV transmitters which was previously defined in § 73.687. Additionally, we take this opportunity to dismiss as moot two pending petitions for rule making (RM–2894 and RM–1709, filed by the NAB and Christopher Philip Payne respectively), urging the

Commission to revise its "audio fidelity rules." These rules are deleted herein.

Sections 15.361, 15.363, and 15.365—Auditory Assistance Devices

41. In addition to the Part 73 matters discussed above, the *Notice* proposed to delete §§ 15.361, 15.363, and 15.365 which specify standards for frequency stability, selectivity and desensitization, and image frequency response, respectively, for auditory assistance receivers. We have classified these regulations under the category of minimum quality standards. Their proposed deletion is consistent with the idea that control of the technical quality of certain competitively supplied equipment can be satisfactorily obtained through marketplace forces and need not be mandated by the Commission.

42. Comments concerning these proposals were filed by NAB, Phonic Ear, Inc., and Williams Sound Corp. Williams Sound Corp. supported our proposal and agreed with our belief that these technical parameters could be controlled through the marketplace forces. The other commenting parties opposed the deletion of these rules stating that these rules are related to interference rather than quality and that, in any case, the special needs of the hearing impaired justify this form of regulation.

43. We agreed that the specified regulations address the matter of the degree of interference experienced by the receiver. However, these rules are concerned with the quality of reception rather than a source of interference to other radio operations. Generally, standards for controlling interference from transmitters address the matter of radio frequency emissions and the effects of those emissions on other users of the spectrum. In this case, these receiver rules address the ability of the receiver to reject an interfering signal and are directly related to the quality of the received signal. Thus, these regulations are correctly classified as minimum quality standards. It should be noted that we are not dealing here with home electronic equipment. Such devices may be regulated with respect to susceptibility to interference pursuant to section 302 of the Communications Act.

44. It is believed that the special needs of the hearing impaired will be more effectively addressed by the deletion of these Part 15 regulations. This will provide the users with the advantage of having a range of cost/performance combinations which may meet their needs better than a single standard design. Under the proposal being implemented by this action, auditory assistance users will be able to purchase the degree of receiver protection required for their particular needs. The retention of mandatory standards would not allow these distinctions to be made and would place the Commission in the position of having to make a single cost/performance trade-off based upon worse case assumptions. Should the potential users of auditory assistance devices be located in an area that is relatively clear of interfering signals or need only one or two channels, a less expensive receiver with relaxed specifications might be more suitable for their needs. Should the users be located in an area with a high level of radio frequency congestion or should they wish to install a multichannel system, a more expensive receiver system with specifications similar to those contained in the concerned regulations may be desired. Therefore, we will defer to the marketplace and are deleting §§ 15.361, 15.363 and 15.365 of the regulations.[12]

Ordering Clauses

45. Accordingly, it is ordered, pursuant to the authority contained in sections 4(i), 302 and 303 of the Communications Act of 1934, as amended, that Parts 15, 73 and 74 of the Commission's Rules are amended, effective December 7, 1984, as shown in Appendix C. It is further ordered that this proceeding is terminated.

46. It is ordered that RM–1709 and RM–2894 are dismissed.

47. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C., *et seq.*).

48. Further information on this matter may be obtained by contacting Michael J. Marcus, (202) 632–7040, or John A. Reed, Office of Science and Technology, (202) 653–6288, or John A. Karousos, Mass Media Bureau, (202) 632–9660.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

[12] The Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for auditory assistance devices. We shall defer to the expertise of the Federal health and safety agencies in the establishment of such standards. If such standard are adopted we would expect equipment submitted for FCC approval to comply with all applicable Federal standards, e.g., performance standards adopted by the appropriate divisions of the U.S. Department of Health and Human Service or safety standards adopted by the Consumer Product Safety Commission.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Attachments:
Appendices A
Appendices B
Appendices C

Appendix A—List of Commenters

1. National Electrical Manufacturers Association ("NEMA")
2. Robert A. Jones, P.E. ("Jones")
3. Siemens
4. Advanced Technology Laboratories, Inc.
5. Hewlett-Packard Company
6. Bird Electronic Corporation
7. ADR Ultrasound
8. Ekoline
9. Technicare
10. The Schenectady Amateur Radio Association, Inc.
11. William Sound Corp.
12. Aerospace and Flight Test Radio Coordinating Council ("AFTRCC")
13. Hoffrel
14. General Electric ("GE")
15. Picker International
16. John D. Spano
17. Donald Chester
18. National Association of Broadcasters ("NAB")
19. Global Telerad, Inc.
20. Elscint, Inc.
21. Bendix
22. Viacom International, Inc.
23. U.S. Department of Agriculture
24. Phonic Ear, Inc.
25. National Radio Broadcasters Association ("NRBA")
26. National Cable Television Association, Inc. ("NCTA")
27. Association of Federal Communications Consulting Engineers (AFCCE).
28. Land Mobile Section of the Telecommunications Group of Electronic Industries Association (EIA/LM)
29. American Radio Relay League, Inc. ("League")
30. County of Los Angeles
31. American Broadcasting Companies, Inc. ("ABC")
32. Metromedia, Inc.
33. CBS, Inc. ("CBS")
34. Association of American Railroads ("AAR")
35. Millicom
36. Independent Data Communications Manufacturers Association, Inc. ("IDCMA")
37. National Association of Business and Educational Radio, Inc. ("NABER")
38. Special Industrial Radio Service Association, Inc. ("SIRSA")
39. Association of Maximum Service Telecasters ("AMST")
40. American Petroleum Institute ("API")
41. Consumer Electronics Group of the Electronic Industries Association ("CEG/EIA")
42. American Telephone and Telegraph ("AT&T")
43. Communications Satellite Corporation ("COMSAT")
44. Rockwell International Corporation ("Rockwell")

45. Department of Defense ("DOD")
46. Hughes Aircraft Company ("Hughes")
47. Cox Communications, Inc. ("Cox")
48. Jules Cohen & Associates
49. Manufacturers Radio Frequency Advisory Committee
50. GTE Service Corporation ("GTE")
51. J.P. Neil, P.E.
52. Forest Industries Telecommunications ("FIT")
53. Multimedia, Inc. ("Multimedia")
54. Association for Broadcast Engineering Standards, Inc. ("ABES")
55. Hommett and Edison, Inc.
56. Harris Corporation ("Harris")
57. Gordon F. Rogers
58. Sidband Technology, Inc.
59. Sperry Corporation
60. American Satellite Company

Appendix B—List of Reply Comments

1. Siemens
2. Bird Electronic Corporation
3. Independent Data Communications Manufacturers Association, Inc. ("IDCMA")
4. International Business Machines ("IBM")
5. Multimedia, Inc. ("Multimedia")
6. National Association of Broadcasters ("NAB")
7. American Radio Relay League, Incorporated ("League")
8. Cox Communications, Inc. ("Cox")
9. Association of Maximum Service Telecasters, Inc. ("AMST")
10. Society of Broadcast Engineers ("SBE")
11. General Electric ("GE")
12. National Cable Television Association, Inc. ("NCTA")
13. Motorola, Inc. ("Motorola")
14. Group W ("Group W")
15. American Broadcasting Companies, Inc. ("ABC")
16. Harris Corporation ("Harris")
17. Shooshan & Jackson, Inc.
18. E.F. Johnson, Inc. ("Johnson")
19. American Telephone & Telegraph ("AT&T")
20. Gordon F. Rogers
21. Sideband Technology, Inc.
22. Sperry Corporation

Appendix C

PART 15—[AMENDED]

A. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. Section 15.333 is amended by revising paragraph (b) to read as follows:

§ 15.333 Operation in the band 72–76 MHz.

* * * * *

(b) A receiver may be operated as part of an auditory assistance system provided it meets the technical specifications in § 15.367 and is certified pursuant to § 15.345.

§§ 15.361, 15.363, and 15.365 [Removed]

2. Sections 15.361, 15.363 and 15.365 are removed in their entirety.

PART 73—[AMENDED]

B. Title 47 of the Code of Federal Regulations, Part 73, is amended as follows:

1. Section 73.40 is amended by revising paragraph (a) and subparagraphs (b) (2) and (3), to read as follows:

§ 73.40 AM transmission system performance requirements.

(a) Stations must annually show compliance with § 73.44. These emission limitations must be met under any conditions of modulation expected to be encountered by the station.

(b) * * *

(2) For main channel modulation only, the total audio frequency distortion from terminals to antenna output shall not exceed 5% harmonics (voltage measurements of arithmetical sums or r.s.s) when modulated from 0 to 84% and shall not exceed 7.5% harmonics (voltage measurements of arithmetical sum or r.s.s) when modulating 85% to 95% (distortion shall be measured with modulating frequencies of 50, 100, 1000, 5000 and 7500 Hz up to tenth harmonic or 16,000 Hz, or any intermediate frequency that readings on these frequencies indicate is desirable). Harmonics should be observed to 20,000 Hz. When stereophonic transmission is used, the distortion must be measured in the left and right channels separately using a suitable stereophonic demodulator.

(3) The audio frequency transmitting characteristics for main (L+R), left (L) only and right (R) only modulation shall not depart more than 2 dB from that at 1000 Hz between 100 and 7500 Hz.

* * * * *

2. Section 73.317 is amended by removing subparagraphs (a)(1), (3), (4) and (5), and by revising and redesignating subparagraph (a)(2) as subparagraph (a)(1) and redesignating subparagraphs (a)(6) through (14) as subparagraphs (a)(2) through (10) to read as follows:

§ 73.317 Transmission system requirements.

(a) * * *

(1) Pre-emphasis shall be employed as closely as practicable in accordance with the impedance-frequency characteristic of a series inductance-resistance network having a time constant of 75 microseconds. (See upper curve of Fig. 2 of § 73.333.)

* * * * *

3. Section 73.687 is amended by deleting subparagraphs (a)(1), (2), (9), (b)(1), (3), (4) and (5), by redesignating subparagraphs (a)(3) through (a)(8) as subparagraphs (a)(1) through (a)(6); by revising and redesignating subparagraph (b)(2) as subparagraph (b)(1); and, by redesignating subparagraphs (b)(6) and (b)(7) as subparagraph (b)(2) and (b)(3), respectively, to read as follows:

§ 73.687 Transmission system requirements.

* * * * *

(b) * * *

(1) Pre-emphasis shall be employed as closely as practicable in accordance with the impedance-frequency characteristic of a series inductance-resistance network having a time constant of 75 microseconds. (See upper curve of Figure 12 § 73.699.)

4. Section 73.1570 is amended by revising subparagraph (b)(3) to read as follows:

§ 73.1570 Modulation levels: AM, FM, and TV aural.

* * * * *

(b) * * *

* * * * *

(3) TV station. In no case shall the total modulation of the aural carrier exceed 100% on peaks of frequent recurrence, unless some other peak modulation level is specified in an instrument of authorization. For monophonic transmissions, 100% modulation is defined as ±25 kHz.

* * * * *

5. Section 73.1590 is amended by removing subdivisions (b)(1) (i), (ii), (iii), (iv), and (b)(3) (i), (ii), (iii), (iv), and subparagraphs (c)(1) and (c)(6) and marking them [Reserved]; and, by revising subdivisions (b)(2) (ii) and (iii) to read as follows:

§ 73.1590 Equipment performance measurements.

* * * * *

(b) * * *

(1) * * *

(i)–(iv) [Reserved].

* * * * *

(2) * * *

(i) * * *

(ii) Data and curves showing audio frequency harmonic content for 25%, 50%, 75% and (main channel only) 100% modulation for the audio frequencies 50, 100, 400, 1000, 5000, and when attainable 7,500, 10,000, 12,000 and 15,000 Hz (either arithmetical or RSS (root sum square)) values up to 10th harmonic or 30,000 Hz) for equal left and right (L=R), left (L) only and right (R) only signals. A family of curves must be plotted (one for each percentage above) with percent distoration as ordinate and audio frequencies as abscissa.

(iii) Data showing percentage of carrier amplitude regulation (carrier

shift) for 25, 50, 85 and, if obtainable, 100% modulation with 400 Hz tone for main channel modulation with equal left and right (L=R) signals.

* * * * *

(3) * * *

(i)–(iv) [Reserved]

* * * * *

(c) * * *

(1) [Reserved]

* * * * *

(6) [Reserved]

* * * * *

PART 74—[AMENDED]

C. Title 47 of the Code of Federal Regulations, Part 74, is amended as follows:

Section 74.750 is amended by revising subparagraph (d)(1) to read as follows:

§ 74.750 Transmission system facilities.

* * * * *

(d) * * *

(1) The equipment shall meet the requirements of paragraphs (a)(1) and (b)(3) of § 73.687.

* * * * *

[FR Doc. 84-32267 Filed 12-11-84; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 76

[RM-3810; Docket No. 20423; FCC 84-527]

Amendment of the Commission's Rules To Delete Restrictions on Cable Television Broadcast Television Cross-Ownership; and Divestiture Requirement of § 76.501

AGENCY: Federal Communication Commission.

ACTION: Final rule.

SUMMARY: This action denies a petition for rule making to consider repeal of the cable/local broadcast television station cross-ownership prohibition of § 76.501 of the Commission's Rules. It also amends § 76.501(b)(2) to require divestiture of all egregious cable/broadcast television cross-interests.

This action is taken in response to a Petition for Rule Making filed by Marsh Media, Ltd., and takes action on the matter of egregious cross-ownership situations which the Commission deferred to this proceeding in the *Third Report and Order* in Docket 20423.

This action will promote the availability of independent voices in the local communications marketplace and is consistent with the Cable Communications Policy Act of 1984.

DATE: Effective January 10, 1985.

ADDRESS: Federal Communications Commission Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 76

Cable television.

Memorandum Opinion and Order

In the matter of amendment of the Commission's Rules to Delete Restrictions on Cable Television Broadcast Television Cross-Ownership (RM-3810), divestiture requirement of § 76.501 Relative to Egregious Cable Television Broadcast Television Cross-Ownership in Existence on or before July 1, 1970 (Docket No. 20423).

Adopted: November 8, 1984.

Released: December 4, 1984.

By the Commission.

Introduction

1. Before the Commission is a petition for rule making filed by Marsh Media, Ltd. (Marsh), on November 24, 1980.[1] The petitioner seeks repeal of § 76.501 of the Commission's Rules that restricts the ownership of cable television properties by television broadcasters.[2]

Marsh Media Petition

2. Section 76.501(a)(2) of the Commission's Rules prohibits cross-ownership between a cable television system and a broadcast station whose predicted Grade B contour overlaps the area served by the cable system. The rule was adopted because the Commission believed that it would further its "policy favoring diversity of control over local mass communications media." [3] In its petition, Marsh states that the rule should be repealed on the grounds that it goes beyond the Commission's jurisdiction, is an infringement on the First Amendment rights of broadcasters and that there is no practical evidence that this restriction serves the public interest.[4]

3. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act) was enacted. Section 613(a) of the Cable Act codifies the Commission's present prohibition of cable television system ownership by local television broadcasters. As a result, the Commission does not have the discretion to amend the rule. Accordingly, Marsh's petition for rule making is herein denied.

Divestiture of Egregious Cases

4. Section 76.501(b)(2) of the Commission's Rules grandfathers those cable/broadcast station cross-interests considered non-egregious (i.e., those cases where the broadcast station was not the only commercial broadcast station providing principal community service to the cable community) that were in existence on or before July 1, 1970, the rule's effective date. It also defines the effective date to be applied to cause divestiture of those egregious cable/local television entities which existed prior to the adoption of the cross-ownership restrictions. However, this portion of the rule has been revisited in numerous Commission proceedings, but has never become effective.[5] The most recent action was the *Third Report and Order* in Docket 20423 where the Commission determined that complete divestiture was not necessarily the most appropriate means of achieving the public interest goals of enhanced competition in both the economic and idea marketplaces in all cases. The Commission decided to grandfather the 13 remaining non-egregious cable/broadcast cross-interests, a policy similar to one adopted for broadcast/newspaper cross-ownership.[6] With

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[1] Marsh is the owner of four television stations and eleven cable television systems.

[2] Section 76.501 prohibits cross-ownership between a cable television system and a national television network or a local broadcast station. Marsh's petition focuses on the portion of the rule relating to cross-ownership by local stations. Network ownership of cable systems is the subject of Docket 82-434, 91 FCC 2d 76 (1982).

[3] *Second Report and Order*, Docket 18397, 23 FCC 820 (1970).

[4] Appendix A is a list of commenters. Public Notice (RM-3810), December 17, 1980. With regard to the cable/local broadcast cross-ownership issue, all five commenting parties reiterate arguments made by Marsh. Several commenters also discuss the rule banning network cable cross-ownership and CBS' request for waiver of that rule, which was pending at that time.

[5] Originally, the rule required divestiture of all existing cross-interests by August 10, 1973. *Second Report and Order*, Docket 18397, 23 FCC 2d 816 (1970). This deadline was subsequently extended until August 10, 1975, and parties were allowed to file waiver petitions for grandfathered status. *Memorandum Opinion and Order*, Docket 18397, 39 FCC 2d 377 (1973). In light of the many waiver petitions filed, the Commission instituted another rule making proceeding. *Notice of Proposed Rule Making*, Docket 20423, 52 FCC 2d 161 (1975). In a *First Report and Order*, Docket 20423, 53 FCC 2d 1102 (1975), the "egregious" only divestiture standard was adopted, effective August 10, 1977. Following a court challenge and a Commission-requested remand, a *Further Notice of Proposed Rule Making* in Docket 20423 was issued to examine the cross-ownership issue again. 61 FCC 2d 150 (1980). The result of this inquiry was the *Third Report and Order*, in Docket 20423, 49 FR 23348.

[6] The Commission adopted a divestiture requirement only for those broadcast station/newspaper cross-interests which were egregious and grandfathered other cross-ownership situations. *Second Report and Order*, Docket 18110, 50 FCC 2d 1046 (1975). Among the cross-interests

Continued

respect to the five remaining cases that appear to be egregious, we temporarily deferred action until consideration of this petition.[7] Given the fundamental issues involved and the potential adverse effects on the public and system and station owners, we believed that additional inquiry and analysis was needed before further action could be taken. Accordingly, the effective date for the divestiture requirement was suspended pending action on the Marsh Media petition and Docket 20423 was terminated.[8]

5. We believe it is necessary to require divestiture in those situations where there would otherwise be a virtual monopoly over local expression.[9] Furthermore, we believe that this action is consistent with the intent of Congress when it adopted the Cable Act. Section 613(f) of the Cable Act grandfathers interests held on July 1, 1984, if such interests were "not consistent with any applicable Federal or State law or regulation in effect on that date." The divestiture requirement for these egregious situations was part of the Commission's rules on July 1, 1984, although the effective date had been temporarily suspended. Accordingly, we will now terminate the stay of the divestiture rule and require divestiture of the five remaining cases that appear to be egregious cable/broadcast station cross-ownership situations within three years of adoption of this item (i.e., by November 8, 1987).[10]

Conclusion

6. The Commission's rule prohibiting common ownership of a cable television system and a co-located television station was codified in the Cable Communications Policy Act of 1984. As such, the Commission cannot repeal its rule. Therefore, Marsh Media's petition is effectively moot and must be denied. With respect to the existing cross-interests that appear to be egregious, divestiture is consistent with the Cable Act.

7. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

8. Accordingly, it is ordered that the request for rule making filed November 24, 1980, by Marsh Media, Ltd. is denied.

9. Accordingly, it is ordered, that effective January 10, 1985, Part 76 of the Commission's Rules and Regulations is amended as set forth in the attached Appendix C.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix A—List of Commenters

American Broadcasting Companies, Inc.
Joint comments of Bahia De San Francisco Television Company
Buford Television, Inc.
Forward Communications Corporation
Futura Communications Corporation
Guaranty Broadcasting Corporation
K-Six Television, Inc.
May Broadcasting Company
John H. Phipps Broadcasting Stations, Inc.
Plains Television Corporation
Retlaw Enterprises, Inc.
Service Broadcasters, Inc.
Shamrock Broadcasting Company, Inc.
Southern Television Corporation
Spanish International Communications Corporation
Studio Broadcasting System
Summit Radio Corporation
Welgel Broadcasting Co.
Ralph C. Wilson Communications, Inc.
Ziff-Davis Broadcasting Company
National Association of Broadcasters
General Electric Broadcasting Company, Inc.
National Broadcasting Company, Inc.

Appendix B—Egregious Cross-Owned Situations

Television station	Cable television system
KLOE–TV, Goodland KS	Goodland, KS.
WKYH–TV, Hazard, KY	Hazard KY.
KXGN–TV, Glendive, MT	Glendive, MT.
KTEN, Ada, OK	Ada, OK.
KSWO–TV, Lawton OK	Lawton, OK.

Appendix C

Part 76 of Chapter I ot Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 76.501 is amended by revising paragraph (b)(2) and by removing the note at the end of the section to read as follows:

§ 76.501. Cross-ownership.

* * * * *

(b) * * *

(2) The provisions of paragraph (a)(2) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

[FR Doc. 84–32222 Filed 12–11–84; 8:45 am]

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grandfathered was Marsh's KVII–TV, Amarillo, Texas and Total Television of Amarillo, the cable system in that city in which Marsh has a 50 percent interest.

[7] The five remaining cases that appear to be egregious cross-ownership situations are listed in Appendix B.

[8] Marsh filed for reconsideration in Docket 20423. In that petition Marsh states that the Commission erred in terminating the proceeding without addressing the broader question of the validity of the cable/broadcast television cross-ownership prohibition. That issue is essentially resolved here. The reconsideration petition also requests a clarification as to the extent that Marsh's cross-interest is grandfathered. That issue will be dealt with separately.

[9] The Commission has asserted the importance of the independence of viewpoints in local media markets throughout the many analyses of its ownership rules. Cable television systems are an integral part of these local media markets. They are potentially influential sources of information concerning local issues along with broadcast stations and newspapers. Cable systems are significantly increasing the supply of programming and information available to the public through the carriage of satellite delivered news and other nonentertainment programming. We continue to believe in this context divestiture that is essential to ensure the diversity of editorial voices in these local media markets. We also note that the Commission recently reiterated this belief that local ownership rules must be mantained when it examined the multiple ownership rules for broadcast stations. *Report and Order.* Docket 83–1009, 49 FR 31877 (1984) at paras. 10, 12, 31 and 32. This is the standard adopted in both Docket 18110 and Docket 20423.

[10] With the resolution of this matter which was deferred to this proceeding in Docket 20423, the Commission now amends § 76.501 to reflect this divestiture date. Textual changes to § 76.501 to effectuate this requirement appear in Appendix C.

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1002, 1182, 1183, and 1186

[Ex Parte No. 55 (Sub-No. 57]

Exemption of Certain Transactions Under 49 U.S.C. 11343

AGENCY: Interstate Commerce Commission.

ACTION: Final rules.

SUMMARY: At an open conference held on September 20, 1984, the Commission voted to exempt, on a class basis, motor finance transactions subject to regulation under 49 U.S.C. 11343(a) (1)–(5) involving motor carriers of property, subject to complaints filed by (1)

employees alleging they are or will be adversely affected by a transaction and (2) any party alleging that the transaction will be anticompetitive in effect. New procedural rules for processing the proposed exempt transactions, to be codified at 49 CFR Part 1186, are adopted. In Ex Parte No. 55 (Sub-No. 57A), *Modification of Small Carrier Transfer Regulations for Transactions Involving Motor Carriers of Property* [notice of proposed rulemaking served December 11, 1984.], the Commission has solicited comments on a proposal to adopt the class exemption regulations as the procedural rules for filing and processing transfer of authority involving the small carriers of property subject to 49 U.S.C. 10926. Incidental changes in 49 CFR Parts 1002, 1182, and 1183 have also been made. The procedures are intended to reduce unnecessary regulation and therefore benefit motor carriers and indirectly shippers and the public at large.

EFFECTIVE DATE: The new rules will be effective January 11, 1985.

FOR FURTHER INFORMATION CONTACT:

Warren C. Wood (202) 275–7977;

or

Howell I. Sporn (202) 275–7691.

SUPPLEMENTARY INFORMATION: Notice of proposed rules and exemption was published at 48 FR 26485, June 8, 1983.

Environmental and Energy Considerations

We adopt our preliminary finding that the proposed changes will not have any significant impact on the quality of the human environment or the conservation of energy resources. No comments were submitted on these issues.

Regulatory Flexibility Analysis

The Commission certifies that the regulations adopted here will not have a significant economic impact on a substantial number of small entities. The modified class exemption adopted here will expedite the processing of motor finance applications filed with the Commission. Informational filing requirements have been lessened, and the initial filing fee has been reduced from $400 to $150.

List of Subjects in 49 CFR Parts 1002, 1182, 1183, and 1186

Administrative practice and procedure, Motor carriers.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. Infosystems, Inc., Room 2227, Interstate Commerce Commission, Washington, D.C. 20423, or call 289–4357 (D.C. metropolitan area) or toll-free (800) 424–5403.

Adoption and Changes in Regulations

We are adopting with modifications, as described above, the rules previously proposed, to be codified at 49 CFR Part 1186, which are set forth in the appendix. In addition, we are amending the regulations at 49 CFR Parts 1002, 1182, and 1183, to the extent set forth in the appendix. The rule changes will take effect on January 11, 1985.

This decision is issued pursuant to 49 U.S.C. 10321, and 11343(e) and 5 U.S.C. 553.

Decided: November 21, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio.

James H. Bayne,

Secretary.

Appendix

Title 49 CFR is amended as follows:

PART 1002—[AMENDED]

1. Revise 49 CFR 1002.2(f)(27) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

(27) A petition for exemption under 49 U.S.C. 11343(e)..... 150

* * * * *

PARTS 1182 AND 1183—[AMENDED]

2. Parts 1182 and 1183 are amended by adding the words "of passengers" to follow the words "motor carrier" each time they appear in the part headings and paragraphs listed below:

The headings of Parts 1182 and 1183.
§ 1182.1(b).
§ 1182.5 (a) (1) and (2) and (b).
§ 1183.1(a).
§ 1183.3(a).
§ 1183.4(a).
§ 1183.5(a).

3. The following new Part 1186 will be added to the Code of Federal Regulations:

PART 1186—EXEMPTION OF CERTAIN TRANSACTIONS UNDER 49 U.S.C. 11343

Sec.

1186.1 Scope of exemption.
1186.2 Notice of exemption.
1186.3 Attachments.
1186.4 Temporary authority.
1186.5 Filing fees.
1186.6 Publication of summary notice.
1186.7 Effective date of exemption.
1186.8 Complaints.

Authority: 49 U.S.C. 10321 and 11343(e) and 5 U.S.C. 553.

§ 1186.1 Scope of exemption.

Any transaction under 49 U.S.C. 11343(a)(1)–(5) among motor carriers of property or between them and non-carriers is exempt from the requirements of 49 U.S.C. 11343, 11344, and 11345a, subject to the right of employees and others to file complaints as set forth in § 1186.8.

§ 1186.2 Notice of exemption.

To qualify for an exemption under § 1186.1, the participants in the transaction must file a joint Notice of Exemption with the Commission. The Notice of Exemption shall contain the following information:

(a) Names and addresses of the carriers involved;

(b) A brief, but specific description of the nature of the transaction; and

(c) Certification of the accuracy of the contents of the notice by, and signatures of, the persons who control the carriers involved in the transaction.

§ 1186.3 Attachments.

Attachments to the Notice of Exemption filed with the Commission should include:

(a) A short summary of the transaction to be published as a notice to the public; and

(b) If appropriate, draft certificates and permits reflecting the operating rights authorized to be acquired, retained, or issued.

§ 1186.4 Temporary authority.

Parties may simultaneously request temporary authority during the pendency of the exemption proceeding by submitting Form OP–F–46 in accordance with the regulations prescribed at 49 CFR 1183.4. The fee will be the same as that contained at 49 CFR 1002.2(f)(24).

§ 1186.5 Filing fees.

The filing fee required to file a Notice of Exemption is set forth in 49 CFR 1002.2(f)(27).

§ 1186.6 Publication of summary notice.

The Commission will publish the summary of the Notice of Exemption describing the nature and scope of the transaction in the ICC Register.

§ 1186.7 Effective date of exemption.

When a Notice of Exemption is filed, the exemption will be effective 60 days after a summary of the Notice of Exemption is published in the ICC Register except:

(a) Where consummation is contingent upon Commission approval of directly related applications involving the conversion of certificates of registration to certificates of public convenience and necessity; or

(b)(1) In the case of employee complaints, a decision will be served and effective 30 days after receipt of the complaint unless the complaint is filed less than 30 days after publication of the summary of the Notice of Exemption, in which case the decision will be effective 60 days after publication of the summary of the Notice of Exemption, or

(2) In case of a complaint on anticompetitive grounds, a decision will be served and effective 30 days after the due date for complaints.

§ 1186.8 Complaints.

(a) Employees that have been or may be adversely affected by an exempt transaction or transaction proposed for exemption may file a complaint with the Commission any time after the Notice of Exemption is filed. A copy of the complaint must be served on the parties to the transaction. The parties may file an answer with the Commission and upon complainant within 10 days after receipt of the complaint. Employee complaints must contain the following information:

(1) The docket number of the corresponding Notice of Exemption (if available at the time) and the names of the participants in the transaction;

(2) Names of the employees alleged to be affected by the transaction and the nature and scope of harm;

(3) A request for specific relief (requests for relief in the alternative are acceptable);

(4) An explanation as to why the particular relief sought is the appropriate remedy for the particular harm suffered; and

(5) (Optional) A request for suspension or revocation of the exemption, accompanied by information showing why suspension or revocation of exemption is necessary.

(b) Any party may file a complaint with the Commission within 30 days after the Notice of Exemption is published alleging that the transaction is potentially anticompetitive. A copy of the complaint must be served on the parties to the transaction. The parties may respond by filing an answer with the Commission and upon complainant within 10 days after the due date of the complaint. The complaint must contain the following information:

(1) The docket number of the corresponding Notice of Exemption (if available at the time) and the names of the participants in the transaction:

(2) A specific description of the manner in which competition will allegedly be adversely affected;

(3) A request for specific relief (requests for relief in the alternative are acceptable); and

(4) An explanation as to why the particular relief sought is deemed to be appropriate.

[FR Doc. 84-32336 Filed 12-11-84; 8:45 am]
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611, 672, and 675

[Docket No. 31230-251]

Foreign Fishing, Groundfish of the Gulf of Alaska, and Groundfish of the Bearing Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of inseason adjustments.

SUMMARY: NOAA announces the apportionment of amounts of Alaska groundfish to the 1984 domestic annual harvest (DAH) and total allowable level of foreign fishing (TALFF) under provisions of the fishery management plans (FMPs) for Groundfish of the Bering Sea and Aleutian Islands Area and for Groundfish of the Gulf of Alaska. Groundfish are apportioned according to the regulations implementing those FMPs. The intent of this action is to assure optimum use of these groundfish by allowing the domestic and foreign fisheries to proceed without interruption.

EFFECTIVE DATE: December 7, 1984.

SUPPLEMENTARY INFORMATION:

Background

The total allowable catches (TACs) for various groundfish species are established under the FMP for Groundfish of the Bering Sea and Aleutian Islands Area; optimun yields (OYs) are established by the FMP for Groundfish of the Gulf of Alaska. These FMPs were developed by the North Pacific Fishery Management Council under the Magnuson Fishery Conservation and Management Act and are implemented by rules appearing at 50 CFR 611.92 and 611.93, and at 50 CFR Parts 672 and 675. The TACs and OYs are apportioned initially among DAH, reserves, and TALFF. Each reserve amount, in turn, is to be apportioned to DAH and/or TALFF during the fishing year, under 50 CFR 611.92(c), 611.93(b), 672.20(c), and 675.20(b). In addition, surplus amounts of both components of DAH [DAP (domestic processed fish) and JVP (joint venture processed fish)] may be apportioned to TALFF during the fishing year under those same regulations.

The initial DAPs and JVPs for 1984 were based on the projected needs of the U.S. industry, as assessed by a mail survey sent by the Director, Alaska Region, NMFS (Regional Director) to fishermen and processors in September 1983. To consider changes in the extent to which U.S. industry will harvest and process groundfish, the Regional Director resurveyed the industry (including new participants) in March 1984. The results of the March survey allowed estimation of amounts of DAH of groundfish to be harvested and/or processed during each half of 1984.

Anticipated shortfalls in DAH amounts were earlier alleviated by the release of reserves to DAP and JVP (49 FR 23355, June 6, 1984, corrected at 49 FR 27322, July 3, 1984). That action also apportioned most of the reserves to TALFF.

1. Bering Sea and Aleutian Islands Area (Table 1)

In the June action, 75 percent of the non-specific reserve was apportioned to TALFF. In July, the JVPs of pollock in the Aleutian Islands area and Atka mackerel in the Bering Sea and Aleutian Islands area were raised by apportionment from the non-specific reserve (49 FR 30313, July 30, 1984). A later action (49 FR 33270, August 22, 1984) transferred DAP amounts of Pacific cod, sablefish, and Pacific ocean perch in the Bering Sea to JVP. An amount from the non-specific reserve was also apportioned to the pollock JVP in the Aleutian Islands area.

Apportionments to DAH:

Joint venture activity in the Bering Sea and in the Aleutian Islands area has ceased for the year, as have several operations delivering to domestic processors.

JVP catches of squid have exceeded the currently specified 20 metric tons (mt); therefore 30 mt of the non-specific reserve is transferred to the squid JVP. JVP catches of "other species" have exceeded the currently specified 2,000 mt; therefore 500 mt of the non-specific reserve is transferred to the "other species" JVP.

Apportionments to TALFF:

Because the Bering Sea sablefish DAP is judged excess to the needs of domestic harvesting and processing, 1,000 mt of the sablefish DAP is reapportioned to TALFF. Because the Bering Sea Pacific cod JVP will not all

be taken by joint venture fisheries, the remaining 10,000 mt of the Pacific cod JVP is reapportioned to TALFF.

Additional amounts from the non-specific reserve determined excess to the 1984 needs of U.S. fishermen are transferred to TALFF as follows: Bering Sea pollock, 32,190 mt; Pacific cod, 7,875 mt; and Bering Sea sablefish, 50 mt.

2. Gulf of Alaska

In March, by emergency interim rule later made final (49 FR 28853, July 17, 1984), the OY for pollock in the Western and Central Regulatory Areas was increased from 200,000 mt to 400,000 mt. This action also increased the OY, reserve, and TALFF of "other species" in this areas. In June, up to 80 percent of the reserves for certain species/areas were apportioned to TALFF (49 FR 23355, June 6, 1984). In July, amounts of Pacific cod excess to the needs of the U.S. industry in the Central Regulatory Area were transferred from reserve and DAP to TALFF (49 30313, July 30, 1984). Later, reserves of Atka mackerel in the Western and Central Regulatory Areas were apportioned to JVP (49 FR 33270, August 22, 1984). Also, the entire sablefish reserve in the West Yakutat area was apportioned to DAP.

Apportionments to DAH:

Deliveries of sablefish to domestic processors in the Central Regulatory Area have exceeded the DAP of 1,360 mt. Therefore, the entire remaining reserve of sablefish in the Central Regulatory Area (612 mt) is apportioned to DAP. Similarly, the entire 256 mt of the sablefish reserve in the Western Regulatory Area is apportioned to DAP.

U.S. processors have taken deliveries of 90 mt of Pacific ocean perch in the Western Regulatory Area. Therefore, 90 mt of the Pacific ocean perch reserve is transferred to the DAP of the Western Regulatory Area. Guld-wide deliveries of "other species" have exceeded the currently specified 100 mt; an additional 100 mt from the reserve of "other species" is apportioned to DAP.

Apportionments to TALFF:

Reserve amounts of all other species/areas (except Pacific ocean perch) are determined excess to the 1984 needs of U.S. fisheries and are transferred to TALFF.

Comments and Responses

One comment preceded this notice.

Comment: Available reserve and DAH amounts of Pacific cod in the Bering Sea and all reserve and certain DAH amounts of sablefish in the Bering Sea exceed the needs of U.S. fishermen and should be apportioned to TALFF.

Response: In the Bering Sea, the remaining 10,000 mt of the Pacific cod JVP is transferred to TALFF as is 7,875 mt of the non-specific reserve. Also in the Bering Sea, 1,000 mt of the sablefish DAP and 50 mt of the non-specific reserve are apportioned to TALFF.

Classification

This action is taken under 50 CFR 611.92(c), 611.93(b), 672.20(c), and 675.20(b), and complies with Executive Order 12291.

In view of the need to allow the domestic and foreign fisheries to proceed without interruption in order to assure optimum use of these groundfish, the Agency has determined that providing prior comment and delaying the effective date of this notice would be impracticable, unnecessary, and contrary to the public interest. Comments on the extent to which U.S. fishermen will harvest and the extent to which U.S. processors will process Alaska groundfish will be accepted until December 24, 1984. Responses to any comments as well as any necessary modifications to these apportionments will be published in the **Federal Register** as soon as practicable.

List of Subjects in 50 CFR Parts 611, 672, and 675

Fisheries.

(16 U.S.C. 1801 *et seq.*)

Dated: December 7, 1984.

Carmen J. Blondin,

Deputy Assistant Administrator for Fisheries Resource Management, National Marine Fisheries Service.

TABLE 1.—1984 REAPPORTIONMENTS OF TAC IN THE BERING SEA AND ALEUTIAN ISLANDS AREA

	Current	Changes November	Revised
Pollock (Bering Sea Area only: TAC=1,200,000; EY=1,200,000):			
DAP	18,200		18,200
JVP	273,000		273,000
RES	39,105	−32,190	6,915
TALFF	869,695	+32,190	901,885
Pacific cod (TAC=210,000; EY=291,300):			
DAP	84,400		84,400
JVP	47,200	−10,000	37,200
RES	7,875	−7,875	0
TALFF	70,525	+17,875	88,400
Sablefish (Bering Sea Area only: (TAC=3,740, EY=4,430):			
DAP	1,865	−1,000	865
JVP	175		175
RES	50	−50	0
TALFF	1,650	+1,060	2,700
Squid (TAC=8,900; EY=10,000):			
DAP	20		20
JVP	20	+30	50
RES	334	−30	304
TALFF	8,526		8,526
Other species (TAC-40,000; EY=61,400):			
DAP	3,000		3,000
JVP	2,000	+500	2,500
RES	1,500	−500	1,000
TALFF	33,500		33,500

TABLE 2.—GULF OF ALASKA REAPPORTIONMENTS OF OY

	Current	Changes this action	Revised
Pollock (Western/Central: OY=400,000):			
DAP	9,000		9,000
JVP	210,300		210,300
RES	16,000	−16,000	0
TALFF	164,700	+16,000	180,700
Pollock (Eastern: OY=16,600):			
DAP	300		300
JVP	0		0
RES	664	−664	0
TALFF	15,636	+664	16,300
Pacific cod (Eastern: OY=9,900):			
DAP	120		120
JVP	0		0
RES	396	−396	0
TALFF	9,384	+396	9,780
Flounders (Eastern: OY=8,400):			
DAP	300		300
JVP	0		0
RES	1,680	−1,680	0
TALFF	6,420	+1,680	8,100
Pacific ocean perch (Western: OY=2,700):			
DAP	0	+90	90
JVP	1,770		1,770
RES	540	−90	450
TALFF	390		390
Sablefish (Western: OY=1,670):			
DAP	100	+256	356
JVP	200		200
RES	256	−256	0
TALFF	1,114		1,114
Sablefish (Central: OY=3,060):			
DAP	1,360	+612	1,972
JVP	290		290
RES	612	−612	0
TALFF	798		798
Atka mackerel (Eastern: OY=3,186):			
DAP	0		0
JVP	0		0
RES	127	−127	0
TALFF	3,059	+127	3,186
Thornyheads (Gulf-wide: OY=3,750):			
DAP	150		150
JVP	50		50
RES	150	−150	0
TALFF	3,400	+150	3,550
Other species (Gulf-wide: OY=28,780):			
DAP	100	+100	200
JVP	1,400		1,400
RES	4,756	−4,756	0
TALFF	22,524	+4,656	27,180
Squid (Gulf-wide: OY=5,000):			
DAP	100		100
JVP	10		10
RES	200	−200	0
TALFF	4,960	+200	4,890

[FR Doc. 84-32383 Filed 12-7-84; 4:32 pm]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 49, No. 240
Wednesday, December 12, 1984

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 249

[Release No. 34-21539; File No. S7-40-84]

Requests for Confidential Treatment Filed by Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Amendments to Instruction to Form.

SUMMARY: The Commission is proposing for public comment amendments to the instructions to the form that prescribes the reporting requirements for institutional investment managers exercising investment discretion over accounts having in the aggregate more than $100,000,000 in exchange-traded or NASDAQ-quoted equity securities. The amendments would simplify the procedures for requesting confidential treatment of certain risk arbitrage positions filed on the form, and place time limitations on confidential treatment requests for securities holdings where the holdings constitute confidential commercial information.

DATE: Comments should be received on or before January 14, 1985.

ADDRESS: Comments should be submitted in triplicate to Shirley E. Hollis, Acting Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. Comment letters should refer to File No. S7-40-84. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: For questions relating specifically to the subject of this release, contact Susan P. Hart, Esq., Attorney/Adviser, Office of Disclosure Policy and Adviser Regulation, (202) 272-2098, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549; for questions relating generally to reporting requirements for institutional investment managers under section 13(f) of the Securities Exchange Act of 1934 and rules thereunder, contact Alice R. Latimer, Research Assistant, Office of Chief Counsel, (202) 272-2038, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On June 15, 1978, the Securities and Exchange Commission (the "Commission") announced the adoption of rule 13f-1 (17 CFR 240.13f-1) and related Form 13F (17 CFR 249.325), under section 13(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq. as amended by Pub. L. No. 94-29 (June 4, 1975)) (the "Exchange Act").[1] Under Section 13(f) and rule 13f-1, as amended effective February 5, 1979,[2] an institutional investment manager exercising investment discretion (as defined in section 3(a)(35) of the Exchange Act (15 U.S.C. 78(c)(a)(35))) with respect to accounts having $100,000,000 or more in exchange-traded or NASDAQ-quoted equity securities on the last trading day of any of the twelve months of calendar year must file five copies of Form 13F with the Commission and, if a bank, with the appropriate bank regulatory agency. The form must be filed within 45 days after the last day of such calendar year and within 45 days after the last day of the first three calendar quarters of the succeeding year. The form requires the reporting manager to state the name of the issuer and the class of security, CUSIP number, number of shares or principal amount in the case of convertible debt, and aggregate fair market value of each security held. The form also requires information concerning the nature of investment discretion and voting authority possessed by the reporting manager.

Rule 13f-1 and Form 13F were adopted to implement the institutional disclosure program mandated by Congress in section 13(f) of the Exchange Act. In general, section 13(f)(3) of the Exchange Act requires that the Commission make the information in reports on Form 13F promptly available to the public. However, that section also provides for confidential treatment for two categories of information that for convenience are referred to in this release as "commercial" and "personal." If the criteria of section 13(f)(3) are met, the Commission's grant of confidential treatment to personal information is nondiscretionary. Decisions about whether to grant confidential treatment to commercial information must be made in accordance with the Freedom of Information Act ("FOIA") (5 U.S.C. 552).

General Instruction D of Form 13F establishes the procedures to be followed in requesting confidential treatment. As last amended, in 1979, General Instruction D provides that if a request for confidential treatment is based on a claim that the required information is commercial or financial, the reporting manager must, among other things: (1) Describe the investment strategy being followed; (2) demonstrate that disclosure of the investment strategy would be premature; and (3) demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position.

The Commission is proposing an amendment to General Instruction D to Form 13F to provide a simplified procedure for requesting confidential treatment of certain arbitrage information filed on the form. Under the revised procedures, confidential treatment would be granted for a period of one year to security holdings which are open risk arbitrage positions if the reporting manager represents in writing at the time Form 13F is filed that: (1) The security holding represents a risk arbitrage position that is open on the last day of the calendar quarter for which the report is filed; and (2) the manager has no present intention to close the position on or before the date on which the report is required to be filed with the Commission. In addition, the Commission is proposing an amendment to require managers requesting confidential treatment requests for commercial information, other than open risk arbitrage information, to limit their requests to a period of one year or less.

[1] Exchange Act Release No. 14852 (June 15, 1978) [43 FR 26700, June 22, 1978].

[2] Exchange Act Release No. 15461 (January 5, 1979) [44 FR 3033, January 15, 1979].

Background

Many of the requests for confidential treatment of commercial information have been from managers who engage in risk arbitrage. Based on its experience with these requests, the Commission believes that it should consider whether decisions relating to confidential treatment of information about open risk arbitrage positions can be made without all of the information currently required by Instruction D. Since the potential harm of public disclosure of such positions is identifiable and similar for all open risk arbitrage positions as a class (for example, if a merger which was the subject of risk arbitrage activity was not consummated, an arbitrageur could be harmed when it attempted to liquidate its position in adverse market conditions, if the extent of its position were known to the public), the Commission is proposing to eliminate the requirement that managers supply full factual support on a holding-by-holding basis, and to grant confidential treatment for such security positions if certain representations are made in writing by the reporting manager. Commercial information may, however, be granted confidential treatment only in accordance with the FOIA, and the Commission requests comment on the extent to which it may grant confidential treatment to a class of holdings such as open risk arbitrage positions.

Amendments

Confidential Treatment for Open Risk Arbitrage Positions

The first of the proposed amendments to General Instructions D, contained in paragraph 2(f) of the revised instruction, would require managers requesting for confidential treatment for certain risk arbitrage positions to provide two good faith representations. The first of these is that the security holding represents a risk arbitrage position that is open on the last day of the calendar quarter for which the report is filed and the second is that the reporting manager has no present intention to close the position on or before the date the report is required to be filed with the Commission. Under the proposed amendment, if such representations are made, confidential treatment will be granted automatically for a period of one year from the calendar quarter end.[3]

a. *Definition of Risk Arbitrage.* For purposes of the revisions to Instruction D, the term "risk arbitrage" refers to the risking of capital in connection with a proposed merger, acquisition, tender offer, or similar transaction involving recapitalization ("risk arbitrage event" or "deal").[4] The term applies only to transactions effected after the public announcement of the deal and before completion or termination of the deal. The term also applies whether the deal involves a proposed exchange of securities or cash tender offer and whether transactions are effected with a view to profiting from the consummation of the deal or from its unsuccessful termination. The new procedures also are available where there is an anticipated program to liquidate a risk arbitrage position before completion or after termination of the deal or within a reasonable period of time thereafter.[5]

Some institutional managers have asserted in connection with confidential treatment requests under section 13(f) that there is a substantial likelihood of competitive harm if open risk arbitrage positions are prematurely disclosed to the public. The following argument is representative of their assertions. A risk arbitrageur who has reason to believe that an announced merger or tender offer may not occur or will occur only after protracted delays, most likely will want to liquidate its position as unobstrusively and rapidly as possible. If the extent of the arbitrageur's position as disclosed on Form 13F is publicly known, the price at which the position can be disposed of could be affected adversely. Thus, the arbitrageur could suffer significant harm if the position held became public knowledge before the holdings were liquidated. This proposed revision to General Instruction D is based on a belief that the potential for harm from disclosure is similar for all open risk arbitrage positions.

b. Duration of Confidential Treatment for Open Risk Arbitrage Positions. Once a manager has met the new criteria for requesting confidential treatment, the information concerning open risk arbitrage positions will be protected from disclosure for a period of one year from the date the report is required to be filed, a period during which all open positions are likely to be closed, or, if still open, to become no longer time-sensitive. Any request for an extension of the period for which confidential treatment has been granted under the new procedures would have to be made in the form of a new request filed with the Commission at least fourteen days before the end of the initial one-year period. Moreover, the new request would have to include the full factual support specified in General Instruction D 2(a)–(d) to Form 13F. Because both section 13(f) of the Exchange Act and the FOIA were intended by Congress to promote public disclosure of information and because there can be significant variations in the amount of time that risk arbitrage positions are held open, the Commission requests comments on the appropriateness of one year as the initial period for which confidential treatment will be granted under the proposed amendment.

c. Applicability. The simplified procedures for requesting confidential treatment set out in paragraph 2(f) of the amended instruction would apply only to open risk arbitrage positions. Managers requesting confidential treatment for other investment strategies such as block positioning and programs of acquisition and/or disposition that cannot appropriately be considered risk arbitrage would still be required to provide full factual support for the requests. Block positions have not been included in the proposal because they involve transactions which are completed during a very short period of time.[6] In the Commission's view, even if a reporting manager held a block position at the calendar quarter end, it is likely that the position would be disposed of by the date on which Form 13F is required to be filed (e.g., 45 days later). Any block position that might be maintained 45 days after the close of a calendar quarter would be presumed to be maintained for investment purposes, rather than as a block position, and would require the full factual support specified in Instruction D. Similarly, confidential treatment requests regarding acquisition or disposition programs, other than risk arbitrage, would have to be supported with facts as specified in paragraph 2(a)–(d) of

[3] In accordance with rule 24b–2 (17 CFR 240.24b–2), this grant of confidential treatment would not preclude reconsideration by the Commission at a later date of the decision concerning confidential treatment. If the Commission were to receive a FOIA request for such information during the one-year period, managers would be required to provide full-factual support to justify the continuation of confidential treatment.

[4] This definition of "risk arbitrage" is the same as that referred to in section 11(a)(1)(D) of the Exchange Act (15 U.S.C. 78(k)(a)(1)(D)). See Exchange Act Release No. 15533 (January 29, 1979), for a more detailed discussion of the definition. "Deal" is the term commonly used in the industry to refer to a risk arbitrage event; therefore, the term "deal" is used in this release to refer to such a transaction.

[5] Risk arbitrage in this context does not include a position assumed by a risk arbitrageur which is maintained for tax or investment purposes after the termination or completion of the deal.

[6] Rule 3b–8(c) of the Exchange Act (17 CFR 240.3b–8(c)) defines a block positioner as a dealer, who, among other things, acting as principal, buys short or sells long a block of stock with a market value of $200,000 or more in a single transaction and sells the stock as rapidly as possible commensurate with the circumstances.

Instruction D, and a showing of a likelihood of competitive harm if the positions are disclosed.

Limitation on Confidential Treatment for Other Commercial Information

The second amendment to General Instruction D, contained in paragraph 2(e) of the revised instruction, would require each institutional manager requesting confidential treatment for commercial information, other than information relating to an open risk arbitrage position, to limit the requested period of confidentiality to a specific time, not to exceed one year. In the Commission's view, this change balances the public disclosure concerns of the statute with the needs of managers to protect certain investment strategies and holdings from public disclosure under the standards of FOIA exemption four. The Commission believes that, in most cases, an investment strategy or holding that was the subject of a confidential treatment request under section 13(f) would within a year following the date that the 13F report is filed become no longer sensitive. Thus, the proposed amendment would require managers to designate a period of time for which confidential treatment of any commercial information, other than that relating to open risk arbitrage positions, is requested. The period requested may not exceed one year from the date the report is required to be filed with the Commission. Requests for extension of the period for which confidential treatment had been granted could be made by submitting a *de novo* request at least fourteen days in advance of the expiration of the original time period for which confidential treatment was granted. The Commission requests specific comment on whether it should limit confidential treatment requests for commercial information, other than open risk arbitrage information, to a specific time period, and if so, whether a one year time period is a reasonable time limit for such requests.

If the proposed amendments to Instruction D are adopted substantially as proposed, the Commission will automatically make public security holdings, for which confidential treatment has been granted, on the specified date without additional notice to managers, unless a new request for confidential treatment is filed at least fourteen days in advance of the expiration of the year specified for open risk arbitrage positions or, for other commercial information, at least fourteen days in advance of the time designated by the manager.

List of Subjects in 17 CFR Part 249

Reporting requirements, Securities.

Text of Proposed Amendment to General Instructions to Form 13F

Chapter II of Title 17 of the Code of Federal Regulations is proposed to be amended as follows:

PART 249—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. By revising paragraph 2 of General Instruction D of the form prescribed in § 249.325 of Title 17 of the Code of Federal Regulations to read as follows:

§ 249.325 Form 13F, report of institutional investment manager pursuant to section 13(f) of the Securities Exchange Act of 1934.

* * * * *

General Instructions

* * * * *

D. * * *

2. If a request for confidential treatment is based upon a claim that the subject information is confidential commercial or financial information, provide information required by paragraphs (a)–(e) except that if the subject information concerns security holdings which represent open risk arbitrage positions and no previous requests for confidential treatment of those holdings have been made, only the information required in paragraph (f) need be provided.

a. Describe the investment strategy being followed with respect to the relevant securities holdings, including the extent of any program of acquisition and disposition (note that the term "investment strategy," as used in this instruction, also includes activities such as block positioning);

b. Explain why public disclosure of the securities holdings would, in fact, be likely to reveal the investment strategy; consider this matter in light of the specific reporting requirements of Form 13F (e.g., securities holdings are reported only quarterly and may be aggregated in many cases);

c. Demonstrate that such revelation of an investment strategy would be premature; indicate whether the manager was engaged in a program of acquisition or disposition of the security both at the end of the quarter and at the time of the filing; address whether the existence of such a program may otherwise be known to the public;

d. Demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position; show what use competitors could make of the information and how harm to the manager could ensue.

e. State the period of time period for which confidential treatment of the securities holdings is requested. The time period specified may not exceed of one year from the date the report is required to be filed with the Commission.

f. For security holdings which represent open risk arbitrage positions, the request must include good faith representations that:

(1) The security holding represents a risk arbitrage position open on the last day of calendar quarter for which the report is filed; and

(2) The reporting manager has no present intention to close the position on or before the date the report is required to be filed with the Commission.

If the representations stated above are made in writing at the time Form 13F is filed, the subject security holdings will automatically be accorded confidential treatment for a period of one year from the date the report is required to be filed with the Commission.

g. At the expiration of the period for which confidential treatment has been granted pursuant to item (e) or item (f) of this paragraph ("expiration date"), the Commission, without additional notice to the reporting manager, will make such security holdings public unless a *de novo* request for confidential treatment of the information that meets the requirements of items (a)–(e) of this paragraph, is filed with the Commission at least fourteen (14) days in advance of the expiration date.

Statutory Authority

The Commission hereby proposes this amendment to Form 13F pursuant to the authority set forth in section 3(b), 13(f) and 23 of the Exchange Act (15 U.S.C. 78c(b), 78m(f), and 78(w).

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, the Chairman of the Commission has certified that the amendments to General Instruction D of Form 13F proposed herein will not, if promulgated, have a significant impact on a substantial number of small entities. These amendments are being proposed under Section 13(f) of the Exchange Act. The Commission has defined small entities for the purposes of rulemaking under the Exchange Act; however, no specific definition is provided for institutional investment managers, the class of persons required to report pursuant to Section 13(f). Moreover, although a definition is provided for investment advisers. However, the Commission has defined small entities when that term is used in connection with the Investment Advisers Act ("Advisers Act"), in Rule 0–7 under the Act (17 CFR 249.0–7).

The term small entities is defined, under the Exchange Act, in Rule 0–10 (17 CFR 240.0–0). Although this definition does not include investment advisers, Rule 0–10 provides that the Commission may adopt a definition of small entities for purposes of a particular rulemaking proceeding. For purposes of the proposed amendments to Instruction D of Form 13F the Commission has

decided to use two definitions of the term small entities that were adopted previously by the Commission. The Commission believes that this action is necessary and appropriate to ensure that all persons or entities that might be institutional investment managers under section 13(f) of the Exchange Act will be included within a category addressed by the definition. The two definitions being used are those in Rule 0–10 under the Exchange Act and in Rule 0–7 under the Advisers Act. Public comment is invited on the Commission's use of this combined definition. Unless significant public comment is received presenting facts that indicate that the definition is not appropriate, the Commission does not propose to issue any further certification under the Regulatory Flexibility Act regarding adoption of the amendments proposed in this release.

The definition under the Advisers Act provides that an investment adviser is a small entity if it manages assets with total value of $50 million or less, in discretionary or nondiscretionary accounts. As relevant to the proposed amendments to Form 13F, the definition under the Exchange Act provides that: a broker or dealer is a small entity if on certain specified dates during the prior fiscal year it had total capital of less than $500,000 and it was not affiliated with any person that was not a small business organization as defined in Rule 0-10 (17 CFR 240.0–10(c)]. The Commission is using the definition under the Advisers Act for all institutional investment managers that are not brokers or dealers. In the Commission's view, this is appropriate because functionally the activities of such managers most closely approximate those of investment advisers. The reason for the certification is that there are not a substantial number of institutional investment managers affected by the rule that come within the elements of this combined definition of small entities. First, the amendment would affect institutional investment managers who have at least $100 million under management. Thus, any investment adviser or other entity required to file 13F reports would not be a small entity under the Advisers Act definition of the term. In addition, the Commission does not believe that there are a significant number of brokers or dealers required to file on Form 13F that meet the definition of small entity in rule 0–10(c) under the Exchange Act.

By the Commission.

Dated: December 5, 1984.

Shirley E. Hollis,

Acting Secretary.

Regulatory Flexibility Act Certification

I, John S.R. Shad, Chairman of the Securities and Exchange Commission, hereby certify pursuant to 5 U.S.C. 605(b) that the proposed amendments to General Instruction D to Form 13F (17 CFR 249.325) under section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78m(f)) set forth in Securities Exchange Act Release No. 21539, if promulgated, will not have a significant economic impact on a substantial number of small entities. For the purposes of this rulemaking, pursuant to Rule 240.0–10 the Commission is using a definition of small entities which is a combinaiton of two definitions of that term previously adopted by the Commission under the Exchange Act and under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) ("Advisers Act"). As to entities that meet the definition of an investment adviser in section 202(a)(11) of the Investment Advisers Act of 1940, and all institutional investment managers other than brokers and dealers, the definition of small entities used is that in Rule 9–7 under the Advisers Act (17 CFR 275.0–7). As to any broker or dealer required to file Form 13F, the term small entities is defined in Rule 0–10 under the Exchange Act (17 CFR 240.0–10). The Commission is adopting this definition because not all institutional investment managers required to file Form 13F would be included in a category addressed by either of the definitions cited if only one of the definitions were used. However, all institutional managers are included within a category addressed by the combined definition. The reason for this certification is that it does not appear that a substantial number of institutional investment managers affected by the rule that come with the definition of "small entities" as set forth in Rule 240.0–10 and Rule 275.0–7.

Dated: December 5, 1984.

John S.R. Shad,

Chairman.

[FR Doc. 84–32364 Filed 12–11–84; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 184

[Docket No. 82N–0239]

Enzyme-Modified Fats; Proposed Affirmation of GRAS Status

Correction

In FR Doc. 84–30634, beginning on page 46164 in the issue of Friday, November 23, 1984, make the following correction: On page 46166, in the second column, the eleventh line below the heading "List of Subjects in 21 CFR Part 184" should read "be amended by adding new § 184.1287, to".

BILLING CODE 1505–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[LR–134–84]

Foreign Management and Foreign Economic Processes Requirements of a Foreign Sales Corporation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document provides proposed Income Tax Regulations relating to foreign management and foreign economic processes requirements of a foreign sales corporation. In the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to these matters. The text of those temporary regulations also serves as the comment document for this proposed rulemaking.

DATES: Written comments and requests for a public hearing must be delivered or mailed before February 11, 1985. The proposed rules are proposed to be effective as final regulations for taxable years beginning after December 31, 1984.

ADDRESS: Send comments and requests for a public hearing to Commissioner of Internal Revenue, Attention: CC:LR:T (LR–134–84), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: David J. Dean of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224, Attention: CC:LR:T (LR–134–84), (202–566–3289, not a toll-free call).

SUPPLEMENTARY INFORMATION: The temporary regulations published in the Rules and Regulations portion of this issue of the **Federal Register** add new §§ 1.924(c)–1T, 1.924(d)–1T, 1.924(e)–1T, 1.925(b)–1T, 1.925(c)–1T, and 1.927–1T to 26 CFR Part 1. The final regulations that are proposed to be based on the temporary regulations would amend 26 CFR Part 1 by adding §§ 1.924(c)–1, 1.924(d)–1, 1.924(e)–1, 1.925(b)–1, 1.925(c)–1, and 1.927–1 to the regulations under sections 924, 925, and 927 of the Internal Revenue Code of 1954. For the text of the temporary regulations, see FR

Doc. 84–32300 [T.D. 7994] published in the Rules and Regulations portion of this issue of the **Federal Register**.

Regulatory Flexibility Act and Executive Order 12291

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. The Secretary of the Treasury has certified that this rule will not have a significant impact on a substantial number of small entities because the number of significantly affected small entities is not substantial. A regulatory flexibility analysis, therefore, is not required under the Regulatory Flexibility Act of 1980 (5 U.S.C. chapter 6).

Paperwork Reduction Act

The recordkeeping requirements contained herein have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act. Comments on these recordkeeping requirements should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Executive Office Building, Washington, D.C. 20503. The Internal Revenue Service requests persons submitting comments to OMB also send copies of the comments to the Service.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments on these proposed regulations. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is David J. Dean of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR §§ 1.861–1 Through 1.997–1

Income taxes, Aliens, Exports, DISC, Foreign investments in U.S., Foreign tax credit, FSC, Sources of income, United States investments abroad.

Proposal of Regulations

The temporary regulations, FR Doc. 84–32300 [T.D. 7994] published in the Rules and Regulations portion of this issue of the **Federal Register**, are hereby also proposed as final regulations under sections 924, 925, and 927 of the Internal Revenue Code of 1954.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

[FR Doc. 84–32299 Filed 12–7–84; 9:45 am]

BILLING CODE 4830–01–M

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26 CFR Part 1

[LR–167–84]

FSC General Rules, Requirements, Definitions, and Special Rules

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains proposed Income Tax Regulations concerning general rules regarding the requirements that a corporation must meet to be a foreign sales corporation (FSC) (or small FSC) and tax treatment of a FSC (or a small FSC) and specific rules regarding the requirements for FSC or small FSC status, the methods of electing and terminating FSC status, and the definition of and computation of carrying charges on sales of property by a FSC. In the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to these matters. The text of those temporary regulations also serves as the comment document for this proposed rulemaking.

DATE: Written comments and requests for a public hearing must be delivered or mailed by February 11, 1985. The amendments would apply to taxable years beginning after December 31, 1984, and is proposed to be effective as final regulations after December 31, 1984.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR–167–84), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: P. Ann Fisher for the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T (LR–167–84), (202–556–3289, not a toll-free call).

SUPPLEMENTARY INFORMATION: The temporary regulations published in the Rules and Regulations portion of this issue of the **Federal Register** add new §§ 1.921–2T, 1.922–1T, 1.927(d)–1T, and 1.927(f)–1T to 26 CFR Part 1 and amend § 1.921–1T (a)(6) and (b)(7). The final regulations that are proposed to be based on the temporary regulations would amend 26 CFR Part 1 by adding §§ 1.921–2T, 1.922–1T, 1.927(d)–1T, and 1.927(f)–1T as final regulations under sections 921, 922, and 927 of the Internal Revenue Code of 1954. For the text of the temporary regulations, see paragraph 1 of the amendments made by FR Doc. 84–32298 [T.D. 7993] published in the Rules and Regulations portion of this issue of the **Federal Register**. Paragraphs 2 and 3 of the temporary regulations, which amend § 1.921–1T (a)(6) and (b)(7) respectively, are not proposed to be adopted as final regulations.

Regulatory Flexibility Act and Executive Order 12291

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. The Secretary of the Treasury has certified that this rule will not have a significant impact on a substantial number of small entities because the number of significantly affected small entities is not substantial. A regulatory flexibility analysis, therefore, is not required under the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Paperwork Reduction Act

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act. Comments on these collection of information requirements should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Executive Office Building, Washington, D.C. 20503. The Internal Revenue Service requests that persons submitting comments on these requirements to OMB also send copies of those comments to the Service.

Comments and Request for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Comissioner by any person who has submitted written comments on these proposed regulations. If a public hearing is to be held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is P. Ann Fisher of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations on matters of both substance and style.

List of Subjects in 26 CFR §§ 1.861–1 Through 1.997–1

Income taxes, Aliens, Exports, DISC, FSC, Foreign investments in U.S., Foreign tax credit, Sources of income, United States investments abroad.

Proposal of Regulations

Paragraph 1 of the amendments made by the temporary regulations, FR. Doc. 84–32298 [T.D. 7993] published in the Rules and Regulations portion of this issue of the **Federal Register**, is hereby also proposed as a final regulation under sections 921, 922, and 927 of the Internal Revenue Code of 1954.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

[FR Doc. 84-32296 Filed 12-7-84; 9:45 am]

BILLING CODE 4830-01-M

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26 CFR Part 1

[LR-240-84]

Information Reporting Requirements for Mortgage Subsidy Bonds

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document provides proposed regulations that relate to the tax exempt status of mortgage subsidy bonds. Changes to the applicable tax law were made by the Tax Reform Act of 1984 (Pub. L. 98–369; 98 Stat. 901). These regulations affect all purchasers and governmental issuers of tax exempt mortgage subsidy bonds. In addition, in the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations that relate to the tax exempt status of mortgage subsidy bonds. The text of those temporary regulations also serves as the comment document for this proposed rulemaking.

DATES: Written comments and requests for a public hearing must be delivered or mailed by February 11, 1985. The regulations relating to qualified mortgage bonds are proposed to be effective for obligations issued after December 31, 1984, except that proposed regulations under § 1.103A–2(a)(2) are proposed to be effective for obligations issued after December 31, 1983. The regulations relating to qualified veterans' mortgage bonds are, in general, proposed to be effective for obligations issued after July 18, 1984.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR–240–84), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: Mitchell H. Rapaport of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3740).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations in the Rules and Regulations portion of this issue of the **Federal Register** amend § 6a.103A–2 of Title 26 of the Code of Federal Regulations. The final regulations, which this document proposes to be based on those temporary regulations, would be added to Part 1 of Title 26 of the Code of Federal Regulations. For the text of the temporary regulations, see FR Doc. 84–32292 (T.D. 7995) published in the Rules and Regulations portion of this issue of the **Federal Register**. The preamble to the temporary regulations explains the addition to the regulations.

The regulations interpret the provisions of section 103A(j) (3), (4), and (5) of the Code, which adds certain information reporting requirements to the other requirements that mortgage subsidy bonds must meet in order to be treated as an obligation described in section 103(a). The regulations also interpret the provisions of section 103A(c)(3)(C), and (o), which adds additional requirements that qualified veterans' mortgage bonds must meet.

These regulations are proposed to be issued under the authority contained in section 103A(j) (3) and (4) and section 7805 of the Internal Revenue Code (98 Stat. 901, 26 U.S.C. 103A(j) (3) and (4); 68A Stat. 917, 26 U.S.C. 7805).

Non-Applicability of Executive Order 12291

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

Regulatory Flexibility Act

Although this document is a notice of proposed rulemaking that solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Drafting Information

The principal author of these proposed regulations is Mitchell H. Rapaport of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, on matters of both substance and style.

Comments and Requests for a Public Hearing

Before the adoption of these proposed regulations, consideration will be given to any written comments that are submitted (preferably seven copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**. The collection of information requirements contained herein have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act. Comments on the requirements should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Executive Office Building, Washington, D.C. 20503. The Internal Revenue Service requests persons

submitting comments to OMB also to send copies of the comments to the Service.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

[FR Doc. 84-32291 Filed 12-7-84; 11:36 am]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Public Comment Procedures and Opportunity for Public Hearing on Proposed Modifications to the Ohio Permanent Regulatory Program Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule.

SUMMARY: OSM is announcing procedures for a public comment period and for requesting a public hearing on the substantive adequacy of program amendments submitted by Ohio as amendments to the State's permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The amendment submitted consists of proposed changes to the Ohio regulations concerning civil penalties for failure to abate a violation, procedures governing review of civil penalties in informal conferences, and formal review of civil penalties.

This notice sets forth the times and locations that the Ohio program and proposed amendment will be available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendments, and the procedures that will be followed for the public hearing.

DATES: Written comments from the public not received by 4:30 p.m. January 11, 1985 will not necessarily be considered in the decision on whether the proposed amendment should be approved and incorporated into the Ohio regulatory program. A public hearing on the proposed amendment has been scheduled for January 7, 1985. Any person interested in speaking at the hearing should contact Ms. Nina Rose Hatfield at the address or telephone number listed below by December 27, 1984. If no person has contacted Ms. Hatfield by that date to express an interest in the hearing, the hearing will be cancelled. If only one person requests an opportunity to speak at the public hearing, a public meeting, rather than a hearing, may be held and the results of the meeting included in the Administrative Record.

ADDRESSES: The public hearing is scheduled for 1:00 p.m. in Room 202, Columbus Field Office, 2242 South Hamilton Road, Columbus, Ohio 43227.

Written comments and requests for an opportunity to speak at the hearing should be directed to Ms. Rose Hatfield, Field Office Director, Columbus Field Office, Office of Surface Mining, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43227; Telephone: (614) 886-0578.

Copies of the Ohio program, the proposed modification to the program, a listing of any scheduled public meetings, and all written comments received in response to this notice will be available for public review at the OSM Headquarters Office and the Office of the State regulatory authority office listed below, during normal working hours Monday through Friday, excluding holidays. Each requestor may receive, free of charge, one single copy of the proposed amendment by contacting OSM's Columbus Field Office.

Office of Surface Mining, Room 5124, 1100 "L" Street, NW., Washington, D.C.

Ohio Division of Reclamation, Building B, Foundation Square, Columbus, Ohio.

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatifield, Director, Columbus Field Office, Office of Surface Mining, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43237; Telephone: (614) 866-0678.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program

The Ohio program was approved effective August 16, 1982, by notice published in the August 10, 1982 **Federal Register** [47 FR 34688]. The approval was conditioned on the correction of 28 minor deficiencies in 11 conditions (a), (b), (c), (d), (e), (f)(1)—(f)(10, (g), (h)(1)—(h)(3), (i)(1)—(i)(3), (j) and (k)(1)—(k)(5). Information pertinent to the general background, revisions, modifications and amendments to the Ohio program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program found in the August 10, 1982 **Federal Register.**

II. Submission of Revisions

By letter dated November 6, 1984, Ohio submitted a program amendment consisting of a revision to rule 1501:13-14-03 concerning civil penalties. The proposed amendment provides for alternative enforcement actions to be taken if a violation has not been abated for over 30 days. The proposed amendment also sets forth procedures and requirements for an informal conference review of civil penalties before the chief or his authorized representatives. Lastly, the proposed amendment provides for formal review of civil penalties before the Reclamation Board of Review as required by State statute. This amendment corresponds to the Federal regulations at 30 CFR 845.15 *et seq.*

The full text of the proposed program amendments submitted by Ohio is available for public inspection at the addresses listed above. The Director now seeks public comment on whether the proposed amendment is consistent with the Federal regulations. If approved, the amendment will become part of the Ohio program.

III. Procedural Matters

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 9 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule would not impose any new requirements; rather, it would ensure that existing requirements established by SMCRA and the Federal rules would be met by the State.

3. *Paperwork Reduction Act:* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Authority: Pub. L. 95-87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*).

Dated: December 6, 1984.

Wesley R. Booker,

Acting Director, Office of Surface Mining.

[FR Doc. 84-32363 Filed 12-11-84; 8:45 am]

BILLING CODE 4310-05-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 67

[CC Docket No. 78-72; CC Docket No. 80-286]

MTS and WATS Market Structure; and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board

AGENCY: Federal Communications Commission.

ACTION: Recommendation to the Commission.

SUMMARY: The Federal-State Joint Board recommends that the Commission: (1) Implement limited subscriber line charges for residential and single line business customers; (2) allow local companies flexibility to file optional alternative interstate tariff provisions for the recovery of carrier common line costs in order to combat bypass; (3) modify the provisions for high cost assistance to direct more aid to smaller companies and those with higher cost levels; and (4) provide the equivalent of a waiver of residential subscriber line charges for low-income households. The Joint Board also stated that it would study broader measures to assist low income households in affording telephone service. The Joint Board action was in response to the Commission's April 1984 request, published in the **Federal Register** on April 30, 1984, 49 FR 18318, for preparation of a Joint Board recommendation on these issues. The Joint Board recommendation will assist the Commission in resolving these issues.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Claudia Pabo or William Kirsch of the Common Carrier Bureau at (202) 632-6363.

SUPPLEMENTARY INFORMATION:

Recommended Decision and Order

In the Matter of MTS and WATS Market Structure Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board (CC Docket No. 78-72, CC Docket No. 80-286).

Adopted: November 15, 1984.

Released November 23, 1984.

By the Federal-State Joint Board.

I. Introduction

A. Summary of Recommended Decision

1. The Federal-State Joint Board hereby presents its recommendations concerning: (1) The use of subscriber line charges as a means of recovering the interstate allocation of non-traffic sensitive (NTS) local exchange costs; (2) modifications to the previously adopted measures for assisting subscribers in areas where the cost of providing telephone service is unusally high; and (3) measures to assist low income households in affording telephone service. The first section of this *Order* summarizes our recommendations and reviews developments in these proceedings to date. The second section deals with subscriber line charges as a means of recovering the NTS local exchange costs allocated to the interstate jurisdiction. The third section concerns provisions for assisting subscribers in high cost areas. Recommendations designed to ensure that implementation of subscriber line charges does not adversely affect the ability of low income households to afford telephone sevice are discussed in the fourth section of the *Order.*

2. In general terms, we recommend that the Commission: (1) Implement limited subscriber line charges for residential and single line business customers; (2) allow local companies flexibility to file optional alternative interstate tariff provisions for the recovery of carrier common line costs in order to combat bypass; (3) modify the provisions for high cost assistance to direct more aid to smaller companies and those with higher cost levels; and (4) provide the equivalent of a waiver of residential subscriber line charges under specific terms and conditions.[1] More specifically, we recommend implementation of a $1.00 per month subscriber line charge for residential and single line business customers effective June 1985. This charge will be increased to $2.00 per month in June 1986. In addition, local telephone companies, with the concurrence of state regulatory officials,[2] should be given flexibility to implement optional alternative interstate tariff provisions for recovery of carrier common line costs [3] in order to combat localized bypass problems. A uniform monthly surcharge up to a maximum of $.35 on the subscriber line charge for all customers would be allowed to fund any revenue shortfall resulting from the optional alternative tariffs.[4] The procedures which we are proposing for implementation of these alternative tariff provisions will ensure that they do not undermine the nationwide averaging of NTS costs for purposes of the carrier common line charge. We also recommend that the basic subscriber line charge for residential and single line business customers be frozen at $2.00 per month.[5] We recommend a further Joint Board proceeding to examine the effect of subscriber line charges and the special anti-bypass tariffs on universal service, bypass, economic efficiency, and interexchange competition. This proceeding should be instituted in late 1986 and completed as soon as possible, consistent with the need for development of an adequate record. The purpose of this proceeding would be to recommend what, if any, further steps should be taken by the FCC.

3. We are also recommending a number of changes in the method of calculating the amount of high cost assistance for local telephone companies. We believe that the high cost assistance should continue to be based on NTS loop costs, rather than

[1] The Joint Board also recommends further study of broader lifeline assistance measures on an expedited basis.

[2] In the absence of state commission concurrence, the local companies would be authorized to go forward with an alternative tariff filing with the FCC only if the Joint Board concurred in the plan. We recommend that the local companies be allowed to seek Joint Board concurrence if the state does not act on the proposal within 60 days of the filing. The state would remain free to act on the company's proposal prior to a Joint Board decision.

[3] Under Part 69 of the Commission's rules, the carrier and subscriber common line elements together cover the cost of customer premises equipment, inside wiring, local loops, the Universal Service Fund and the National Exchange Carrier Association's operating expenses.

[4] For example, some of these optional alternative tariff provisions may take the form of volume discounts. To the extent that these tariff provisions fail to generate the same revenue levels as application of the nationwide averaged carrier common line charge, the revenue shortfall will be recovered through a uniform surcharge of no more than $.35 per month on the suscriber line charge for all customers in the relevent study area. For further discussion of the alternative carrier common line tariff provisions see paragraphs 36 through 41.

[5] This does not include any subscriber line surcharge that would be necessary in conjunction with optional alternative tariff provisions to recover carrier common line costs. To the extent a surcharge is necessary, it would be in addition to the $2.00 basic charge.

other factors.[6] The changes we recommend are designed to direct more assistance to small telephone companies and those with higher cost levels. Under this approach, companies with more than 50,000 working loops and costs below 150 percent of the national average would receive less assistance than under the provisions previously adopted by the Commission.[7] We recommend that the local exchange companies' authorized rate of return for interstate access service, now 12.75 percent, be used in calculating the level of high cost assistance. We also recommend that existing study area boundaries continue to be used for separation purposes including calculation of the level of high cost assistance. In addition, we conclude that the transition from a SPF based interstate NTS cost allocation to the new 25 percent basic allocation factor (combined with high cost assistance) should be implemented in eight annual steps rather than four as currently provided in Part 67 of the Commission's rules.

4. In addition, we recommend that the Commission adopt a two phase program for assistance to low income households. The first step would offset the effect of subscriber line charges. We recommend an optional program for a 50 percent reduction in the subscriber line charge for customers meeting a state established means test subject to verification. This revenue shortfall would be funded through the interstate carrier common line charge. States taking advantage of this assistance mechanism would be required to make an equal monetary reduction in the local exchange rate for subscribers who qualify for the subscriber line charge reduction. This reduction in local rates would be funded from intrastate sources. Implementation of this assistance measure would be at the option of the state commissions. We also recommend expedited study of broader lifeline assistance measures as the second phase of our plan. It is anticipated that the state developed means tests for the reduced subscriber line charge will assist us in developing broader lifeline measures in the near future.

B. Background

1. MTS and WATS Market Structure Proceeding

5. On December 22, 1982, the Commission adopted the *Third Report and Order* in the *MTS and WATS Market Structure* proceeding, CC Docket No. 78–72.[8] This *Order* established a plan for replacing the interstate division of revenues and settlements process with a system of tariffed access charges. Under this approach, a major portion of the local loop costs allocated to the interstate jurisdiction [9] would have been recovered directly from telephone subscribers.[10] Other NTS costs allocated to the interstate jurisdiction would have been recovered from the interexchange carriers and reflected in their toll rates.[11] These rules were modified in the Commission's *Memorandum Opinion and Order (Reconsideration Order)* in the *MTS and WATS Market Structure* proceeding adopted July 27, 1983.[12] The revised rules established a uniform initial subscriber line charge of $2.00 per month for residential customers in 1984. That charge was scheduled to increase to $3.00 in 1985 and $4.00 in 1986. The revised rules also provided for a subscriber line charge for business customers equal to the lesser of $6.00 per month or the full interstate allocation of loop costs for the study area involved. The revised rules also contained provisions for calculating residential subscriber line charges for 1987 and beyond.

6. In a subsequent *Memorandum Opinion and Order (Second Reconsideration Order)*, adopted February 3, 1984, the Commission reaffirmed its conclusion that a system of flat subscriber line charges to recover a portion of the interstate NTS cost allocation would best serve the public interest.[13] In particular, the Commission reiterated that a system of fixed subscriber line charges would:

(1) Eliminate the discrimination or preferences that result from the inconsistent methods that have been used to recover interstate subscriber loop and private line loop costs;

(2) Promote economic efficiency by eliminating the distortions that inevitably result from the recovery of fixed costs through usage charges; . . .

(3) Deter uneconomic bypass by removing the incentive for large users to substitute bypass facilities that may be more costly than the local distribution facilities of the telephone companies; [and]

(4) Preserve universal telephone service by avoiding rate increases for remaining telephone company customers that would result from uneconomic bypass.[14]

The Commission also emphasized that the access charge plan represented an

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[6] We recommend that the cost of NTS Category 6 Central Office Equipment (COE), Local Dial Switching Equipment, continue to be allocated to the interstate jurisdiction on the basis of the frozen Subscriber Plant Factor (SPF) pending review of all issues concerning the allocation of COE. In light of the continued use of SPF, NTS category 6 COE costs should not be included in calculating the level of high cost assistance.

[7] Under our proposal, assistance to subscribers in high cost areas would continue to be provided through an interstate allocation of the relevant local loop costs in addition to the basic 25 percent interstate allocation. We recommend that the additional interstate allocation for study areas with less than 50,000 working loops (excluding WATS and private line loops) include: (1) 50 percent of the relevant cost per loop in excess of 115 percent but not greater than 150 percent of the national average for these costs; and (2) 75 percent of the relevant cost per loop in excess of 150 percent of the national average. We recommend that the additional interstate cost allocation for study areas with more than 50,000 working loops (excluding WATS and private line loops) include: (1) 25 percent of the relevant cost per loop in excess of 115 percent but not greater than 150 percent of the national average for these costs; and (2) 75 percent of the relevant cost per loop in excess of 150 percent of the national average. Under this approach all relevant NTS costs in excess of 150 percent of the national average would be allocated to the interstate jurisdiction. (Twenty five percent of these costs would be allocated to interstate through the basic allocation factor. An additional 75 percent would be allocated to interstate through the high cost formula.)

[8] 93 FCC 2d 241 (1983).

[9] A portion of local telephone company plant investment and expenses is allocated to the interstate jurisdiction and recovered through the rates for interstate services. The remainder of these costs are allocated to the state jurisdiction and recovered through the charges for local exchange and other intrastate services. Local telephone company costs are allocated between the two jurisdictions because local facilities are used for the origination and termination of interstate as well as intrastate telephone services. The procedures for allocating these costs between the jurisdictions are set out in Part 67 of the Commission's rules.

[10] The Commission's initial decision provided that, in 1984, the first year of the plan, local telephone companies would have to charge a minimum flat fee of $2.00 per line per month for residential subscribers and $4.00 per line per month for business subscribers. Additional NTS costs could be recovered from subscribers through usage charges, up to a maximum fee equivalent to the local telephone company's rate for a dedicated interstate private line. Aside from the pre-set minimum and maximum charges, local companies were given a great deal of flexibility to experiment with combinations of flat and usage based charges. Two major changes in the plan were scheduled to be phased in over a transition period. First, all of the NTS costs associated with subscriber loop plant and station connections, other than inside wiring, and the universal service fund amount, would gradually be shifted to a subscriber charge. (The costs of CPE, which are being phased out, as well as inside wire and NTS Category 6 Local Dial Switching Equipment would not be shifted to the subscriber charge.) Second, subscriber charges, which would initially be structured as a combination of minimum flat fees and usage sensitive charges, would gradually be converted to exclusively flat fees for most carriers.

[11] In the past, all local exchange telephone company costs allocated to the interstate jurisdiction were paid by the interexchange carriers and reflected in their rates to the public.

[12] FCC 83–356, released August 22, 1983, 48 FR 42984 (September 21, 1983).

[13] FCC 84–36, released February 15, 1984, 49 Fed. Reg. 7810 (March 2, 1984).

[14] *Id.* at para. 6.

effort to preserve the opportunity for fair competition during the transition to a new environment in which all interexchange competitors would be offered equal interconnection options.

7. In the *Second Reconsideration Order*, the Commission proceeded with implementation of a maximum $6.00 monthly charge for multi-line business customers.[15] The Commission deferred implementation of subscriber line charges for residential and single line business customers until June 1985, and capped such charges for these subscribers at $4.00 through the end of 1989. The Commission stated that it would complete the following five additional proceedings before it allowed subscriber line charges to become effective for residential and single line business customers: (1) A further rulemaking to devise exemptions or targeted assistance for subscribers who may not be able to afford subscriber line charges; (2) a further inquiry into the effects upon universal service of subscriber line charges as well as federal decisions in general; (3) a further inquiry to compile more detailed data upon the extent and dangers of bypass; (4) a further rulemaking to adopt more effective mechanisms to meet the needs of small telephone companies for additional assistance; and (5) a further rulemaking to examine how best to implement subscriber line charges for residential and single line business customers.

2. Jurisdictional Separations Proceeding

8. During the period covered by these orders in the *MTS and WATS Market Structure* proceeding, the Joint Board was reexamining the procedures governing the allocation of local exchange plant investment between the state and interstate jurisdictions in *Amendment of Part 67 of the Commission's Rules*, CC Docket No. 80–286.[16] In the *Second Recommended Decision and Order*[17] in this proceeding, adopted on April 15, 1983, we recommended: (1) A basic 25 percent interstate allocation factor for local exchange loops (other than wideband loops and loops subject to direct assignment to one jurisdiction or the other) and inside wiring as well as the associated maintenance and depreciation expenses; (2) and additional interstate cost allocation for study areas with relevant loop costs in excess of 115 percent of the national average;[18] and (3) a number of other changes in the allocation of local exchange plant costs. The joint Board also recommended that implementation of the new basic allocation factor supplemented with high cost assistance take place in four steps beginning in 1986. The Commission adopted the Joint Board's recommendations with a number of changes and clarifications.[19]

9. The Commission subsequently asked the Joint Board to prepare recommendations concerning a number of issues[20] related to the recovery of NIS costs.[21] These issues included: (1) The subscriber line charge for residential and single line business customers; (2) the transition mechanism for implementing subscriber line charges for these customers; (3) an exemption from the subscriber line charge or other assistance for low income households; and (4) additional assistance for small telephone companies.[22]

10. In seeking additional comments on these issues the Commission recognized that subscriber line charges represent a major change in the way the interstate allocation of local exchange telephone company costs are recovered, and stated that "it is important to compile as complete a record as possible concerning end user access charges for residential and single line business subscribers.[23] At the same time, the Commission noted the extensive record already compiled in CC Docket No. 78–72 and added:

> Based on the substantial record in this proceeding, we are convinced that a significant reduction in the level of toll leading is necessary to ensure the long term viability of the telephone network and best serve the four basic goals which we have established in this proceeding, namely: (1) The continued assurance of universal service; (2) the elimination of unjust discrimination or unlawful preferential rates; (3) the encouragement of network efficiency; and (4) the prevention of uneconomic bypass. We have already reached a number of basic conclusions. First, bypass and the economic inefficiency inherent in the present system of toll rates represents a serious long term threat to universal service. Second, the emergence of competition in the telecommunications industry requires that charges more fully reflect the cost of service. Third, a nationwide solution to these problems is necessary in the near future to provide the industry with certainty. Fourth, flat fee end user charges are an equitable and economically sound method for recovering a portion of NIS costs, although assistance is

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[15] The maximum $6.00 monthly charge applied to Centrex lines ordered after July 27, 1983. A $2.00 monthly charge was authorized for embedded Centrex lines (those ordered or in place on or before July 27, 1983). The Commission also stated that it would reexamine transitional end user charges for all customers, but did not expect charges for embedded Centrex lines to exceed $3.00 per month in the 1985 and 1986 access period.

[16] This proceeding was instituted in July 1980 pursuant to Section 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. 410(c). *Notice of Proposed Rulemaking and Order Establishing a Joint Board*, 78 FCC 2d 837 (1980).

[17] CC Docket No. 80–286, 48 FR 46556 (October 13, 1983). The Joint Board had previously recommended that customer premises equipment (CPE) be phased out of the separations process over a five year period in light of the Commission's decision in Docket No. 20828, *Amendment of Section 64.702 of the Commission's Rules*, to detariff CPE. *Recommended Decision and Order*, CC Docket No. 80–286, FCC 81–566, released December 14, 1981, 46 FR 63344 (December 31, 1981). At that time, the Joint Board also recommended that the Commission freeze SPF at the 1981 annual average level for each study area to prevent further growth in the interstate NTS cost allocation pending adoption of new separations procedures. *Recommended Interim Order*, CC Docket No. 80–286, FCC 81–565, released December 14, 1981, 46 FR 63354 (December 31, 1981). The Commission adopted both the CPE phase out plan and the interim SPF freeze with a number of technical modifications. *Decision and Order*, CC Docket No. 80–286, 89 FCC 2d 1 (1982), *reconsideration denied*, 91 FCC 2d 558 (1982), *appeals pending sub nom. MCI Telecommunications Corp. v. FCC*, D.C. Cir. Nos. 82–1237, 82–1456 (filed March 4, 1982 and April 23, 1982).

[18] The Joint Board also recommended provisions designed to cap subscriber line charges (for high cost areas) at twice the national average charge. The Commission endorsed this in concept, but concluded that it should be incorporated in Part 69, the access charge rules rather than Part 67 dealing with jurisdictional separations. As previously mentioned, the Commission subsequently decided to cap subscriber line charges for residential and single line business customers at $4.00 per month through the end of 1989.

[19] *Decision and Order, amendment of Part 67 of the Commission's Rules*, CC Docket No. 80–286, 96 FCC 2d 781 (1984). The most significant of these changes included: (1) inclusion of drop and block wire and Category 8.13, Subscriber Line Circuit Equipment, in the plant categories considered in determining whether a study area qualifies for high cost assistance; (2) advancing the date for the initial high cost data filing with the National Exchange Carrier Association (NECA) from June 1985 to June 1984; and (3) continuation of the existing separations treatment of WATS closed end access lines pending further recommendations by the Joint Board. The Joint Board modified its original recommendation to request the first two changes. *Id.* at para. 5.

[20] Since these issues do not involve the allocation of costs between the jurisdictions, preparation of a Joint Board recommendation is not mandatory. *See* Section 410 of the Communications Act, as amended, 47 U.S.C. 410.

[21] *Further Notice of Proposed Rulemaking, MTS and WATS Market Structure* and *Amendment of Part 67 of the Commission's Rules*, CC Docket Nos. 78–72 and 80–286, FCC 84–133, released April 11, 1984, 49 FR 18318 (April 30, 1984).

[22] The Commission also instituted studies concerning bypass of the local exchange and the effect of federal decisions on universal service. Public Notice, "Request for Data, Information, and Studies Pertaining to Bypass of the Public Switched Network," Mimeo No. 3206, released March 28, 1984; Public Notice, "Commission Seeks Further Information on the Effects of Federal Decisions on Local Rates and Services, "Mimeo No. 3246, released March 30, 1984; Public Notice, "Request for Comments on Bypass Studies," Mimeo No. 6784, released September 21, 1984; Public Notice, "Request for Comments on Bypass Study by USTA," released October 10, 1984.

[23] *Further Notice of Proposed Rulemaking*, CC Docket Nos. 78–72 and 80–286, FCC 84–133, at para. 4, released April 11, 1984, 49 FR 18318 at para. 4 (April 30, 1984).

needed for low income subscribers and those in high cost areas. In particular, rural telephone companies must be able to continue operations. Fifth, an appropriate transition to the new environment is needed. We seek comments on the residential and single line business end user charges as a means toward these ends.[24]

Despite this, the Commission stated that it would not preclude consideration of alternative plans which would significantly decrease toll loading [25] and achieve the Commission's four basic goals in providing for the recovery of interstate NTS local exchange costs.

11. On April 11, 1984, the Joint Board adopted an *Order Inviting Comments*,[26] which, among other things, requested comments on means of refining the high cost provisions previously recommended by the Joint Board and adopted by the Commission. We sought additional comments concerning the provisions for high cost assistance in order to allow further study of certain matters related to the targeting of high cost assistance which we had expressed concern about in our *Second Recommended Decision and Order*.

12. More than 50 parties filed comments or replies in response to he Commission's *Further Notice of Proposed Rulemaking* in CC Docket Nos. 78–72 and 80–286. Approximately 30 parties filed comments or replies concerning the high cost issues addressed in the Joint Board's *Order Inviting Comments*. The comments are discussed in the following sections concerning the recovery of NTS costs, high cost assistance and protection for low income households.

II. Recovery of NTS Costs

A. Summary

13. As previously stated, we recommend implementation of subscriber line charges for residential and single line business customers with a basic $1.00 monthly charge effective June 1985 increasing to $2.00 per month in June 1986.[27] We believe that subscriber line charges should be frozen at this level pending completion of a further study concerning: (1) The effect of subscriber line charges and other federal decisions on universal service; (2) the extent and potential for bypass of the local exchange; (3) the benefits of subscriber line charges in terms of increased economic efficiency; and (4) the effect of these cost recovery mechanisms on interexchange competition. This study should be initiated in late 1986 and competed as soon as possible consistent with the need to develop an adequate record. We also believe that a certain amount of flexibility must be allowed with regard to the recovery of carrier common line costs. Accordingly, we are recommending provisions designed to allow local telephone companies the option of filing alternative interstate tariff provisions for the recovery of carrier common line costs in order to combat localized bypass problems. Such tariff filings would be authorized under Part 69 of the rules only after concurrence in the company's proposal by the relevant state regulatory commission or the Joint Board. The company would be allowed to request Joint Board action on its proposal if the state commission does not act within 60 days of the filing, although the state commission would remain free to act on the proposal pending a decision by the Joint Board. Upon concurrence, a tariff filing would then be made with the Commission, subject to normal FCC tariff review procedures. While the rate elements and charges under these tariff provisions would differ from those in the National Exchange Carrier Association (NECA) tariff, we are recommending rules for the implementation of these optional alternative interstate tariff provisions that will ensure that they do not undermine the mandatory nationwide averaging of interstate NTS costs for purposes of the NECA carrier common line charge.[28] We believe that this approach will best serve the Commission's goals in the *MTS and WATS Market Structure* proceeding. Our recommendations also incorporate a number of important ideas contained in the major alternatives to subscriber line charges proposed in the comments.[29]

B. Comments

14. American Telephone and Telegraph Company (AT&T) supported the Commission's plan for implementation of residential and single line business subscriber line charges. AT&T argued that the additional time available to evaluate the universal service issue should allow focused consideration of alternative measures designed to meet those needs directly. It opposed further delay or weakening of the plan. United States Transmission Systems, Inc. (USTS) argued that it is imperative that the Commission begin implementation of a system of subscriber line charges at an early date. EMX Telecom stated that fixed monthly charges for residential and single line business subscribers would have an unfair impact on the majority of these subscribers. It suggested that the Commission develop an alternative means of compensating exchange carriers that more fairly reflects actual usage of exchange facilities.

15. Most of the Bell Operating Companies stated that the FCC's current plan for implementing subscriber line charges for single line business and residential subscribers represents the slowest acceptable transition plan. They found no reason to postpone implementation further. Mountain States, Northwestern Bell and Pacific Northwest Bell (U.S. West) states that the initial charge should be equal to each company's multi-line business rate. If the Commissison decided to allow a lower charge for residential and single line business users on an interim basis, they argued that the initial charge should be no less than $4.00 per line in 1985. NYNEX and Southwestern Bell argued that their econometric models demonstrate that implementation of a $4 subscriber line charge on a flash-cut basis in 1985 would have little effect on telephone penetration in their service territories.

16. Most of the large independent companies, including GTE Corporation (GTE), Central Telephone Company, Southern New England Telephone Company (SNET) and United Telephone Company, as well as the United States Telephone Association (USTA) also supported implementation of the Commission's plan. Rochester Telephone Corporation argued that the

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[24] *Id.*

[25] Toll loading refers to the recovery of NTS or fixed local exchange telephone costs through the usage based rates for toll service.

[26] CC Docket No. 80–286, FCC 84–139, released April 11, 1984, 49 Fed. Reg. 18746 (May 2, 1984).

[27] We also recommend that the $2.00 per line charge for embedded Centrex lines be retained until we complete our study of the impact of subscriber line charges on Centrex service. We expect to consider further staff recommendations concerning Centrex service in February 1985. We are not making a recommendation concerning subscriber line charges for multi-party service. We expect the Commission to institute proceedings shortly to reexamine the rules in this area pursuant to the remand by the Court of Appeals in *National Association of Regulatory Utility Commissioners* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984) *petition for cert. pending*, U.S. No. 84–95 (filed July 18, 1984).

[28] A more detailed explanation of the procedures for implementing the alternative carrier common line tariff provisions are discussed in paragraphs 36 through 41.

[29] We propose that this plan be implemented by adopting new §§ 69.203, 69.204, and 69.611 to describe interim, common line charges and associated pooling arrangements. Although subsequent proceedings may produce substantial changes in any post-transition rules for common line charges, we are not proposing changes in those rules at this time. We have not recommended deletion of the post-transition rules because some of the interim rules cross-reference the original post-transition rules.

Commission should adopt a transition plan for subscriber line charges that would impose equal charges for all customers by January 1, 1986 and would require all remaining NTS costs to be recovered through end user charges by January 1, 1989. Rochester took the position that the only possible alternative NTS recovery approach consistent with the Commission's policy objectives is the allocation of all NTS costs to the intrastate jurisdiction. Continental Telecom Inc. (Contel) proposed replacing frozen SPF with an Exchange Network Usage Factor (ENUF), equivalent to SLU, over a five year transition period.

17. The small independent telephone companies generally opposed subscriber line charges for residential and single line business customers or stated that they supported waiver of such charges for customers served by small telephone companies. Mashell Telephone Co. and the Michigan Action Group argued that subscriber line charges for all residential and single line business customers should be capped indefinitely at $4.00 for the period beyond 1989. The Rural Telephone Coalition (RTC) argued that a permanent cap on subscriber line charges would be an attractive modification to the current plan with the permanent cap set at the lesser of a percentage of interstate NTS costs determined as a result of quantitative studies of bypass and other relevant factors, or $4.00 for residential and $6.00 for business subscribers.

18. The large user groups filing comments included the Ad Hoc Telecommunications Users Committee (Ad Hoc), Federal Executive Agencies (FEA) and International Communications Association (ICA). They strongly supported the Commission's plan for implementation of subscriber line charges. Three groups representing residential telephone subscribers, Telecommunications Research and Action Center (TRAC), the National Association of State Utility Consumer Advocates (NASUCA) and the Office of Consumers' Counsel, State of Ohio (OCCO) opposed subscriber line charges. OCCO stated that the transition to these charges would gain greater consumer understanding and acceptance if the initial charge were set at $.25 or $.50, with gradual increases over the rest of the decade. The National Federation of Independent Business stated that subscriber line charges should initially be set at a low level with small incremental increases to permit careful monitoring of developments. The National Association of Homes for Children requested that the Commission either define private orphanages as residential subscribers or exempt private orphanages from the multi-line business subscriber line charge.

19. Most of the state regulatory commissions supported the concept of state flexibility behind the National Association of Regulatory Utility Commissioners (NARUC) proposal for a system of unified state and federal access tariffs to be filed with the state commissions subject to general federal guidelines.[30] These states included: Florida, Iowa, Kansas, Kentucky, Michigan, North Dakota and Vermont. Florida and Michigan also requested that the Joint Board and Commission provide for experiments in their states to implement such an approach. The New York Department of Public Service argued that no drastic restructuring of interstate rates, such as that contained in the Commission's plan, is necessary at this time. It stated that if the interstate rate structure needs to be modified, it prefers a cap on the NTS costs recovered from any one user through usage sensitive pricing. The staff of the Pennsylvania Public Utility Commission opposed subscriber line charges and instead recommended gradual implementation of SLU based charges to the interexchange carriers. The Rural Electrification Administration (REA) argued that a move from SPF to SLU or a flat allocation factor approximating SLU would be a palatable compromise. NTIA urged the Commission to retain its plan while exploring in detail the implications of the proposed alternatives.

20. The Commission also requested comments on a letter which NARUC filed September 16, 1984, responding to a number of questions concerning the meaning and effect of the St. Louis plan.[31] These questions were raised by the Chief, Common Carrier Bureau in a letter to the President of NARUC.[32] Approximately 37 parties filed comments concerning the NARUC letter. AT&T stated that the current Commission plan should be used as the basis for judging any alternatives. It argued that a review of the St. Louis proposal revealed areas requiring further amplification and explanation. These included: (1) The mechanism for a national Universal Service Fund; (2) the clarity and specificity of the guidelines; and (3) the level of the proposed cap on NTS costs to be recovered in interstate charges. The other interexchange carriers, including American Satellite Company, ALTEL, Lexitel, MCI, SBS, Teltec, U.S. Tel. and USTS, uniformly opposed the St. Louis plan and argued that it would create an enormous increase in their administrative burdens.

21. The Bell Operating Companies and GTE supported implementation of the FCC access charge plan, with further study of the feasibility of an approach such as the St. Louis plan which incorporates a degree of state flexibility. Rochester Telephone Compony supported the concept of a unified tariff and aruged that all NTS costs should be allocated to the state jurisdiction. It took the position that this could eliminate or reduce interregional subsidies and assure a uniform NTS cost recovery mechanism for each exchange carrier. United opposed the St. Louis plan, arguing that it would add further confusion and uncertainty to an industry which needs neither.

22. The Rural Telephone Coalition (RTC) also oposed the St. Louis resolution. RTC argued that the St. Louis plan would cause significant problems including additional administrative burdens and increased pressure for toll rate deaveraging. RTC stated that flexible pricing strategies do not address the underlying problems of companies serving high cost areas. It also argued that the FCC can not delegate its authority over interstate ratemaking to the states. The large user groups, such as Ad Hoc, Aeronautical Radio, Inc., FEA and ICA uniformly opposed the St. Louis plan. ABC, CBS, and NBC requested that the Commission ensure that television and audio programming services are expressly excluded from the scope of any unified tariffs.

23. Most of the state commissions endorsed the St. Louis approach. The Michigan, New Jersey, New York, Utah, Vermont and Wisconsin Commissions, the New England Conference of Public Utilities Commissions, as well as the Office of Consumers' Council, State of Ohio supported the St. Louis plan. These parties argued that a single unified access charge tariff administered by the states has three main advantages: greater flexibility in meeting localized bypass and other ratemaking concerns; reduced adminstrative problems; and

[30] This approach is frequently referred to as the St. Louis plan since it was adopted by the NARUC Communications Committee at its May meeting in St. Louis, Missouri.

[31] Public Notice, "Commission Seeks Comments on National Association of Regulatory Utility Commissioners (NARUC) Response to Common Carrier Bureau Questions on the St. Louis Resolution," September 19, 1984.

[32] Letter to Junie L. Bradshaw, President, NARUC from Jack D. Smith, Chief, Common Carrier Bureau, dated Autust 24, 1984.

reduced possibility for arbitrage.[33] The Illinois Commerce Commission also favored the St. Louis plan, but conditioned its support on the simultaneous relaxation of the FCC policy requiring averaging of NTS costs for the purpose of interstate ratemaking. The Alabama Public Service Commission opposed the concept presented in the St. Louis resolution, and any other measures which would create additional pressure for the deaveraging of toll rates. Alabama also argued that it is imperative that the Commission provide adequate benefits to high cost companies. The Washington Utilities and Transportation Commission stated that a unified set of tariffs as suggested by NARUC would not meet the state's needs.

24. On November 1, 1984, most of the major exchange carrier associations[34] filed a Joint Petition with the Commission and Joint Board outlining a plan for implementation of subscriber line charges and high cost assistance.[35] This plan is predicated on recovery of almost all interstate loop costs through subscriber line charges. It begins with the Commission's previously adopted $2.00, $3.00 and $4.00 access charge plan and a maximum $4.00 monthly subscriber line charge for residential and single line business customers through 1989. Section III discusses their proposal for high cost assistance.[36] The parties to this filing state that their recommendations on subscriber line charges and high cost assistance represent a unified proposal and they oppose adoption of any part of the plan by itself.

25. In the post 1989 period, this plan proposes different levels of subscriber line charges for small companies (those with less than 200,000 loops) and large companies. For small companies, subscriber line charges would be set to recover interstate loop costs (defined by the basic 25 percent interstate allocation), up to 110 percent of the nationwide average interstate NTS costs. This would equate to a subscriber line charge of $4.77 (based on 1983 data) for small companies with interstate NTS costs equal to or greater than 110 percent of the nationwide average. For large companies, the basic interstate allocation factor would be 35 percent for NTS costs between 110 percent and 160 percent of the national average and 55 percent for NTS costs between 160 percent and 169 percent of the national average. Under this allocation scale, the subscriber line charge for large companies with loop costs of more than 169 percent of the national average would be capped at twice the national average for these costs or $8.66 (based on 1983 data). The plan also provides for modifying multiline business charges to equal the residential and single line business charges.

C. Discussion

1. Basic Plan for Interstate NTS Cost Recovery

26. The Joint Board believes that implementation of subscriber line charges in the amounts outlined at the beginning of this Section will best serve the Commission's goals of: (1) Eliminating unreasonable discrimination and undue preferences among the rates for interstate services; (2) promoting efficient use of the local network; (3) preventing uneconomic bypass; and (4) preserving universal service. A basic $2.00 subscriber line charge for residential and single line business customers will substantially reduce the extent of the discrimination which the Commission found to exist between the flat rates charged for dedicated private line local loops and the per minute access charges for use of switched local loops. Flat rate recovery of a portion of the interstate costs of switched local loops will also promote economically efficient use of the local telephone network. In addition, it will allow major reductions in the carrier common line charge.[37] This will substantially reduce the incentive for the interexchange carriers and high volume toll users to bypass the local exchange[38] and will allow significant toll rate reductions. The Joint Board recommends that the Commission take all appropriate steps to ensure that the revenues generated by residential and single line business subscriber line charges are flowed through to customers in the form of reduced interstate toll rates. The additional provisions authorizing local companies (with the approval of their state commissions or the Joint Board) to file optional alternative tariff provisions for recover of interstate carrier common line costs pursuant to Part 69 of the FCC rules will also contribute substantially to reducing localized bypass problems which the across-the-board reduction in the carrier common line charge cannot prevent.

27. Limiting the basic subscriber line charge to $2.00 per month pending reevaluation by the Joint Board will also ensure that implementation of subscriber line charges for residential and single line business customers will not undermine universal service. It does not appear that a $1.00 or $2.00 monthly subscriber line charge, by itself, will have an adverse effect on the affordability of telephone service. However, we are concerned that recovery of additional NTS costs through subscriber line charges, in conjunction with other federal actions, such as more rapid depreciation of telephone company plant, and recent separations changes as well as the general upward pressure on local telephone rates,[39] could undermine universal service.[40] Subscriber line charges represent a major change in the way the interstate allocation of NTS local exchange costs have been recovered. We believe that such changes must be implemented gradually, subject to careful reevaluation before increases are allowed. Only a complete reexamination of these issues in light of actual experience will allow a sound determination of whether the basic subscriber line charge for these customers should ever be increased beyond $2.00 per month.

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[33] For purposes of this discussion, the term "arbitrage" refers to the ability of the interexchange carriers to take advantage of differences between state and federal access tariffs, for example, by misreporting the use of facilities to obtain favorable rates or terms.

[34] These associations included the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, the National Rural Telecom Association and the United States Telephone Association. They represent over 1,300 of the approximately 1,400 exchange carriers.

[35] The Joint Board's procedures governing *ex parte* presentations generally prohibit written *ex parte* presentation during the 15 day period immediately preceding a Joint Board meeting, although there is an exception for filings in response to a request by the Joint Board or its staff. *Order*, CC Docket No. 80-286, FCC 82-106, released March 5, 1982, 47 Fed. Reg. 23459 (May 28, 1982). The Joint Petition was filed less than 15 days before the Joint Board meeting on November 15, 1984, but it satisfies the Joint Board's *ex parte* procedures since the staff requested a filing by these groups.

[36] *See* paragraph 54.

[37] The carrier common line charge is designed to recover all interstate NTS Local exchange costs for switched access that are not recovered through subscriber line charges with the exception of Category 6 NTS COE costs which are recovered through line termination charges.

[38] The NTS costs recovered through the per minute carrier common line charge are reflected in the interexchange carriers' rates for toll service. As a result, high volume toll users pay much more than the cost of connecting them to the telephone network. This creates an incentive for large users to construct or lease private communications systems which bypass the local exchange. The interexchange carriers also have a significant incentive to bypass the local exchange to avoid the carrier common line charge so they can offer lower rates to high volume users.

[39] This is due primarily to increases in wages and the cost of materials and supplies.

[40] The Joint Board is committed to development of a careful monitoring program to allow timely adjustments if necessary.

28. The weight of the comments supports implementation of subscriber line charges for residential and single line business users. As already indicated, we agree that gradual implementation of a $2.00 flat charge for these subscribers is in the long term public interest. However, we are recommending a number of changes in the Commission's existing plan designed to reflect certain ideas contained in the major alternative NTS cost recovery mechanisms proposed in the comments. These alternatives include: (1) The St. Louis plan for state flexibility through unified state and interstate access charge tariffs filed with the state commissions; (2) reductions in the interstate allocation of NTS local exchange costs; (3) restructuring interstate toll rates to reflect volume discounts for large users; and (4) restructuring access charges to reflect volume discounts or modifying the access charge rate structure to reduce the impetus for bypass. While we do not believe that any of these alternatives, by themselves, represent a workable means of recovering interstate NTS costs in a manner consistent with the Commission's basic goals, each of these alternative approaches reflects important underlying concerns that should be dealth with in any plan for recovering interstate NTS costs. Our recommendations in this regard represent a means of dealing with these concerns within a system of subscriber line charges.

29. In recommending implementation of limited subscriber line charges for residential and single line business subscribers, we recognize the extraordinary efforts of the National Telephone Cooperative Association (NTCA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), the National Rural Telecom Association (NRTA) and the United States Telephone Association (USTA) in developing a consensus position among local exchange companies concerning subscriber line charges and assistance for subscribers in high cost areas. The decision by these organizations, representing both large and small local exchange carriers, to recommend subscriber line charges as a means of recovering the interstate NTS cost allocation demonstrates a broad industry-wide agreement concerning the need for flat rate recovery of most interstate NTS costs. Although we agree with these groups in recommending implementation of subscriber line charges for residential and single line business customers, we differ from them in our conclusion that flat rate recovery of interstate NTS costs should be limited to $2.00 per month for these subscribers until completion of further studies to determine whether additional flat rate recovery of interstate NTS costs should ever be authorized.

30. One of the major concerns underlying the St. Louis plan appears to be a desire on the part of state regulatory officials for flexibility to deal with bypass on a highly targeted basis.[41] Many of the comments in response to the NARUC letter persuade us that further study would be necessary before the approach proposed in the St. Louis plan could be implemented. We believe that an immediate solution is necessary to the problems inherent in the present system of interstate NTS cost recovery. Furthermore, the St. Louis plan is not compatible with the present method of recovering interstate NTS costs through nationwide average carrier common line charges. Under an approach with averaged charges, bypass represents a threat to all telephone subscribers, not just those served by the local company whose facilities may be bypassed. For example, a portion of the revenue generated by the per minute carrier common line charge for traffic originating and terminating in major metropolitan areas goes to cover NTS costs in high cost rural and remote areas. As a result, we believe that bypass represents a national problem that cannot be solved exclusively at the state level. The promotion of economic efficiency and the elimination of discrimination in the use of the local switched network for the origination and termination of interstate services also represents a problem with national implications which can best be dealt with through joint federal-state action.

31. On the other hand, the potential for bypass of the local exchange differs from company to company. There are certain areas where the across-the-board reduction in the carrier common line charge resulting from implementation of a maximum $2.00 basic subscriber line charge will not be sufficient to prevent bypass. In light of this, we believe that a system of nationwide subscriber line charges should be supplemented with provisions which authorize the local exchange companies to develop (with the concurrence of their state commission or the Joint Board) optional alternative interstate tariff filings with the FCC to recover carrier common line costs. We believe that this recommendation reflects one of the major concerns underlying the St. Louis plan while allowing immediate steps to alleviate the problems inherent in the existing system.

32. The provision for alternative, highly targeted, interstate access charge tariff provisions designed to combat localized bypass problems also reflects proposals for dealing with the bypass problem through volume discounts in the access charge or interstate toll tariffs. In fact, we expect that many of the alternative tariff provisions for the recovery of carrier common line costs will take the form of volume discounts. Again, volume discounts alone do not appear to represent a satisfactory approach for dealing with the present problems related to the recovery of interstate NTS costs. A system of volume discount tariffs would reduce the pressure for bypass. It would also reduce the extent of discrimination and economic inefficiency which the Commission has found to be inherent in the present system. Despite this, volume discount tariffs, by themselves, will not address the bypass, discrimination and economic efficiency concerns to the same extent as the proposed subscriber line charge supplemented with optional volume discounts or other innovative tariff structures to deal with localized bypass problems. Relying exclusively on volume discounts for large users would also require major toll rate increases for low volume residential and small business subscribers. Using volume discounts in conjunction with subscriber line charges will alleviate this problem.

33. Capping basic subscriber line charge at $2.00 per month pending an evaluation of the need to recover additional NTS costs through flat charges also reflects one of the basic concerns underlying the proposals for a reduced interstate cost allocation. Most of these proposals are based on the idea that the interexchange carriers should continue to pay a major portion of interstate NTS costs, although some of them suggest a reduced interstate allocation in conjunction with subscriber line charges. At present, we do not believe that reducing the interstate NTS cost allocation represents a sound response to the problems produced by the existing NTS cost allocation and recovery mechanisms. Among other things, it would force state regulators to implement solutions to a national problem which can best be remedied through federal measures developed in cooperation with the state commissions. A significant reduction in the interstate

[41] The St. Louis plan was also intended to eliminate a number of other problems associated with disparate intrastate and interstate rates for equivalent access service.

NTS cost allocation would require increases in local exchange and other intrastate rates to recover the increased intrastate costs. At the same time, interstate rates would be reduced to reflect a decreased revenue requirement.

34. We believe that the interexchange carriers should continue to pay a major portion of interstate NTS costs, at least through the interim period covered by our recommendations. Specifically, we recommend that subscriber line charges (including any surcharge necessary in conjunction with the optional anti-bypass tariff provisions discussed later in this section) be limited so that the interexchange carriers continue to pay at least a SLU (Subscriber Line Usage) [42] based portion of NTS loop costs on a nationwide average basis [43] during 1985 and 1986. Based on current data, a $2.00 subscriber line charge implemented in June 1986 will satisfy this criterion. During this period, the interstate allocation of CPE, inside wiring and NTS Category 6 COE, (Local Dial Switching Equipment) will also be recovered from the interexchange carriers through usage based charges.[44] While we believe that at least a SLU based portion of local loop costs should continue to be recovered from the interexchange carriers during this interim period, we recognize that full reevaluation of these issues in late 1986 and 1987 will be necessary to allow a determination of whether the portion of NTS costs paid by the interexchange carriers should be adjusted. Only a full reexamination of our experience in implementing the $1.00 and $2.00 subscriber line charges will allow a sound decision on this point.

2. Optional Alternative Carrier Common Line Tariffs

35. We now turn to a more detailed discussion of our proposal for allowing the local exchange companies, working in conjunction with their state regulators, a degree of flexibility in recovering carrier common line costs. Under the Commission's access charge rules, the carrier common line element is designed to recover interstate costs associated with CPE, inside wire, the universal service fund, NECA costs and the loop costs which are not recovered through subscriber line charges. These costs are averaged on a nationwide basis to produce a uniform per minute charge for origination and termination of interstate switched services (other than those provided by the OCCs through line side connections which qualify for a discounted access charge rate). The implementation of $1.00 and $2.00 subscriber line charges for residential and single line business customers will result in significant reductions in the nationwide average carrier common line charge. As previously mentioned, we recommend that the Commission ensure flow through of the new residential and single line business subscriber line charge revenues in the form of interstate toll rate reductions.

36. We also believe that additional measures may be necessary to combat bypass in certain areas. As a result, we are recommending that the Commission allow local exchange companies the option of filing alternatives to the carrier common line element in the NECA tariff. These tariffs would reflect volume discount rates for interstate access or other innovative rate structures designed to encourage use of the local switched network by the interexchange carriers and large volume customers. In order for these alternative rates or tariff structures to be fully effective in preventing bypass of the local network, we believe that the large volume users must realize cost savings. We recommend that the Commission adopt measures to ensure that the alternative tariff provisions benefit high volume toll users in the relevant study area.

37. We recommend structuring the provisions for such optional tariff filings to ensure nationwide averaging of carrier common line costs as required by the Commission's access charge rules.[45] This can be done by requiring the local exchange companies implementing alternative tariffs to pay into the NECA pool as if the alternative tariffs were not in effect. In the first year of the alternative tariff, the company's payment into the NECA pool would be based on a projection of their carrier common line minutes, ignoring the effect of the alternative tariff. In subsequent years, the number of minutes to be used in calculating the company's payments to the NECA pool would be developed by comparing: (1) Projections based on the company's carrier common line minutes in the last year prior to the alternative tariff; and (2) the total of the previous year's carrier common line minutes and the minutes under the alternative tariff minus the number of those minutes estimated to be due to stimulation. The amount of the company's NECA carrier common line pool distribution would remain unchanged. Under this approach, increased revenues due to the stimulation of traffic under the alternative tariffs would reduce the level of the subscriber line surcharge.[46]

38. As previously indicated, we believe that such optional alternative tariff filings should be allowed pursuant to Part 69 of the Commission's rules only when the local exchange company concludes that such tariff changes are necessary and the state regulatory commission concurs in this decision. We also recommend that the local companies be allowed to ask the Joint Board to override a state commission's objection or act on such proposals if the state commission does not do so within 60 days of the filing.[47] This period should be ample for state consideration since concurrence in the proposal for an alternative tariff can be accomplished through a filing with the FCC, and does not require a rate proceeding before the state commission.[48] Under this procedure, the Joint Board could concur in the proposal, allowing a company to go forward with a special tariff filing before the FCC pursuant to Part 69 of the rules if the Joint Board was convinced that such measures were necessary to deal with a localized bypass problem. However, the state commission's grounds for objecting to the alternative tariff filing should be given considerable weight in any such Joint Board proceedings. A local company would not be authorized to go forward with such a tariff filing before the FCC pursuant to Part 69 of the rules in the absence of state commission or Joint Board approval. In order to facilitate state commission, Joint Board and FCC review of local company proposals for alternative tariff filings, we believe that

[42] The Subscriber Line Usage factor is equivalent to the portion of total usage that is interstate. If ten out of every one hundred minutes of use are interstate, SLU would be 10 percent.

[43] A $2.00 subscriber line charge for residential and single line business customers may leave less than a SLU based portion of loop costs to be recovered through carriers' carrier charges in the case of some states and companies. This is due to the fact that subscriber line charges for these customers will be uniform throughout the country, while the SLU based portion of local loop costs varies widely from company to company due to differences in interstate SLU levels and unseparated (total intrastate and interstate) costs per loop.

[44] These costs will continue to be recovered from the interexchange carriers as long as they remain part of the regulated rate base subject to separations.

[45] The averaging of most NTS costs (other than those recovered pursuant to subscriber line charges) through the carrier common line access charge element contributes to maintaining geographically averaged interstate toll rates.

[46] For a discussion of the subscriber line surcharge see paragraphs 39 and 40.

[47] The state commission would remain free to act on the company's proposal pending a Joint Board decision.

[48] Under this procedure, the state commission would be providing input concerning a proposal for a fedral tariff filing. As a result, the provisions concerning state ratemaking or other administrative proceedings would not appear to apply.

the company should be required to serve each of these organizations concurrently with a copy of the proposal. Once the state commission or Joint Board concurrence is obtained, the actual tariff would be filed with the Commission and reviewed pursuant to normal FCC tariff filing procedures.[49]

39. The alternative tariffs are not likely to produce enough revenue to cover the required payments to the NECA pool. We believe that any revenue short fall should be recouped through a uniform surcharge on subscriber line charges for all customers in the study area involved. Although this approach will increase the cost burdens borne by these customers, we do not believe that alternative tariffs will receive state commission or Joint Board concurrence unless all subscribers will, in the long run, benefit from measures encouraging use of the switched local network by the interexchange carriers and high volume users. If the revenue shortfall were funded by a surcharge on the nationwide NECA carrier common line charge, local companies and the state commissions would have a strong incentive to proceed with such alternative tariff filings even when they were not necessary. Such an approach would allow local companies to reduce the NTS costs which they recovered in their service territory while requiring that all other toll users make up the revenue shortfall produced by these tariffs. This approach would also require that telephone subscribers in high cost rural areas pay higher toll rates designed to pick up the NTS costs which were previously paid by large users. We believe that our proposal will ensure that the decisions to proceed with these alternative tariff filings are made in a context where both the benefits and drawbacks of additional NTS deloading are realized within the study area involved.

40. We also recommend that the subscriber line surcharge for all customers in the relevant study area be limited to a maximum of $.35 per month. We believe all subscribers should be subject to the same surcharge since all customers will, in the long run, benefit from these measures to prevent bypass of the local exchange. Even without this limit, we doubt that state regulators would approve alternative carrier common line tariffs requiring surcharges in excess of this amount. Despite this, we believe that the Commission should establish a cap on the level of the surcharge to provide subscribers with a necessary degree of certainty. We also recommend that the Joint Board undertake further study of the level of the surcharge in late 1985 or early 1986 (unless earlier review of this matter is necessary) to determine whether a higher cap on the surcharge would be desirable in conjunction with the $2.00 subscriber line charge to be implemented in June 1986. This determination can best be made on the basis of actual experience with alternative tariff filings.

41. We believe that the optional alternative interstate tariff provisions which we are recommending will serve as an effective means of combatting localized bypass problems. However, we recognize that there are a number of questions concerning implementation of such tariffs that should be examined further. We wish to facilitate the earliest possible implementation of these alternative tariffs, assuming Commission adoption of our recommendations. As a result, we intend to request comments on these implementation issues early in December 1984.

42. We conclude that these provisions for allowing individual local exchange companies to file alternative tariff provisions for recovery of carrier common line costs with state commission or Joint Board concurrence are entirely consistent with the Communications Act.[50] The Act normally provides for a system of carrier initiated tariff filings. *American Telephone and Telegraph Co.* v. *FCC*, 487 F.2d 865 (2d Cir. 1973). The provisions requiring state commission or Joint Board concurrence before a local company is authorized to proceed with an alternative tariff filing pursuant to Part 69 of the Commission's rules does not contravene this basic principle. The pooling of certain interstate NTS costs for purposes of the carrier common line charge has been prescribed in Part 69 of the rules pursuant to Section 205(a) of the Act. As a result, the local carriers are required to participate in the carrier common line pool. The state commission or Joint Board concurrence gives the local company authority to file under other provisions of Part 69 allowing alternative individual company tariff filings to recover carrier common line costs.

43. We also conclude that the alternative tariffs designed to combat localized bypass problems are consistent with the Act's prohibition against "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, directly or indirectly, . . ." Section 202(a) of the Act, 47 U.S.C. 202(a). Switched access service is basically the same service regardless of whether the customer involved is a high or low volume user. However, a rate differential or alternative tariff structure designed to prevent the interexchange carriers and large toll customers from bypassing the local exchange appears to be just and reasonable. Such tariffs would, in fact, reduce the degreee of discrimination inherent in recovering NTS costs from high volume users through usage based charges, promote economically efficient use of the local network and, in the long run, contribute to the preservation of universal telephone service. In *Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221, 1230 (D.C. Cir. 1980), *cert den.*, 451 U.S. 920, 451 U.S. 976 (1981) the D.C. Circuit approved provisions for departures from the fully distributed costs methodology when the carrier could justify such departures on the ground of efficiency or other public interest benefits, including competitive necessity. We believe our present recommendation satisfies this criterion.

44. In addition to these specific measures for allowing local exchange companies to file alternative anti-bypass tariffs, we urge the Commission and the Joint Board staff to work closely with interested state commissions to explore more comprehensive alternative tariff mechanisms for recovering the interstate allocation of NTS costs. We believe that carefully designed experiments with different tariff structures for recovering these costs will be valuable to the Commission in refining the present NTS cost recovery structure, and therefore we recommend that they be carefully reviewed through the Joint Board process. Such alternatives might well involve an even greater level of federal-state cooperation, and could be based on separations changes to permit states to substitute intrastate recovery

[49] The Communications Act provides for a maximum of 90 days public notice before a tariff filing becomes effective. Part 61 of the Commission's rules concerning tariff filings provides for a maximum of 45 days notice for tariff filings. However, Part 69 of the rules provides for 90 days notice for the annual access charge tariff filings. We recommend that the alternative tariffs also be filed on 90 days notice. During the public notice period the Commission may suspend the tariff to allow investigation of the filing or reject it if it is unlawful on its face. *See* Sections 203 and 204 of the Communications Act, 47 U.S.C. 203 and 204. Additional provisions concerning review of tariff filings are contained in Part 61 of the Commission's rules.

[50] The Commission can establish a state commission and Joint Board role in authorizing alternative tariff filings based on local conditions pursuant to Part 69 of the rules. See Sections 4(i) and (j) and 410 of the Communications Act, 47 U.S.C. 4(i) and (j) and 410(c).

mechanisms for the customer line surcharge. For example, the Florida Public Service Commission filed a petition with the FCC on November 8, 1984 for authority to implement a comprehensive unified interstate and intrastate access charge plan (Florida plan) in Florida on an experimental basis. It should be noted that under the Florida plan tariffs for recovery of interstate costs would continue to be filed with the FCC.

45. An additional issue before the Joint Board involves the treatment of orphanages as multi-line business customers for purposes of subscriber line charges. This is due to the fact that the NECA tariff uses the customer's local exchange tariff status as a residential or business subscriber for purposes of applying subscriber line charges. We continue to believe that this approach is appropriate.[51] Classification of customers as residential or business users in the local exchange tariffs is usually subject to state commission review like any other term or condition in the local tariffs. If the state commission is satisfied with treating a particular subscriber as a business customer for purposes of the local tariff, we believe that such treatment should be appropriate for purposes of subscriber line charges as well. Having the FCC second guess the state commissions on this point would require the expenditure of substantial federal resources and would serve no useful purpose. Therefore, we recommend that any change in the user classification of orphanages be dealt with by state regulators.

III. High Cost Assistance

A. Summary

46. The Joint Board recommends that the Commission continue to use NTS local exchange costs as the basis for determining the level of assistance which each company should receive.[52] We are also recommending a number of changes in the separations provisions designed to assist telephone subscribers in areas with unusually high NTS local exchange costs. The most important change involves a revision in the scale for determining high cost assistance to qualifying study areas. Assistance will continue to apply to relevant unseparated (*i.e.*, total intrastate and interstate) NTS local exchange costs in excess of 115 percent of the national average. We recommend revising the high cost assistance for study areas with less than 50,000 working loops to cover the following: (1) 50 percent of the study area's relevant cost per working loop in excess of 115 percent of the national average, but not more than 150 percent of the national average; and (2) 75 percent of the study area's relevant cost per working loop in excess of 150 percent of the national average. We recommend changing the high cost assistance for study areas with more than 50,000 working loops to include: (1) 25 percent of the study area's relevant cost per working loop in excess of 115 percent of the national average, but not more than 150 percent of the national average; and (2) 75 percent of the relevant cost per loop in excess of 150 percent of the national average. This retargeting of high cost assistance will provide increased protection for subscribers served by small high cost companies, while keeping the overall size of the high cost fund at a reasonable level.

47. We are also recommending a number of other changes in the existing plan for high cost assistance. We conclude that the authorized rate of return for interstate access service [53] should be used in calculating the level of high cost assistance. We also recommend freezing study area boundaries as they are on November 15, 1984 for separations purposes, including calculation of the level of high cost assistance. In addition, we believe that the transition from frozen SPF to the 25 percent basic allocation factor combined with high cost assistance should be extended from four to eight annual steps for all companies. We recommend continued use of frozen SPF as the allocation factor for NTS Category 6 Central Office Equipment (COE), Local Dial Switching Equipment, pending a comprehensive review of all COE separations issues. As a result, we do not believe that NTS Category 6 COE should be included in determining the level of high cost assistance. The first two changes involving the rate of return and study area definition will continue long-standing industry practices. They will have a relatively small impact on the size of the total high cost fund. Our recommendations concerning Category 6 NTS COE are also designed to maintain the status quo pending further study. Extending the transition period will ease the burden on companies which will experience significant reductions in their interstate cost allocation as a result of the move from SPF to the new allocation method.[54]

B. Targeting High Cost Assistance

1. Background

48. The high cost assistance originally recommended by the Joint Board and adopted by the Commission [55] covers: (1) 50 percent of the study area's relevant NTS costs [56] between 115 percent and 160 percent of the national average; (2) 60 percent of the costs between 160 and 200 percent of the national average; (3) 70 percent of the costs between 200 percent and 250 percent of the national average; and (4) 75 percent of the costs above 250 percent of the national average.

49. In recommending this formula for high cost assistance, the Joint Board stated that, based on the existing record, the formula appeared to produce an appropriate level of high cost assistance without excesssive toll loading. We expressed concern, however, that this approach produced anomalous results in the case of certain high growth areas which would receive a disproportionate share of the total assistance. As a result, we stated that we would continue to study this situation and issue a supplemental recommendation to the Commission if appropriate.

50. In the subsequent *Second Reconsideration Order* in CC Docket No. 78–72 the Commission stated, among other things, that it intended to conduct further proceedings concerning supplemental assistance for subscribers served by small telephone companies. The Commission noted two possible means of accomplishing this goal. The first involved making interstate subscriber line charges optional for companies with fewer than 50,000 loops in a study area. The second option involved increasing the level or

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[51] *See Second Reconsideration Order* in CC Docket No. 78–72, FCC 84–36, released February 15, 1984, 49 FR 7810 at footnote 32 (March 2, 1984).

[52] We recommend that the carrier common line pool distribution for average schedule companies utilize a surrogate for the high cost assistance provided in Part 67 of the Commission's rules.

[53] The authorized rate of return for interstate access service is now 12.75 percent.

[54] Local telephone companies will move from their current frozen SPF to the new allocation factor in eight steps unless they qualify for an extended transition period. *See* paragraphs 71 through 73 for a further discussion of the transition provisions.

[55] The high cost assistance involves an additional interstate cost allocation for study areas with high NTS local exchange costs. This is designed to reduce the intrastate cost allocation and keep local rates lower than they would otherwise be. Pursuant to Part 69 of the Commission's rules, this additional interstate cost allocation is recovered from the interexchange carriers through usage based charges.

[56] The high cost assistance covers the costs of non-wideband local loops (excluding those used for WATS and private line service), as well as the associated drop and block wiring and Category 8.13 COE, Circuit Termination Equipment. The related maintenance, depreciation and taxes are also included along with a proportionate share of certain overhead expenses. *See* Appendix A for a list of the accounts involved.

assistance to high cost areas served by telephone companies with less than 50,000 loops in a study area. In its *Further Notice of Proposed Rulemaking*, in CC Docket Nos. 78–72 and 80–286 [57] the Commission requested comments concerning additional assistance for small telephone companies and asked the Joint Board to prepare a recommendation on this issue. On April 10, 1984, the Joint Board adopted an *Order Inviting Comments* in CC Docket No. 80–286 [58] requesting comments on a number of issues including matters related to "fine tuning" the provisions for high cost assistance. Among other things, we requested comments on whether large telephone companies had more flexibility than small companies to recover above average costs without an adverse effect on residential subscribers. In connection with this, we also asked for comments concerning decreasing the level of assistance for large telephone companies and increasing the level of assistance for small companies. In addition, we sought comments on whether the high cost assistance should be based on costs (and possibly the size of the study area) or whether additional factors, such as subscriber density, income levels or the rate of growth in local loops, should also be considered.

2. Comments

51. The comments revealed strong differences of opinion concerning the level of high cost assistance adopted by the Commission. Alaska, the Michigan Action Group and a number of small, rural telephone companies expressed support for the concept of increased assistance to small telephone companies. REA, NTIA, RTC, and the North Dakota Public Service Commission expressed support for the inclusion of a density standard in the high cost formula. AT&T supported measures directing assistance to companies with fewer than 50,000 loops. It also stated that small companies which would experience significant decreases in their interstate cost allocations resulting from the move from frozen SPF to the 25 percent basic allocation factor might need additional assistance. Southwestern Bell proposed limiting high cost assistance to study areas which have less than 50,000 loops and a composite local rate in excess of 75 percent of the national average.

52. Central, Contel and United favored the plan recommended by the Joint Board and approved by the Commission. United stated that it would support additional assistance to small companies if the need could be substantiated. GTE argued that the qualifying threshold for high cost assistance should be increased from 115 to 150 percent of the national average with a higher level of coverage above this threshold. Ad Hoc suggested the use of a multi-year moving cost average as a way to eliminate the effects of high growth or exceptional plant replacement and modernization from consideration in determining the high cost assistance. Kentucky argued that the level of assistance should be based primarily on the extent of residential telephone service penetration. West Virginia stated that assistance should be based on a combination of high NTS costs and the average per capita income of residents in the service territory. Vermont took the position that the states should design and administer any high cost assistance program. Vermont opposed national pooling of any high cost fund. Florida stated that, in the event its unified tariff proposal is adopted, assistance for small telephone companies should be provided within the state, with outside assistance only when the state was unable to generate a sufficient toll contribution.

53. A variety of parties including Ad Hoc, Bell Atlantic, Bell South, ICA, Rochester and U.S. West opposed basing high cost assistance on company size. SBS opposed separations based high cost assistance on the grounds that it provided improper economic signals, incentives for bypass and inefficient operations, as well as windfall profits for certain local companies. Rochester and NTIA proposed a cap on the amount of high cost assistance.

54. As previously mentioned, a number of exchange carrier associations filed a Joint Petition on November 1, 1984, proposing a plan for subscriber line charges as well as high cost assistance. When compared with the high cost plan adopted by the Commission, this plan provides for an increased level of assistance for small companies (those with less than 200,000 loops) and a greatly reduced level of assistance for large companies. Assistance for large companies would generally be limited to cost in excess of 169 percent of the national average. For large companies the high cost assistance would cover: (1) 55 percent of costs between 169 percent and 200 percent of the national average; (2) 85 percent of the costs between 200 percent and 250 percent of the national average; and (3) 90 percent of costs in excess of 250 percent of the national average. For small companies, 90 percent of NTS costs in excess of 110 percent of the national average would be covered. This plan endorses the use of a composite rate of return, such as the current 12.75 percent, in determining interstate NTS costs. These measures would serve to produce a high cost fund of about $427 million based on 1983 data. The plan also results in subscriber line charges for large high cost companies (as high as $8.66 per month based on 1983 data) which are substantially higher than those for smaller companies ($4.77 per month) as well as a greater intrastate NTS cost allocation. For example, 65 percent of NTS costs for large companies would be allocated to intrastate in the band covering costs from 110 percent to 160 percent of the national average, whereas only 10 percent of the costs would be allocated to intrastate in the case of the small companies.

3. Discussion

55. We conclude that high cost assistance should continue to be based primarily on NTS local exchange costs, although somewhat more assistance should be directed to smaller companies. We have examined the possibility of modifying the assistance formula to reflect additional factors such as income, subscriber density and the ration of business to residential loops in each study area. Although inclusion of some of these factors in the high cost formula may be theoretically attractive, the record does not contain sufficient information to allow a determination of which factors significantly affect the affordability of telephone service,[59] and the weight which should be accorded to them. Substantial administrative burdens would also be involved in reflecting factors other than costs and company size in the high cost formula. As a result, we believe that high cost assistance should continue to be based primarily on cost since this is the single most important factor in determining the price of telephone service.

56. Although we conclude that the level of assistance provided to a given company should be based primarily on costs, we also believe that additional assistance is necessary for small companies. We also recommend an increased level of assistance for companies with the highest cost levels. At the same time, it is necessary to keep the overall amount of high cost

[57] 49 FR 18138 (April 30, 1984).

[58] 49 FR 18746 (May 2, 1984).

[59] For example, income levels would appear to have an effect on the affordability of telephone service, but this factor may be offset in many cases by differences in the cost of living.

assistance at a manageable level. We conclude that our objective of ensuring that telephone service remains affordable in high cost areas while avoiding an excessive level of toll loading can best be accomplished by reducing the level of assistance for companies with costs below 150 percent of the national average, except in the case of companies with less than 50,000 working loops. The existing level of assistance would be maintained in the initial cost band for the smaller companies.[60] However, we propose an increased level of assistance for all companies to the extent that their costs exceed 150 percent of the national average. Accordingly, we recommend that the high cost assistance for study areas with fewer than 50,000 working loops include 50 percent of the study area's relevant cost per working loop in excess of 115 percent of the national average, but not more than 150 percent of the national average. For study areas with more than 50,000 working loops we recommend that the high cost assistance include 25 percent of the relevant cost per working loop in excess of 115 percent, but not more than 150 percent, of the national average. The high cost assistance for all companies would also include 75 percent of the relevant cost per working loop in excess of 150 percent of the national average.[61]

57. Our recommendation concerning retargeting of the high cost assistance reflects the conclusion that smaller telephone companies need somewhat more high cost assistance than larger companies. This conclusion is also one of the underpinnings of the high cost assistance plan proposed in the Joint Petition. However, we differ from RTC, OPASTCO, NRTA, and USTA with regards to the appropriate level of the differential in assistance between large and small companies. While we agree with these groups that small telephone companies need more assistance than large companies, we do not believe that the difference in assistance levels should be as great as proposed in the Joint Petition. We agree that large companies have more flexibility than small companies to recover above average costs without an adverse impact on residential subscribers. However, the information available to us does not indicate that the extent of the large companies' flexibility to recover above average costs without an adverse subscriber impact is as great as the proposal on high cost assistance in the Joint Petition would suggest.

58. We find that the formula which we are recommending will direct assistance to the areas where it is most needed to ensure that telephone rates remain affordable for the average subscriber. Increasing the level of high cost coverage in the highest cost band will help to reduce the variation in local exchange rates from company to company. Under this approach all relevant NTS costs in excess of 150 percent of the national average would be allocated to the interstate jurisdiction. (Twenty-five percent of these costs would be allocated to interstate through application of the new basic allocation factor. The remaining seventy-five percent of the costs in this band would be allocated to interstate through the high cost formula.) Smaller companies would receive the same level of assistance in the first cost band as provided under the existing formula. The larger companies would continue to receive a substantial degree of assistance in the first cost band, although the amount of coverage would be lower than that originally adopted. This will keep the overall amount of high cost assistance at a reasonable level. The reduction in the level of assistance for the larger companies should not adversely affect universal service since these companies have some flexibility to recover above average costs without an adverse effect on residential subscribers.[62] For example, they have a larger and more varied base of business subscribers and services, and a greater ability to recover costs through approaches such as local measured service or increased short haul toll charges generated by modifying extended area service (EAS) offerings. Although several parties have suggested freezing the total dollar amount of high cost assistance, we do not believe that this approach is desirable since it would effectively decrease the amount of assistance over time due to inflation. We recognize, however, that rapid growth in the amount of high cost assistance could necessitate reexamination of the high cost formula.

59. We conclude that this level of high cost assistance, combined with the other changes which we are recommending, should ensure the continued viability of small telephone companies. We do not believe that subscriber line charges for residential and single line business customers should be made optional in the case of small companies. Assistance should be directed to those areas with high costs, not just small companies. In fact, many of the smaller companies have average NTS costs. We also wish to reemphasize our conclusion that the high cost assistance should be used exclusively to keep local telephone rates lower than they otherwise would be. Several parties such as the International Communications Association (ICA) have expressed concern that there is no assurance that telephone companies receiving high cost assistance will flow the benefits through to their customers. We strongly urge all of the state commissions to ensure that the benefits of these measures accrue to local ratepayers as intended. We will make supplemental recommendations to the Commission proposing remedial measures if it appears that the high cost assistance is being used for inappropriate purposes.

D. Cost of Capital

60. We recommend use of the relevant authorized rate of return for interstate access service in determining the high cost assistance. The Commission has historically applied a single rate of return for the interstate services at AT&T and the exchange carriers.[63] In our *Second Recommended Decision and Order*, however, we proposed use of each company's actual debt/equity ratio and embedded cost of debt along with AT&T's authorized interstate rate of return on equity of 17.4 percent in calculating the high cost assistance. We

[60] Under our new proposal, the first cost band covers costs between 115 and 150 percent of the national average. The first cost band in the existing formula covers costs between 115 and 160 percent of the national average.

[61] Data showing the effect of alternative measures for high cost assistance were placed in the docket files in CC Docket Nos. 78–72 and 80–286 on November 1, 1984. "Public Notice," "High Cost Fund Data Placed in Docket File," November 1, 1984.

[62] Implementation of other cost recovery mechanisms would, of course, require state commission action.

[63] *AT&T: Modification of Prescribed Rate of Return*, 86 FCC 2d 221 (1981) *aff'd sub nom. United States v. FCC*, 707 F.2d 610 (D.C Cir. 1983); AT&T, Docket No. 20376, 57 FCC 2d 960 (1976); AT&T Docket No. 19129, 38 FCC 2d 213 (1972), *aff'd sub nom. Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975); AT&T, Docket Nos. 16258 and 15011, 9 FCC 2d 30 (1967). Under traditional procedures devised within the telephone industry, interstate charges collected by each telephone company originating tariff were merged to form an interstate revenue pool. Telephone companies agreed to distribute pooled revenues to participating carriers on the basis of the total expense and investment which each participant allocated to the interstate jurisdiction. This arrangement was sometimes called a "partnership" because each participant received the same return on its interstate investment. The transfer process among the Bell entities was known as "division of revenues" (DR) and the transfer process involving the independent telephone companies (Independents) was known as "settlements." However, the DR/settlements process was designed to operate as a single system producing the same results for Bell and non-Bell "partners." All local exchange carriers received AT&T's earned rate of return on the plant investment allocated to interstate.

concluded that these measures were appropriate in light of the wide variations in capital structure and cost of debt among local telephone companies and our decision to base assistance on actual costs to the greatest extent possible. In its *Decision and Order*, the Commission adopted the Joint Board's recommendations on this point, but asked that we study this issue further and prepare a supplemental recommendation if appropriate. In our *Order Inviting Comments* in CC Docket No. 80–286 we requested comments on a number of questions concerning the cost of capital issue.

61. The parties filing comments reflect two basic points of view on this issue. REA, RTC, USTA, and the small independent telephone companies supported use of the AT&T authorized interstate rate of return in determining the level of high cost assistance. REA argued that use of the actual cost of debt and the authorized AT&T interstate rate of return on equity would shift high cost assistance away from the small rural systems which need it most, causing substantial hardships for these companies and their subscribers. REA contended that use of the AT&T rate of return on equity in conjunction with the actual cost of debt is totally inadequate for REA borrowers because their operations involve a greater element of risk than AT&T due to the fact that they are very highly leveraged.[64] Alaska argued that the Commission should use an average industry-wide cost of capital unless it is prepared to analyze all elements of each company's cost of capital.

62. AT&T, Contel and Southwestern Bell opposed use of a uniform authorized rate of return for purposes of determining the high cost assistance. AT&T argued that the high cost assistance should, to the extent possible, reflect each company's actual costs, including cost of capital. AT&T recognized that the cost of each company's common equity is not always known, but argued that a state commission determination on the cost of equity could be used. In the absence of such a prescription, AT&T took the position that use of the interstate cost of equity is reasonable. Contel suggested development of a standardized capital structure model to determine the cost of capital for each local exchange telephone company.

[64] The degree of business risk faced by a particular company is normally taken into account in prescribing a rate of return on equity. This is done because a business with a greater degree of risk will have to offer a higher return in order to attract investors.

63. The Joint Board recommends use of the authorized rate of return for interstate access service [65] in determining the level of high cost assistance. At the present time, this would be AT&T's 12.75 percent authorized interstate rate of return. As previously mentioned, the local exchange companies have historically received a nationwide average return (equal to AT&T's earned rate of return) on their interstate plant allocation through the separations and division of revenues/settlements process. A high cost assistance formula using the actual capital structure and embedded cost of debt could significantly reduce the level of interstate cost recovery for these companies at a time when they are already faced with an unprecedented degree of change. Our recommended approach is necessary in order to limit the degree of change experienced by small telephone companies to a manageable level as the industry moves into a new, more competitive environment.[66] The approach we are proposing also has the advantages of being very simple to administer and eliminating the need for decisions on a number of difficult, technical questions concerning the calculation of actual capital costs. Use of the authorized rate of return for interstate access will not have a major effect on the size of the high cost fund.[67]

E. Study Area Definition

64. In the *Second Recommended Decision and Order* in CC Docket No. 80–286, the Joint Board recommended that the term "study area" be defined as "a telephone holding company's operations within a single state" for separations purposes. The Commission subsequently adopted this definition. In its comments, the Rural Telephone Coalition (RTC) stated that the term "study area" has historically referred to the operations of an individual telephone company within a state, regardless of its affiliation with any other company. RTC argued that the new definition could require a single statewide cost study for companies owned by the same holding company even though the two companies do not have consolidated operations and have previously performed separate cost studies. RTC pointed out that such consolidated cost studies have not been performed in the past by companies owned by the same holding company and argued that implementation of this change would be costly.

65. The study area definition adopted by the Commission requires the averaging of NTS costs for separations purposes, including calculation of the high cost assistance, in the case of all companies, within a state which are owned by a single holding company. This approach would eliminate differences in the overall level of assistance resulting from the number of separate companies a holding company owns within a state. It would also discourage companies from spinning off high cost exchanges as separate companies in order to maximize high cost support. However, the present definition could also discourage the acquisition of high cost exchanges or the expansion of service to cover high cost areas since such undertakings would penalize existing study area customers through the averaging process. Use of the present definition would also involve substantial administrative costs due to the need to reorganize the recordkeeping of existing study areas and perform consolidated cost studies. The present definition would also be inconsistent with state ratemaking mechanisms since most companies are treated separately for local ratemaking purposes even if the same parent owns other companies within the state.

66. The Joint Board recommends that study area boundaries in existence as of November 15, 1984 be frozen for separations purposes with high cost assistance calculated separately for each study area. Under this approach, an existing company study area purchased by a holding company which owned other companies within the same state could continue to be treated separately for separations purposes. Areas in which telephone service was instituted for the first time could also be treated as a separate study area if separately incorporated. In either case, the parent company would also have the option of folding the new service territory into one of its existing companies and using the average NTS costs for the expanded service area in determining the high cost assistance. We expect this to be the case when the benefits of consolidated operations exceed the reduction in high cost support. However, companies would be prohibited from setting up high cost

[65] After the release of our *Order Inviting Comments*, in CC Docket No. 80–286, the Commission adopted a *Notice of Proposed Rulemaking*, in CC Docket No. 84–800, *Authorized Rate of Return*, for the purpose of examining the authorized rate of return for interstate services provided by AT&T and the exchange telephone companies. FCC 84–395, released August 13, 1984, 49 FR 32871 (August 17, 1984).

[66] We urge the Commission to consider the concerns underlying our recommendation here in reaching its decision in CC Docket No. 84–800, *Authorized Rate of Return*.

[67] *See* footnote 61, *supra*.

exchanges within their existing service territory as separate companies to maximize high cost support. This definition would facilitate administration of the high cost fund, eliminate recordkeeping burdens, and remove the disincentive for purchase of high cost companies or expansion of service into high cost areas, which would result from the previously adopted definition.

F. NTS Category 6 Central Office Equipment

67. In the *Second Recommended Decision and Order*, the Joint Board recommended that the interstate allocation of NTS Category 6 COE costs continue to be based on frozen percentage SPF pending a comprehensive review of the need for changes in the separations treatment of central office equipment. We also recommended exclusion of NTS Category 6 COE in calculating the high cost assistance. The Commission subsequently adopted these recommendations. In the *Further Notice of Proposed Rulemaking*, CC Docket Nos. 78–72 and 80–286, the Commission asked the Joint Board to undertake a comprehensive review of the separations procedures for all COE and recommend revisions where necessary. We requested preliminary comments concerning COE issues in our *Order Inviting Comments* in CC Docket 80–286. Among other things, we noted that interested parties might wish to discuss the inclusion of certain Category 6 COE costs in calculating the level of high cost assistance.

68. Alaska, the Michigan Action Group, and a number of small telephone companies supported inclusion of NTS Category 6 COE in calculating the high cost assistance. Some of these parties suggested that the exclusion of NTS Category 6 COE will have a significant adverse effect on high cost companies, since many of them have very high levels of investment in this plant. Contel proposed replacing frozen SPF as the allocation factor for NTS Category 6 COE with an exchange network usage factor equivalent to the Subscriber Line Usage (SLU). A number of parties suggested continued use of frozen SPF as the allocation factor for NTS Category 6 COE pending further review. AT&T and Southwestern Bell opposed high cost coverage for NTS Category 6 COE.

69. We recommend that NTS Category 6 COE continue to be allocated between the jurisdictions based on frozen SPF pending an in-depth review of all COE issues.[68] Since these costs will not be covered by the new 25 percent interstate allocation factor, including them in calculating the high cost assistance is not appropriate. Applying the 25 percent interstate basic allocation factor to NTS Category 6 COE would result in consistent treatment of plant traditionally identified as NTS for separations purposes. However, this is outweighed by the fact that application of the new 25 percent allocation factor presumes proper categorization of this plant without study of the major technological and engineering changes which have taken place in central office equipment over the past decade. Furthermore, this approach often fails to benefit high cost companies with a high proportion of NTS Category 6 COE investment since many of these companies also have high frozen SPFs. For these reasons, we believe that it is preferable to maintain the existing separations treatment of this plant until we are able to complete a comprehensive review of all COE issues. This recommendation does not affect the recovery of NTS Category 6 COE costs on a traffic sensitive basis through carrier's carrier charges under the Commission's access charge plan.

G. Account Inclusion

70. The Commission's rules governing the high cost assistance do not specify all of the accounts to be included in calculating the relevant NTS cost per loop. While inclusion of all relevant accounts is generally desirable to ensure that the high cost assistance truly reflects costs, we believe that the following accounts should be excluded from consideration in calculating high cost assistance because they are not normally recognized for state ratemaking purposes: (1) Account 100.2, Telephone Plant Under Construction; (2) Account 100.3, Property Held for Future Telephone Use; (3) Account 100.4, Telephone Plant Acquisition Adjustment; and (4) Account 614, Amortization of Telephone Plant Acquisition. A list of the accounts which should be considered in calculating the high cost assistance is set forth in Attachment A.

H. Extended Transition

71. Currently, nationwide average SPF is frozen at approximately 28 percent, although the SPF factor for each study area varies. The transition from frozen SPF to the 25 percent basic allocation factor is now scheduled to be implemented in four annual steps beginning January 1, 1986. The Joint Board also recommended and the Commission adopted provisions limiting to ten percentage points the total annual decrease in any study area's interstate allocation for relevant NTS costs[69] after the additional interstate high cost allocation is taken into account. The Commission also adopted the Joint Board's recommendation that the high cost assistance be implemented in four steps even if the study area involved qualifies for an extended transition period.

72. A number of the small telephone companies filing comments asked that we reexamine the effect of the basic 25 percent allocation factor on small, rural telephone companies. Nevada Telephone-Telegraph Company suggested measures to ensure that small companies receive from interstate sources, at a minimum, the NTS revenues which they received in 1982. Other small telephone companies asked us to limit the maximum annual decrease in the interstate allocation to five percentage points. AT&T suggested easing the transition for small telephone companies by further limiting the annual decrease in their interstate allocations during the period.

73. We recommend that the Commission extend the basic transition period for implementation of the new allocation methodology from four to eight annual steps. The extended transition period would apply to all companies regardless of whether their present interestate allocation exceeds their allocation based on the new method. We also recommend limiting to five percentage points the total annual decrease for any study area in the interstate allocation of the relevant NTS costs after the high cost assistance is taken into account.[70] The high cost assistance should be implemented in eight steps even if the study area involved qualifies for an extended transition period. Extending the transition period will ease the impact of the new allocation methodology on companies with high SPFs and average costs. Although such companies should have average local exchange rates at the end of the transition period, they will experience significant increases in their intrastate NTS cost allocation. An extended transition will give subscribers

[68] Including NTS Category 6 COE in calculating the high cost assistance has a negligible effect on the overall level of assistance.

[69] These NTS costs include Category 1.33 Outside Plant (including drop and block wire) inside wire, and Category 8.13 COE.

[70] For example, this would result in a 12 step transition in the case of a local company with a current frozen SPF of 85 percent if it does not qualify for high cost assistance.

served by these companies more time to adjust to the necessary changes. Since both frozen SPF and the new 25 percent allocation factor with high cost assistance produce a similar total interstate cost allocation, extending the transition period will have little effect on the overall division of costs between the jurisdictions.

IV. Assistance for Low Income Households

A. Background

74. One objective of this proceeding is to maintain universal telephone service as identified in Section 1 of the Communications Act, 47 U.S.C. 151. In the *Third Report and Order* [71] in the *MTS and WATS Market Structure* proceeding, CC Docket No. 78–72, the Commission further defined the universal service objective to mean "avoiding actions that would cause a significant number of local exchange service subscribers to cancel [telephone] service." [72]

75. Consistent with these concerns, in the *Third Report and Order*, the Commission indicated that it would entertain requests for waiver of the mandatory flat subscriber line charges from carriers who wish to provide lifeline options to ameliorate the effects of these charges on low income individuals who would not be able to afford telephone service. Waiver requests were required to specify: (1) The terms and conditions which apply to lifeline service; (2) the interstate revenues which would be lost from lifeline subscribers; and (3) adjustments to other interstate charges which would be required to secure the revenues lost. The Commission also added:

> [o]f course, states continue to have full authority to modify existing life line rates for local exchange telephone service or to institute such rates should they believe it is necessary to ameliorate the effects of interstate access charges.[73]

76. In the *Reconsideration Order*, in CC Docket No. 78–72,[74] the Commission stated that it had not received any petitions for waiver and added that the petitions for reconsideration failed to provide any concrete proposals for complete or partial exemptions from subscriber line charges. The Commission further indicated, that the decision to reaffirm subscriber line charges should not be interpreted as foreclosing petitions for waiver for residential customers who cannot afford these charges.

77. Although the right to file a petition for waiver would normally be limited to the telephone companies whose tariffs are subject to the rule in question, the Commission extended the right to file waiver requests to state public utility commissions because of the public policy implications of lifeline service. The Commission also noted that in many cases states could maintain low residential rates without resort to waiver of subscriber line charges by creating local service lifeline rates that ameliorate the effects of these interstate charges.

78. In the *Second Reconsideration Order* in CC Docket No. 78–72[75] released on February 15, 1984, the Commission reported that it had received only two petitions for lifeline service waivers. Applications were received from the New York Telephone Company and the Pacific Telephone and Telegraph Company on September 28, 1983. Although no state commissions filed applications for waiver, the Commission found after review of state ratemaking proceedings that few state commissions had developed intrastate lifeline programs. The Commission also found that measured service options were not available to residential subscribers in many exchanges. Since the record in CC Docket No. 78–72 did not provide sufficient information to allow development of federal assistance mechanisms, the Commission decided to conduct supplemental proceedings to develop the necessary rules to provide an exemption from subscriber line charges for those who might otherwise be unable to afford telephone service.

79. Accordingly, the Commission requested additional comments concerning a lifeline exemption or other assistance for low income subscribers in the *Further Notice of Proposed Rulemaking*, in CC Docket Nos. 78–72 and 80–286,[76] released April 11, 1984. At the same time, the Commission requested that the Joint Board prepared recommendations concerning this issue. With regard to lifeline or other assistance for needy subscribers, the *Further Notice* requested commenting parties to: (1) explain the type of assistance which they believe is needed, for example a subscriber line charge waiver; (2) define the group to receive assistance; and (3) explain how the assistance would be funded.

B. Comments

80. The commenting parties expressed general support for assistance for low income households. Thirty-five filings were received from state commissions, user groups and telephone companies. The Ameritech Operating Companies, the Cheyenne River Sioux Tribe Telephone Authority, Golden West Telecommunications Cooperative and Bell Communications Research argued that a lifeline program is not needed. They argued that subsidies cannot be maintained in a competitive environment since they increase costs in other areas, thereby distorting the competitive market. These parties also took the position that adoption of lifeline measures by the Commission at this time is premature because the states need more time to develop their own programs. They also argued that lifeline programs are too costly and administratively burdensome for telephone companies to administer.

81. The parties supporting an assistance program vary in their recommendations for: (1) The type of assistance; (2) source of funding (3) eligibility criteria; and (4) program administration. The major reason which these parties gave for supporting such programs is the need to preserve universal service and the possible adverse effect of additional costs on low income residential subscribers.

1. Type of Assistance

82. The parties filing comments propose three types of assistance: (1) A waiver or exemption from residential subscriber line charges; (2) a discount service with unlimited incoming calls and limited outgoing calls (without additional charge) or other form of measured service; and (3) direct subsidies through a public assistance program. The comments also propose a hybrid which includes a waiver of subscriber line charges and a low cost discount service.

83. A number of the commenting parties suggested intrastate plans developed in New York and California as models for other lifeline plans. The New York Telephone Company plan includes the following elements: (1) A requirement that applicants be recipients of public assistance; (2) a 50 percent discount on the charge for standard residential local exchange service; (3) untimed message service or reduced flat rate; and (4) applicant self certification.

84. The Pacific Bell plan in California includes the following elements: (1) A requirement that customers have a gross

[71] 93 FCC 2d 241 (1983).
[72] *Id.* at 266.
[73] *Id.* at 282.
[74] 48 FR 42984 (September 21, 1983).
[75] 49 FR 7810 (March 2, 1984).
[76] 49 FR 18318 (April 30, 1984).

household income of less than $11,000 per year; (2) limitation of assistance to single line telephone service in the subscriber's principal residence; (3) customer self certification; (4) lifeline rates set at 50 percent of the local measured service rate (or flat rate) exclusive of federal end user charges; and (5) funding through a Universal Service Fund generated by a 4 percent tax on intrastate interLATA services. Pacific Bell of California proposes that interstate residential subscriber line charges be reduced by 50 percent for certified lifeline customers. It recommends funding the resulting revenue shortfall through an adjustment in the interstate subscriber line charge for all remaining business and residence customers in the study area. Those proposing some type of lifeline service indicate that customers receiving service should be restricted to receiving the lowest priced local service offering available.

2. Eligibility for Assistance

85. In defining the group eligible to receive lifeline assistance, most of the commenters stress the need to target those truly in need "who would be unable to maintain access to essential local service without some form of assistance." [77] They recommend using household income and resources as the determinant. The commenting parties suggested the following eligibility criteria: (1) qualification for existing public assistance programs including food stamps, welfare and social security; (2) a household income below the poverty line (approximately 10 percent of the population); and (3) a household income below a level set by the welfare department or state regulatory commission. Alaska suggests that the cost of living should be considered in addition to household income. AT&T argues that other financial resources available to the household should also be considered.

3. Funding of Assistance

86. There were substantial differences among the commenting parties regarding the appropriate method for funding assistance. They identified the following possible sources of funding: (1) Universal Service Fund (USF); (2) state of federal taxes; (3) customer line charges; and (4) increased public assistance funds. A number of parties indicated that if the states were given responsibility for establishing a state lifeline program, state funding would be appropriate. However, they took the position that if the Commission set guidelines, national funding either from the USF, federal taxes or a public assistance program would be appropriate. Some of the parties, citing an overall social purpose linked to universal service, indicated that there should be federal assistance through a mechanism other than from charges for other customers, exchange or interexchange carriers.

4. Administration of Lifeline Programs

87. Most of the commenting parties supported state administration of lifeline programs, with or without federal guidelines. Some parties suggested federal administration, but few suggested administration by local telephone companies. Many of the parties suggested that lifeline assistance be coordinated with current public assistance programs to reduce administrative burdens on the telephone companies. The main reason given by the parties for state administration is that state commissioners are better acquainted with the particular needs of low income subscribers within their states and can better tailor programs to meet those needs. A number of parties suggest that the states administer the programs using the model of other government entitlement programs even if federal guidelines are developed. NYNEX suggests eligibility requirements for lifeline plans be established by state officials with joint administration by the state and telephone company.

88. Some of the parties suggest a hybrid system for lifeline assistance, under which the state in conjunction with the local telephone company would have authority for a lifeline program using intrastate funds to recover state revenue shortfalls while a federal program using funds generated from interstate sources would be available for waivers of subscriber line charges.

C. Discussion

89. There is no evidence before us at this time to indicate that implementation of the limited subscriber line charges which we are recommending will harm universal telephone service.[78] However, we recognize that implementation of subscriber line charges in conjunction with the general upward pressure on local rates has generated legitimate concern regarding the protection of universal service.[79] Therefore, we are recommending implementation of a two-phase plan for dealing with these concerns. As the initial step we recommend implementation of a program to offset the subscriber line charge for low income households. In conjunction with this, as the second phase of the plan we recommend further study, on an expedited basis, of broader measures to assist low income households in affording telephone service.

90. We recommend that the Commission provide an optional program for a 50 percent reduction in the subscriber line charge for customers who satisfy a state determined means test which is subject to verification. The shortfall in subscriber line charge revenues resulting from the subscriber line charge reduction would be recovered through an increase in the nationwide average carrier common line charge. The states wishing to take advantage of this assistance mechanism would be required to implement an equal monetary reduction in the local exchange rate for subscribers who qualify for the subscriber line charge reduction. This reduction would be funded from intrastate sources. The decision to implement this joint federal-state assistance mechanism would be left to the individual state commissions.

91. We believe that this approach represents an appropriate joint federal-state response to concerns about the preservation of universal service. We believe that the eligibility criteria for assistance should be established by the individual states since they are in a better position than the federal government to assess the need for assistance and develop means tests suited to local conditions and circumstances. A single nationwide standard would not be able to accomplish this. We also recommend further study or broader assistance measures by the Joint Board as the second phase of our plan. We expect that the means tests developed by the individual states in implementing the reduced subscriber line charge will be valuable in developing broader lifeline assistance measures in the near future. Development of such eligibility criteria by the state commissions will encourage active state involvement in instituting programs for broader lifeline assistance and contribute substantially to the successful implementation of such measures.

[77] Satellite Business Systems Direct Comments at 2.

[78] For purposes of this discussion, the preservation of universal service refers to maintaining at least the existing level of telephone service penetration.

[79] In this regard, we note the Commission's ongoing studies concerning the effect of federal decisions and local rate increases on consumers, and emphasize the need to continue and expand such monitoring efforts.

V. Ordering Clauses

92. Accordingly the Joint Board recommends, that the Commission adopt the attached revisions to Parts 67 and 69 of the Commission's rules.[80]

William J. Tricarico,

Secretary, Federal Communications Commission.

Appendix A

We recommended inclusion of costs [1] in the following accounts in calculating the high cost assistance:

Account 100.1 Telephone Plant In Service
Account 122 Materials & Supplies
Account 171 Depreciation Reserve
Account 172 Amortization Reserve
Account 176 Accumulated Deferred Income Taxes
Account 608 Depreciation
Account 609 Extraordinary Retirements
Account 613 Amortization of Intangible Property
Account 602 Repairs to Outside Plant
Account 603 Test Desk Work
Account 604 Repairs of Central Office Equipment
Account 605 Installations & Repairs of Station Equip.
Account 606 Repairs of Buildings & Grounds
Account 610 Maintaining Transmission Power
Account 611 Employment Stabilization
Account 612 Other Maintenance Expenses
Account 306 Federal Income Taxes—Operating
Account 307 Other Operating Taxes
Account 308 Operating Federal Income Taxes Deferred
Account 309 Income Credits & Charges Fr. Def. Inc. Tax
Account 661 Executive Department Expense
Account 662 Accounting Department Expense
Account 663 Treasury Department Expense
Account 664 Law Department Expense
Account 665 Other General Office Salaries & Expenses
Account 668 Insurance Expense
Account 669 Accidents & Damages Expense
Account 675 Other Expenses
Account 677 Expenses Charged Construction
Account 671 Operating Rents
Account 672 Relief & Pensions
Account 674 General Services & Licenses

Appendix B—Recommended Amendments to Part 67 of the Commission's Rules

§ 67.124 [Amended]

1. Amend § 67.124(d)(6) to read as follows:

(6) The interstate allocations of OSP Category 1.33 plant investment for the years 1986, 1987, 1988, 1989, 1990, 1991 and 1992 will be as follows, subject to the limitation contained in § 64.124(d)(7):

(i) 1986—The § 67.124(d)(4)(i) allocation factor multiplied by .875 plus .03125.

(ii) 1987—The § 67.124(d)(4)(i) allocation factor multiplied by .750 plus .0625.

(iii) 1988—The § 67.124(d)(4)(i) allocation factor multiplied by .625 plus .09375

(iv) 1989—The § 67.124(d)(4)(i) allocation factor multiplied by .5 plus .125

(v) 1990—The § 67.124(d)(4)(i) allocation factor multiplied by .375 plus .15625

(vi) 1991—The § 67.124(d)(4)(i) allocation factor multiplied by .25 plus .1875

(vii) 1992—The § 67.124(d)(4)(i) allocation factor multiplied by .125 plus .21875

2. Amend § 67.124(d)(7)(i), (ii) and (iii) by substituting the phrase "five percentage points" for the phrase "ten percentage points".

§ 67.611 [Amended]

3. Amend § 67.611 by deleting § 67.611 (a)(9).

§ 67.621 [Amended]

4. Amend § 67.621(a)(1) by substituting "is multiplied by the study area's authorized interstate rate of return" for "is multiplied by the study area's cost of capital" and by deleting the final sentence in § 67.621(a)(1).

5. Amend § 67.631 to read as follows:

§ 67.631 Expense adjustment.

(a) For study areas reporting 50,000 or fewer working loops pursuant to § 67.611(a)(8). The expense adjustment (additional interstate expense allocation) is equal to the sum of the following:

(1) Fifty percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 115 percent of the national average for this cost but not greater than 150 percent of the national average for this cost as calculated pursuant to § 67.622(a) multiplied by the number of working loops reported in § 67.611(a)(8) for the study area.

(2) Seventy-five percent of the study area unseparated loop cost per working loop as calculated pursuant to § 67.622(b) in excess of 150 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in §67.611(a)(8) for the study area.

(b) For study areas reporting more than 50,000 working loops pursuant to §67.611(a)(8) for the expense adjustment (additional interstate expense allocation) is equal to the sum of the following:

(1) Twenty-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 115 percent of the national average for this cost but not greater than 150 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in §67.611(a)(8) for the study area.

(2) The amount calculated pursuant to §67.631(a)(2).

§ 67.641 [Amended]

6. Amend §67.641 by substituting "1993" for "1989".

7. Amend §67.641(c) to read as follows:

(c) The expense adjustments for 1986 through 1992 shall be as follows:

(1) One-eight of the amount computed in accordance with §67.631 in 1986;

(2) One-quarter of the amount computed in accordance with § 67.631 in 1987;

(3) Three-eights of the amount computed in accordance with § 67.631 in 1988;

(4) One-half of the amount computed in accordance with § 67.631 in 1989;

(5) Five-eights of the amount computed in accordance with § 67.631 in 1990;

(6) Three-quarters of the amount computed in accordance with § 67.631 in 1991; and

(7) Seven-eights of the amount computed in accordance with § 67.631 in 1992.

8. Amend the definition of the term "study area" in the Glossary to read as follows:

Study area—Study area boundaries shall be frozen as they are on November 15, 1984.

Appendix C—Recommended Amendments to Part 69 of the Commission's Rules

1. Add the following new Sections 69.203 and 69.204:

§ 69.203. Interim common line charges.

(a) Except as provided in Section 69.204, End User Common Line and Carrier Common Line charges for any period commencing after May 31, 1985, shall be computed as provided in this section.

(b) Charges shall be computed as provided in Sections 69.202 and 69.205

[80] This recommendation is adopted pursuant to Sections 4(i) and (j), 201, 202, 203, 205, 218, 221, 403 and 410 of the Communications Act, as amended, 47 U.S.C. 154 (i) & (j), 201, 202, 203, 205, 218, 221, 403 and 410.

[1] Part 67 of the Commission's rules specifies what portion of these costs is to be included in calculating the level of assistance.

except that End User Common Line charges shall be assessed as provided in subsections (c)–(f) of this section.

(c) The End User Common Line charge for single line business subscribers shall be $1 per month per subscriber during the June 1, 1985—May 31, 1986 period and $2 per month per subscriber after May 31, 1986.

(d) Except as provided in subsection (f), the End User Common Line charge for single line and muti-line residential subscribers shall be $1 per month per line during the June 1, 1985—May 31, 1986 period and $2 per month per line after May 31, 1986.

(e) [Reserved for party line charges.]

(f) The End User Common Line charge for a residential subscriber shall be 50% of the charge specified in subsections (d) and (e) if the residential local exchange rate for such subscribes is reduced by an equivalent amount, provided that such local exchange service rate reduction is based upon a means test that is subject to verification.

§ 69.204 Optional alternative carrier common line tariff provisions.

(a) A telephone company that files a concurrence described in paragraph (c) of this section may file Optional Alternative Carrier Common Line tariff provisions for a particular study area to encourage use of telephone compnay access service facilities by interexchange carriers and large volume users. Such tariff provisions shall be designed to ensure that large volume users of interstate or foreign telecommunications services in such study area will receive the benefit of any reduction in Carrier Common Line charges.

(b) A telephone company that files an Optional Alternative Carrier Common charge may file a surcharge upon End User Common Line charge if

(1) a uniform surcharge is imposed upon all monthly End User Common Line charges in such study erea;

(2) the monthly surcharge does not exceed 35 cents; and

(3) such surcharge revenues are not likely to exceed the difference between the annual revenues that would have been produced by the association Carrier Common Line charge and the annual revenues that will be produced by the Optional Alternative Carrier Common Line tariff provisions.

(c) A concurrence may be issued by a public utility commission that regulates intrastate telecommunications services in the relevant area or by the CC Docket 80–286 Joint Board. A telephone company may request a concurrence from the CC Docket 80–286 Joint Board if, but only if, the appropriate public utility commission declines to issue a concurrence or fails to act upon a request for a concurrence within 60 days after such request has been filed. A concurrence shall signify that a majority of such commission or Joint Board agree that the Optional Alternative Carrier Common Line tariff provisions are warrented to deter bypass in the affective area and that any End User Common Line surcharge is not likely to impair universal service in the affected area.

2. Add the following new section 69.611:

§ 69.611 Effect of optional alternative carrier common line tariff provisions and end user common line surcharges.

(a) The existence or potential existence of Optional Alternative tariff provisions filed pursuant to § 69.204 shall not affect the computation of association charges for any access element.

(b) End User Common Line surcharge revenues shall not be included in End User Common Line revenues for purposes of computing pool distributions.

(c) The Carrier Common Line residue that is computed pursuant to § 69.605 shall be increased by adding an amount that is computed by subtracting the Carrier Common Line revenues attributable to study areas with Alternative Carrier Common Line tariff provisions from the projected Carrier Common Line revenues for such study areas that would have been received at the association Carrier Common Line rate.

(d) The Carrier Common Line residue distribution that is computed pursuant to § 69.607 shall be reduced for a company that has effective Alternative Carrier Common Line tariff provisions by subtracting an amount that is computed by subtracting the Carrier Common Line revenues attributable to such company's study area of areas with Alternative Carrier Common Line tariff provisions from the projected Carrier Common Line revenues for such study area or areas that would have been received at the association Carrier Common Line rate.

[FR Doc. 84-32375 Filed 12-11-84; 8:45 am]

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INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1181 and 1186

[Ex Parte No. 55 (Sub-57A)]

Modification of Small Carrier Transfer Regulations for Transactions Involving Motor Carriers of Property

AGENCY: Interstate Commerce Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: At an open conference held on September 20, 1984, the Commission voted in Ex Parte No. 55 (Sub-No. 57), *Exemption of Transactions Under 49 U.S.C. 11343* [notice of proposed rulemaking published at 48 FR 26485, June 8, 1983,] to adopt modified class exemption procedures for all but the smallest carriers engaging in transactions under 49 U.S.C. 11343. This action was taken pursuant to the exemption authority was taken pursuant to the exemption authority of 49 U.S.C. 11343(e). The exemption authority does not, however, specifically empower the Commission to exempt small carrier transaction subject to 49 U.S.C. 10926. Under section 10926, however, these small carrier transactions are governed simply by "regulations" of the Commission. The Commission voted at the September 20th Conference to issue a notice for public comment proposing to modify the so-called "transfer regulations" to make the procedures which are being adopted for section 11343 transactions also applicable for small carrier transactions under section 10926. Because regulations implementing the class exemption for section 11343 transactions will be promulgated shortly, we intend to make any modification of the transfer regulations effective immediately upon the issuance of a decision adopting final rules. In addition to the proposed rules in Part 1181 shown in the appendix, upon adoption of Ex Parte No. 55 (Sub-No. 57), Part 1186 (except for § 1186.8) is proposed to be amended as required to cover transfers of authority involving small motor carriers of property after Ex Parte No. 55 (Sub-No. 57) becomes final.

DATES: Comments must be submitted by December 27, 1984.

ADDRESSES: Send comments (an original and 15 copies, if possible) to: Ex Parte No. 55 (Sub-No. 57A), Case Control Branch, Office of the Secretary,

Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT:

Warren C. Wood, (202) 275–7977;

or

Howell I. Sporn, (202) 275–7691.

SUPPLEMENTARY INFORMATION:

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. Infosystems, Inc., Room 2227, Interstate Commerce Commission, Washington, D.C. 20423, or call 289–4357 (D.C. metropolitan area) or toll-free (800) 424–5403.

Regulatory Flexibility Analysis

The Commission certifies that the proposed rules will not, if adopted, have a significant economic impact on a substantial number or small entities. The proposed modification of the transfer regulations will reduce somewhat the administrative filing burden on small carriers and expedite the processing of applications which they submit for approval. The class exemption procedures will shortly become available to large carriers of property engaging in transactions subject to section 11343. By extending the class exemption regulations as the procedural rules for section 10926 transfers, the Commission is merely eliminating a discriminatory burden on small carriers that would otherwise result. Comments are welcome on this issue.

Energy and Environmental Considerations

Because this rulemaking proposes only changes in the method of processing small carrier transfer applications, we conclude preliminarily that there will be no significant environmental or energy impacts. To the extent that the new rules facilitate transfers of operating authority between small carriers that increase their operating efficiency, the proposed changes may have beneficial impacts on energy consumption and the environment. Comments are also welcome on these issues.

List of Subjects in 49 CFR Parts 1181 and 1186

Administrative practice and procedure, Employee complaints, Motor carriers, Transfers.

Authority: 49 U.S.C. 10321, 10926, and 5 U.S.C. 553.

Proposed Regulations

The proposed changes in 49 CFR Part 1181, Subpart A are set forth in the Appendix.

Decided: November 21, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio.

James H. Bayne,

Secretary.

Appendix

PART 1181—[AMENDED]

Proposed changes in regulations resulting from adoption of class exemption procedures for small carrier transfers of property authority.

49 CFR Part 1181, Subpart A would be amended as follows:

1. The Note preceding 49 CFR 1181.1 would be revised to read as follows:

Note.—These rules spell out the procedures which enable motor carriers of passengers to obtain approval from the Interstate Commerce Commission to merge, transfer or lease their operating rights in financial transactions not subject to section 11343 of the Interstate Commerce Act. These rules do *not* apply to transactions involving motor carriers of property. Parties must comply instead with the regulations set forth at 49 CFR Part 1186 to effectuate transactions involving property carriers. The filing fee for small carrier transactions subject to Part 1186 will be the same as that required for small carrier transactions involving passenger carriers. See 49 CFR 1002.2.(f)(25).

2. The words "of passengers" would be inserted after the words "motor carrier" each time they appear in 49 CFR Part 1181, Subpart A.

[FR Doc. 84–32335 Filed 12–11–84; 8:45 am]

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Notices

Federal Register
Vol. 49, No. 240
Wednesday, December 12, 1984

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

1985-Crop Peanut Program Proposed Determination Regarding National Average Support Levels for Quota and Additional Peanuts and the Minimum Commodity Credit Corporation Export Edible Sales Price for Additional Loan Peanuts

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice of Proposed Determination.

SUMMARY: This notice requests comments with respect to the following determinations for the 1985 crop of peanuts: (1) The national average level of price support for quota peanuts, (2) the national average level of support for additional peanuts and (3) the Commodity Credit Corporation (CCC) export edible sales policy for 1985-crop additional peanuts which are pledged as collateral for a price support loan. These determinations are necessary to carry out the peanut price support program provided for in section 108A of the Agricultural Act of 1949, as amended (hereinafter referred to as the "Act"). It is proposed that the quota support level for the 1985 crop shall be $560.60 per ton and the additional support level for the 1985 crop shall be $185 per ton. With respect to the minimum export edible sales price for additional peanuts pledged as loan collateral, this notice sets forth the range of prices under consideration.

DATE: Comments must be received on or before January 28, 1985 to be assured of consideration.

ADDRESSES: Send comments to Director, Commodity Analysis Division, 3741-South Building, P.O. Box 2415, Washington, D.C. 20013.

All written submission will be made available for public inspection from 8:15 a.m. to 4:45 p.m. Monday through Friday in Room 3741-South Building, 14th and Independence Avenue, SW., Washington, D.C. 20013

FOR FURTHER INFORMATION CONTACT: Gypsy Banks, Agricultural Economist, Agricultural Stabilization and Conservation Service, USDA, Room 3732-South Building, P.O. Box 2415, Washington, D.C. 20013, (202) 447-5953. A Preliminary Regulatory Impact Analysis is available upon request.

SUPPLEMENTARY INFORMATION: This notice has been reviewed under USDA procedures required by Executive Order 12291 and Departmental Regulation 1512-1 and has been classified "not major." It has been determined that the actions proposed by the notice will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographical regions; or (3) significant adverse effects on competiton, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The title and number of the Federal Assistance Program to which this notice applies are: Title—Commodity Loans and Purchases, Number—10.051, as found in the Catalog of Federal Domestic Assistance.

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this notice.

This program/activity is not subject to the provisions of Executive Order 13272 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

It has been determined that the public comment period with respect to this notice of proposed determination should be 45 days. The determination of the national average support level for the 1985-crop of additional peanuts is required by law to be made by the Secretary of Agriculture no later than February 15, 1985. Limiting the comment period to forty-five days is necessary to assure adequate time for review and consideration of comments and permit a final determination with respect to the loan level for additional peanuts to be made by that date. The determinations with respect to the national average support level for quota peanuts and the minimum CCC export edible sales price for loan collateral additional peanuts are usually made at the same time as the additional support level in order to facilitate producer planning for the crop year.

The determination of the national average support level for the 1985-crop of additional peanuts is required to be made by the Secretary of Agriculture no later than February 15, 1985. The determinations with respect to the national average support level for quota peanuts and the minimum CCC export edible sales price for loan collateral additional peanuts are usually made at the same time to facilitate producer planning for the crop year.

These matters involve the considerations set forth below and comments are requested to aid in the determinations.

A. National Average Support Level for Quota Peanuts

Section 108A (1) of the Agricultural Act of 1949 ("the 1949 Act") provides that the national average support level for the 1985 crop of quota peanuts shall be the national average quota support rate for such peanuts for the preceding crop, adjusted to reflect any increase in the national average cost of peanut production, excluding any increase in the cost of land, during the period January 1 and ending December 31 of the calendar year immediately preceding the marketing year for the crop for which a level of support is being determined. Section 108A provides further that in no event shall the national average quota support rate for any such crop exceed by more than 6 per centum the national average quota support rate for the preceding crop.

Accordingly, the 1985 quota support level is required to be the 1984 quota support of $550 per ton adjusted to reflect any such increase in the national average cost of peanut production in calendar year 1984.

Cash expenses, capital replacement, net land rent and labor are the cost components used in this comparison. Because section 108A excludes any increase in the cost of land, 1983 net

land rent was substituted for 1984 net land rent. Based on these production cost components as estimated by the Economic Research Service (ERS), USDA, it is presently estimated that the national average cost of producing 1984-crop peanuts on a planted acre basis increased $21 per acre from the 1983 cost estimate.

Using a trend yield, planted acre costs have been converted to a cents per pound figure. A trend yield is used to reduce year-to-year per unit cost variability caused by abnormal weather and related factors. The national average cost of producing 1984 crop peanuts on a per pound basis is estimated to have increased $0.0053 per pound or $10.60 per ton from the 1983 cost of production. Details of the cost of production estimates are shown in the following table:

APPENDIX TABLE I.—U.S. PEANUT PRODUCTION COSTS, 1983–84

Item	Dollars per planted acre	
	1983P	1984F
Cash receipts:		
Primary crop	$559.58	$681.88
Secondary crop	12.98	13.36
Total	572.56	695.24
Cash expenses:		
Seed	66.43	71.01
Fertilizer	19.09	20.40
Lime and gypsum	14.34	15.32
Chemicals	89.05	91.19
Custom operations	7.20	7.50
Fuel, lube, and electricity	30.93	30.88
Repairs	20.37	20.11
Drying	32.91	36.38
Miscellaneous	.09	.09
Management fees	.20	.21
Total, variable expenses	280.61	295.09
General farm overhead	27.84	29.34
Taxes and insurance	10.73	12.32
Interest	107.06	106.36
Total, fixed expenses	145.63	148.02
Total, cash expenses	426.24	443.11
Receipts less cash expenses	146.32	252.13
Capital replacement	50.73	55.07
Receipts less cash expenses and replacement	95.59	197.06
Economic costs:		
Variable expenses	280.61	295.09
General farm overhead	27.84	29.34
Taxes and insurance	10.73	12.32
Capital replacement	50.73	55.07
Allocated returns to owned inputs:		
Return to operating capital	9.49	11.45
Return to other nonland capital	19.17	20.48
Net land rent	83.86	90.35
Labor (paid and unpaid) [1]	30.89	30.95
Total, economic costs	513.32	545.04
Residual returns to management and risk	59.24	150.20
Net returns to owned inputs	202.65	303.42
Cash expenses, capital replacement, and labor ($ per planted acre)	507.86	529.13
Net land rent	83.86	[2] 83.86
Total	591.72	612.99
Trend yield (pounds per planted acre)	2,695	2,726

APPENDIX TABLE I.—U.S. PEANUT PRODUCTION COSTS, 1983–84—Continued

Item	Dollars per planted acre	
	1983P	1984F
Cost (cents per pound)	.2196	.2249

[1] Hired labor (a cash expense) and unpaid labor could not be separately identified given available survey date.
[2] 1983 net land rent was substituted for the 1984 net land rent in order to comply with legislative requirement to exclude any increase in the value of land when using production costs to determine the 1985 quota support level for peanuts.

NOTE: P—Preliminary, F—Forecast.
Source: ERS/ASCS/Oct. 1984.

Based on current cost estimates, which could change prior to announcement of the final level, it is the Department's current view that the national average support level for the 1985 crop of quota peanuts will be increased by $10.60 per ton from the 1984 level of $550 per ton to $560.60 per ton.

B. National Average Level of Support for Additional Peanuts.

Section 108A(2) of the 1949 Act provides that the Secretary shall make price support available to producers through loans, purchases, or other operations on 1985-crop additional peanuts at such level as the Secretary determines to be appropriate, taking into consideration certain factors. Those factors are the demand for peanut oil and meal, expected prices of other vegetable oils and meals, and the demand for peanuts in foreign markets. The 1949 Act further provides that the Secretary shall establish the support rate for additional peanuts at a level which the Secretary estimates will ensure that there are no losses to CCC on the sale or disposal of such peanuts. Section 358(p) of the Agricultural Adjustment Act of 1938 defines additional peanuts for any marketing year as: (A) Any peanuts marketed from a farm for which a farm poundage quota has been established that are in excess of the quota marketings from such farm for such year and (B) all peanuts marketed from a farm for which no farm poundage quota has been established. The 1949 Act provides that the level of support for 1985-crop additional peanuts shall be announced no later than February 15, 1985. The statutory factors for determining the additional support level are discussed below for the 1985 crop.

1. Demand for Peanut Oil and Meal

The quantity of peanuts available for crushing for the 1985/86 marketing year (August 1, 1985 to July 31, 1986), a residual of edible use, is projected to range from 303,000 tons to 380,000 tons compared with 358,000 tons for the 1984/85 marketing year. Peanut oil and meal prices are expected to average from 30 to 32 cents per pound and $176 per ton, respectively, for the 1985/86 marketing year.

2. Expected Prices of Other Vegetable Oils and Meals

For the 1984/85 marketing year, the world aggregate production of oilseeds is estimated to be 204 million short tons (185 million metric tons), 11 percent higher than for 1983/84. The recovery in U.S. soybean production is the biggest single factor in the increase. Soybeans account for 50 percent of the total world aggregate oilseed production while peanuts account for 11 percent. Because of soybean dominance of the total supply, soybeans lead the demand-supply price patterns for oilseeds.

It is estimated that U.S. soybean production for 1984–85 will increase about 20 percent to 2 billion bushels. However, low carryover stocks will hold the increase in supply to 12 percent, which is a level below previous highs. Modest gains in total use combined with a more substantial production increase should raise ending stocks to more normal levels. Soybean oil prices will likely remain high relative to recent years because slack demand for meal will probably inhibit the incentive to crush. For the 1984/85 marketing year, soybean oil prices are expected to range from 25 to 31 cents per pound in comparison to an average price of 31 cents per pound for the 1983/84 marketing year. Soybean meal prices are expected to range from $145 to $165 per ton for the 1984/85 marketing year in comparison to a price of $190 per ton for 1983/84.

The 1985 soybean acreage will likely remain about the same as for 1984. The estimated production of soybeans for the 1985/86 marketing year is expected to continue to offset the 1983/84 drawdown in carryout stocks. Soyoil prices are projected to decrease about 7 percent below 1984/85 levels and soybean meal prices are projected to remain about the same as expected 1984/85 levels. Total use of oil and meal is expected to be up 2 to 5 percent.

3. Demand for Peanuts in Foreign Markets

The demand for U.S. peanuts in foreign markets is expected to strengthen as U.S. exports return toward the higher levels that existed prior to the drought-reduced 1980 crop. The U.S. is expected to supply as much as 512,000 short tons of peanuts to the export market in the 1985/86 marketing year

compared with 463,000 tons for the 1983/84 marketing year.

As indicated, the 1949 Act also provides that the support rate must be established at a level estimated to ensure no loss to CCC from the sale or disposal of additional peanuts pledged as loan collateral. Section 108A(3)(B) of the 1949 Act requires each area marketing association to establish accounting pools for each type and segregation for quota and additional peanuts. Under the pool concept, gains from any pool may be redistributed to producers. A loss in any pool is a net loss to CCC. It is expected that all peanuts in some additional loan pools will be disposed of exclusively through sales for domestic crushing. Based on present data, it is the Department's current view that the level of price support for the 1985 crop of additional peanuts will be established within a range of $185 to $195 per ton. The higher figure of $195 per ton is derived from an expected crushing price for the 1985/1986 marketing year of $269 per ton minus expected CCC handling and related costs of $74 per ton. The lower figure of $185 per ton is the level of support for the 1984 crop of additional peanuts. Based upon present expectations, a 1985-crop support level for additional peanuts of less than the $195 per ton figure would provide a cushion against lower than expected crushing prices, higher than expected costs, or other factors which could result in a loss to CCC from the sale or disposal of additional loan collateral peanuts.

C. Minimum CCC Export Edible Sales Price for Additional Peanuts Pledged as Collateral for a Price Support Loan

The determination of a minimum CCC export edible sales price with regard to additional peanuts pledged as loan collateral is discretionary with the Secretary. It is presently intended that the determination of this price will be announced at the same time as the determination of the support levels for quota and additional peanuts in order to give handlers and growers adequate information on which to base export contracts for additional peanuts. If the minimum sales price is established too high, it may discourage export contracting between handlers and growers and encourage the production of additional peanuts for the loan program on the assumption that the minimum CCC sales price would be the price growers actually will receive for the sale of their loan collateral peanuts as the result of supplemental payments made as pool dividends pursuant to section 108A of the 1949 Act. This assumption may be incorrect, however, since a misjudgment of the price of edible peanuts in the export market could result in CCC losing edible sales and having to crush the loan inventory. If the minimum sales price is too low, returns from export sales will not be maximized and grower income will be reduced since export contracts between handlers and growers are generally based on the CCC minimum sales price. It is the Department's current view that the minimum export edible sales price for the 1985 crop of peanuts will be established within a range of $255 to $540 per ton. The lower figure of $255 per ton is equal to the lowest figure estimated for the additional support level (i.e., $185 per ton) plus the estimated costs incurred by CCC for the storage, handling, and inspection of export edible peanuts. If the lower figure of $255 per ton is selected, the actual minimum price would be established after the additional loan rate is determined and an official estimate is made of the 1985 CCC storage and handling charges. The higher figure of $540 per ton was derived by deducting $20.60 per ton from the proposed $560.60 per ton quota support level. The minimum CCC export edible sales price for the 1978 through 1981 crops was established at $20 per ton below the quota support level. However, for the 1982, 1983 and 1984 crops, the minimum CCC export edible sales price was established at $75 per ton, $150 per ton and $125 per ton below the quota support level, respectively. Some growers have suggested in prior years that the minimum CCC sales price for export edible sales of additional peanuts should be established at a price which approximates the quota support level.

Proposed Determinations

Comments are requested on the following issues with respect to 1985-crop peanuts:

(1) The national average price support level for quota peanuts.

(2) The national average price support level for additional peanuts.

(3) The minimum CCC export edible sales price for additional peanuts pledged as price-support loan collateral.

All written submissions will be made available for public inspection from 8:15 a.m. to 4:45 p.m. Monday through Friday in Room 3741–South Building, 14th and Independence Avenue, SW., Washington, D.C. 20013.

Signed at Washington, D.C., on December 7, 1984.

Everett Rank,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 84-32396 Filed 12-11-84; 8:45 am]

BILLING CODE 3410-05-M

ARMS CONTROL AND DISARMAMENT AGENCY

Hubert H. Humphrey Fellowship Competition

The U.S. Arms Control and Disarmament Agency will conduct a competition in 1985 for one-year Hubert H. Humphrey Fellowships in arms control and disarmament. The fellowships will support unclassified doctoral dissertation research in the field. Law candidates for the Juris Doctor or any higher degree are also eligible, if they are writing a substantial paper in partial fulfillment of degree requirements. The fellowship stipends for Ph.D. candidates will be $5,000, plus applicable tuition and fees up to a maximum of $3,400. Stipends and tuition for law candidates will be prorated according to the credits given for the research paper. Fellows must be citizens or nationals of the United States and degree candidates at a U.S. university. The application deadline for the awards, which are for a 12-month period beginning either September 1985 or January 1986, is March 1, 1985 and announcement of final selection will be on May 31, 1985. For information and application materials write: Hubert H. Humphrey Fellowship Program, Office of Public Affairs, U.S. Arms Control and Disarmament Agency, Washington, D.C. 20451.

Dated: December 6, 1984.

Joseph D. Lehman,

Director, Office of Public Affairs.

[FR Doc. 84-32328 Filed 12-11-84; 8:45 am]

BILLING CODE 6820-32-M

CIVIL AERONAUTICS BOARD

[Docket 42321]

Hawaii One Corp. Fitness Investigation; Hearing

Notice is hereby given that the hearing in the above-titled matter will be held on December 14, 1984, at 10:00 a.m. (local time), in Room 5334, Nassif Building, 400 Seventh Street, SW., Washington, D.C., before the undersigned administrative law judge who is now located at Room 9400–A, Nassif Building and may be telephoned

at (202) 426–5560. Participants should enter the Nassif Building through the Northeast Lobby.

Dated at Washington, D.C., December 6, 1984.

William A. Kane, Jr.,
Administrative Law Judge.

[FR Doc. 84-32408 Filed 12-11-84; 8:45 am]
BILLING CODE 6320-01-M

[Order 84-11-113]

Proposed Revocation of Air Carrier Certification; Action Air Cargo Corp.

AGENCY: Civil Aeronautics Board.

ACTION: Notice of Order to Show Cause, Order 84-11-113.

SUMMARY: The Board is proposing to revoke the air carrier certificates of Action Air Cargo Corporation; Air New England, Inc.; American Eagle Airlines, Inc.; Ball Brothers, Inc.; Century Airlines, Inc.; Circle Airfreight Corporation; Flight Transportation Corporation; Great Plains Airlines, Ltd., Holiday Airways, Inc.; Houston Airlines, Inc.; Intercontinental Airways, Inc.; International Air Association, Inc.; Jet Executive International; National Air Commuter, Inc.; Peninsular Air Transport, Inc.; S. S. Airways, Inc; Sun Land Airlines, Inc.; Swift Aire Lines, Inc.; Taino International Airways, Inc.; and U.S. Aircoach, Inc. for noncompliance with the insurance, reporting, and continuing fitness requirements for certificated air carriers.

DATE: All interested persons having objections to the Board issuing an order making final the tentative findings, shall file their objections with the Board and serve them upon the carrier or carriers involved, no later than December 20, 1984.

ADDRESS: Objections should be filed in Docket 42663, and sent to the Docket Section, Civil Aeronautics Board, Washington, D.C. 20428.

FOR FURTHER INFORMATION CONTACT: Mary Catherine Terry, Special Authorities Division, Bureau of Domestic Aviation, Civil Aeronautics Board, 1825 Connecticut Avenue NW., Washington, D.C. 20428 (202) 673-5088.

SUPPLEMENTARY INFORMATION: The complete text of Order 84-11-113 is available from the Distribution Section, Room 100, 1825 Connecticut Avenue, N.W., Washington, D.C. Persons outside the metropolitan area may send a postcard request for Order 84-11-113 to the Distribution Section, Civil Aeronautics Board Washington, D.C. 20428.

By the Civil Aeronautics Board:
November 28, 1984

Phyllis T. Kaylor,
Secretary.

[FR Doc. 84-32409 Filed 12-11-84; 8:45 am]
BILLING CODE 6320-01-M

DEPARTMENT OF COMMERCE

Bureau of the Census

Annual Wholesale Trade; Determination

In accordance with Title 13, United States Code, Sections 182, 224, and 225, and due Notice of Consideration having been published October 23, 1984 (49 FR 42600), I have determined that the Census Bureau needs data covering year-end inventories and annual sales to provide a sound statistical basis for the formation of policy by various governmental agencies. These data also apply to a variety of public and business needs. This annual survey is a continuation of similar surveys conducted each year since 1978. It provides, on a comparable classification basis, annual sales for 1984, year-end inventories for 1983 and 1984, and purchases for 1984. These data are not available publicly on a timely basis from nongovernmental or other governmental sources.

The Bureau will require a selected sample of firms operating merchant wholesale establishments in the United States (with sales size determining the probability of selection) to report in the 1984 Annual Wholesale Trade Survey. The sample will provide, with measurable reliability, statistics on the subjects specified above.

We will furnish report forms to the firms covered by this survey and will require their submission within 20 days after receipt. We will provide copies of the forms upon written request to the Director, Bureau of the Census, Washington, D.C. 20233.

I have directed, therefore, that an annual survey be conducted for the purpose of collecting these data.

Dated: December 6, 1984.

John G. Keane,
Director, Bureau of the Census.

[FR Doc. 84-32329 Filed 12-11-84; 8:45 am]
BILLING CODE 3510-07-M

International Trade Administration

[C-201-408]

Initiation of a Countervailing Duty Investigation; Converted Paper-Related School and Office Supplies From Mexico

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether manufacturers, producers, or exporters in Mexico of converted paper-related school and office supplies, as described in the "Scope of Investigation" section of this notice, receive benefits which constitute bounties or grants within the meaning of the countervailing duty law. We will make our preliminary determination on or before July 24, 1985. Under section 703(h) of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, we may extend the deadline for a preliminary determination up to 250 days after the filing of a petition whenever there is a reasonable basis to believe or suspect that an upstream subsidy is being bestowed and additional time is required to investigate the upstream subsidization. Petitioner has presented information establishing a reasonable basis to believe or suspect that upstream subsidies are bestowed upon the products under investigation, and the Department concludes that additional time is necessary to investigate this allegation.

EFFECTIVE DATE: December 12, 1984.

FOR FURTHER INFORMATION CONTACT: Laura Winfrey or Stuart Keitz, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377-0160 or (202) 377-1769.

SUPPLEMENTARY INFORMATION:

Petition

On November 16, 1984, we received a petition from the Stationery International Trade Committee filed on behalf of the U.S. industry producing converted paper-related school and office supplies. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters in Mexico of converted paper-related school and

office supplies receive bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act). Since Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act, sections 303 (a)(1) and (b)(1) of the Act apply to this investigation. The merchandise subject to this investigation enters the United States duty-free under the Generalized System of Preferences (GSP). Because there are no "international obligations" within the meaning of the section 303(a)(2) of the Act, (which require an injury determination for nondutiable merchandise from Mexico), petitioner is not required to allege that, and the U.S. International Trade Commission (ITC) is not required to determine whether, imports of the subject merchandise from Mexico materially injure or threaten material injury to a U.S. industry.

Initiation of Investigation

Under section 702(c) of the Act, we must determine, within 20 days after a petition is filed, whether a petition sets forth the allegations necessary for the initiation of a countervailing duty investigation and whether it contains information reasonably available to the petitioner supporting the allegations. We have examined the petition on converted paper-related school and office supplies from Mexico, and we have found that the petition meets these requirements. Therefore, we are initiating a countervailing duty investigation to determine whether the manufacturers, producers, or exporters in Mexico of converted paper-related school and office supplies as described in the "Scope of Investigation" section of this notice, receive bounties or grants. Based on our initiation of an investigation of upstream subsidies, we are extending the period for our preliminary determination up to 165 days.

Scope of Investigation

The products covered by this investigation are converted paper-related school and office supplies, which comprise:

- typing and filler paper
- wirebound notebooks and composition books
- pads

These products are currently classified under item numbers 256.9080, 256.5600, 256.5800, and 256.9040 of the *Tariff Schedules of the United States, Annotated* (TSUSA).

Allegation of Bounties and Grants

The petition alleges that manufacturers, producers, or exporters in Mexico of converted paper-related school and office supplies receive benefits under the following programs which constitute bounties or grants:

- Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX)
- Fund for Industrial Development (FONEI)
- Preferential Federal Tax Credits (CEPROFI)
- Accelerated Depreciation of Capital Equipment and Machinery
- Development Funds Administered by Nacional Financiera, S.A. (NAFINSA)

  Guarantee and Development Fund for Medium and Small Business (FOGAIN)

  Trust Fund for Industrial Parks, Cities and Commercial Centers (FIDEIN)
- Import Duty Reductions and Exemptions
- Preferential State Investment Incentives
- Tax Certificates issued by the Mexican Government (CEDI)
- Upstream Subsidies to Related Suppliers

Petitioner alleges that Mexican producers of converted paper-related school and office supplies receive upstream subsidies, within the meaning of section 771 of the Act. In support of this allegation they have submitted sufficient evidence to give rise to a reasonable basis to believe or suspect that:

—Mexican producers of pulp and paper, which we have reason to believe are wholly-owned subsidiaries of certain producers of the merchandise under investigation, receive bounties or grants described in section 771(5)(B) of the Act;

—The bounties or grants received by the pulp and paper producers have a significant effect on the cost of manufacturing the converted paper products because of the apparent size of the bounties or grants and because paper accounts for a significant proportion of the value of the converted product, and

—The upstream subsidy confers a competitive benefit because the producers of the converted product allegedly obtain paper from their related suppliers at lower prices than they would otherwise pay in an arm's-length transaction.

Based on the foregoing, the petitioner has established reasonable grounds to believe or suspect that upstream subsidies are being bestowed on the manufacturers of converted paper-related school and office supplies that obtain their paper input from related suppliers. Petitioner has not established reasonable grounds to believe or suspect that producers of the product under investigation who are not related to their suppliers receive a competitive benefit from bounties or grants bestowed on pulp and paper manufacturers in Mexico. Therefore we are initiating an upstream subsidy investigation only with respect to converted paper-related school and office supplies produced by Kimberly-Clark and San Cristobal.

In addition, we will include in this investigation the following Mexican government programs which, in prior cases, we found might confer countervialable benefits:

- Article 94 Loans
- Trust Fund for Small- and Medium-Sized Companies (FOMIN)
- Government Financed Technology Development
- Regional Energy Discounts
- BANCOMEXT
- PROFIDE.

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

December 6, 1984.

[FR Doc. 84-32382 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

National Marine Fisheries Service; Issuance of a General Permit; International Trading and Shipping Agency

On November 2, 1984, a general permit was issued to the International Trading and Shipping Agency, Inc, New York, New York, on behalf of Portuguese fishermen to take marine mammals incidental to commercial fishing operations under Category 1:Towed or Dragged Gear, pursuant to 50 CFR 216.24.

The general permit allows the taking of not more than 40 northern sea lions (*Eumetopias jubatus*), 20 harbor seals (*Phoca vitulina*), and 20 cetaceans (except harbor porpoise) within the U.S. Fishery Conservation Zone during 1985.

This general permit is available for public review in the Office of the Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street NW., Washington, D.C.

Dated: December 4, 1984.

Richard B. Roe,

Director, Office of Protected Species and Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 84-32317 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-22-M

Coastal Zone Management; Federal Consistency Appeal by the City of Hudson, NY, From Objection of the New York State Department of State

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of Indefinite Stay of Consideration of Consistency Appeal.

SUMMARY: On August 6, 1984, the Secretary of Commerce (Secretary) received an appeal by the City of Hudson, New York (Appellant), from an objection by the New York State Department of State (Department) to the Appellant's application for a Department of Housing and Urban Development Action Grant to construct an octane petroleum recovery and finishing facility in the South Bay waterfront area of the City of Hudson. The appeal was filed pursuant to section 307(d) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. 1456(d), and implementing regulations at 15 CFR Part 930, Subpart H. Notice of the appeal was published in 49 FR 33303 (1984).

The Secretary has granted the Appellant's request of November 5, 1984, to stay consideration of the appeal pending negotiations between the parties to resolve the Department's consistency objection. The stay will remain in effect until lifted at the Secretary's discretion. In such event, notice will be provided setting forth the schedule for further consideration of the appeal and the opportunity for public comment.

FOR FURTHER INFORMATION CONTACT: Tony Giedt, Attorney Advisor, Office of the Assistant General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, Room 270, Page 1 Building, 2001 Wisconsin Ave., NW., Washington, D.C. 20235; (202/254-7512).

(Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management Program Adinistration)

Dated: December 3, 1984.

Robert J. McManus,

General Counsel, National Oceanic and Atmospheric Administration.

[FR Doc. 84-32373 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-08-M

Coastal Zone Management; Federal Consistency Appeal by Florida East Coast Railway Company From Consistency Objection of the Florida Department of Environmental Regulation to Proposed Industrial Park Development in Southern Florida

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of Appeal and Stay of Consideration.

SUMMARY: On November 8, 1984, Florida East Coast Railway Company (FEC) appealed to the Secretary of Commerce (Secretary) an objection by the Florida Department of Environmental Regulation (DER) to FEC's proposed project requiring a Corps of Engineers section 404 permit to fill 332 acres of wetlands for an access road for a proposed industrial park, Town of Medley, Dade County, Florida. This appeal has been filed pursuant to subparagraph (A) of section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. 1456(c)(3)(A) and implementing regulations at 15 CFR Part 930, Subpart H.

Concurrent with its consistency appeal, FEC filed a motion requesting the Secretary to stay consideration of the appeal until the State of Florida Adjudicatory Commission resolves a similar matter before it concerning the same parties and addresssing a related issue. The Secretary has granted FEC's motion, and the appeal is stayed until dissolved at the Secretary's discretion. Upon dissolution of the stay, public notice will be provided setting forth the schedule for further consideration of the appeal, including the opportunity for public comment.

FOR FURTHER INFORMATION CONTACT David P. Drake, Attorney Advisor, Office of the Assistant General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, Room 270, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, D.C. 20235; (202) 254-7512.

(Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management Program Administration)

Dated: December 1, 1984.

Robert J. McManus,

General Counsel, National Oceanic and Atmospheric Administration.

[FR Doc. 84-32372 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-08-M

Marine Mammal Permit Applications; Zeedierenpark Harderwijk B.V.

On September 20, 1984, Notice was published in the **Federal Register** (49 FR 36899), that an application had been filed with the National Marine Fisheries Service by Zeedierenpark Harderwijk B.V., Strandboulevard-OOST 1, 8341 AB Harderwijk, Holland, for a permit to take six (6) Atlantic bottlenose dolphins (*Tursiops truncatus)* for public display.

Notice is hereby given that on December 5, 1984, and as authorized by the provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), the National Marine Fisheries Service issued a Public Display Permit for the above activities to Zeedierenpark Harderwijk B.V. subject to certain conditions set forth therein.

This Permit is available for review in the following offices:

Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street, NW., Washington, D.C.; and

Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702.

Dated: December 5, 1984.

Richard B. Roe,

Director, Office of Protected Species and Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 84-32374 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjusting Import Limits for Certain Apparel Products Produced or Manufactured in the Republic of the Philippines

December 7, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on December 7, 1984. For further information contact James Nader, International Trade Specialist (202) 377-4212.

Background

A CITA directive dated December 16, 1983 (48 FR 56425), as amended, established limits for certain categories of cotton, wool and man-made fiber textile products, including Categories 336T, 431, 435, 635T, 641NT, 642NT,

646T, 659T and 659NT, produced or manufactured in the Philippines and exported during the agreement year which began on January 1, 1984. Under the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of November 24, 1982 between the Governments of the United States and the Republic of the Philippines, the 1984 limits for Categories 431, 635T, 641NT, and 659NT are being increased, variously, by the application of carryover, carryforward and swing. Carryforward, to the extent used in 1984, will be deducted from the 1985 limits of the affected categories. The limits for Categories 336T, 435, 642NT, and 659T are being reduced to account for the swing applied to Categories 431, 635T, 641NT, 646T and 659NT, as provided in the bilateral agreement.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), and November 9, 1984 (49 FR 44782).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

December 7, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury, Washington, D.C.

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive of December 16, 1983, as amended, from the Chairman of the Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in the Philippines and exported during 1984.[1]

Effective on December 7, 1984, paragraph 1 of the previously amended directive of December 16, 1983 is hereby further amended to include adjusted restraint limits for the following categories.

Category	Adjusted 12-mo restraint limit[1]
336T	360,346 dozen.
431	65,378 dozen pairs.
435	2,126 dozen.
635T	43,980 dozen.
641NT	214,050 dozen.
642NT	54,211 dozen.
646T	295,968 dozen.
659T	3,668,059 dozen.
659NT	1,721,220 pounds.

[1] The agreement, provides in part, that: (1) specific limits may be exceeded during the agreement year by designated percentages; (2) specific limits may be adjusted for carryover and carryforward; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement.

[1] The limits have not been adjusted to reflect any imports exported after December 31, 1983.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-32381 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-DR-M

Adjusting the Import Restraint Limit for Certain Man-Made Fiber Textiles Produced or Manufactured in Singapore

December 7, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on December 13, 1984. For further information contact Jane Corwin, International Trade Specialist Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–'4212.

Background

Under the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of August 21, 1981, as amended between the Governments of the United States and the Republic of Singapore, swing in the amount of 127,339 pounds is being applied to the restraint limit established for man-made fiber yarn in Category 604 further increasing it to 1,404,365 pounds for goods produced or manufactured in Singapore and exported during 1984.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), and November 9, 1984 (49 FR 44782).

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

December 7, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury, Washington, D.C.

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive of December 19, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements, which directed you to prohibit entry for consumption and withdrawal from warehouse for consumption of certain cotton, wool and man-made fiber textile products, produced or manufactured in Singapore and exported during 1984.

Effective on December 13, 1984, the directive of December 19, 1983 is hereby amended to include an adjusted restraint limit of 1,404,365 pounds[1] for Category 604

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 84-32380 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-DR-M

Adjusting the Import Limits for Certain Wool and Man-Made Fiber Textile Products From the Polish People's Republic

December 6, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on December 14, 1984. For further information contact Eve Anderson, International Trade Specialist (202) 377–4212.

Background

The Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of September 15, 1980 and March 20, 1981 between the Governments of the United States and the Polish People's Republic provides, among other things, for designated percentage increases in certain categories (swing), and for the

[1] The limit has not been adjusted to account for any imports exported after December 31, 1983.

borrowing of yardage from the succeeding year's level with the amount used being deducted from the level in the succeeding year (carryforward). At the request of the Government of the Polish People's Republic, increases for swing are being applied to the restraint limits previously established for wool and man-made fiber textile products in Categories 433, 444, and 443/643/644, produced or manufactured in Poland and exported during the agreement year which began on January 1, 1984. The adjusted limit for Category 433 and 443/643/644 also includes adjustment to restore unused carryforward. The limit for Category 444 has been adjusted to reflect the addition of 31 dozen in carryover from 1983. A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), and July 16, 1984 (49 FR 28754).

Walter E. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements.

December 6, 1984.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury, Washington, D.C.

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive of December 7, 1983 which prohibited entry into the United States for consumption of certain wool and man-made fiber textile products, produced or manufactured in Poland and exported during 1984.

Effective on December 14, 1984, the directive of December 7, 1983 is hereby amended to include adjusted restraint limits for the following categories, as indicated:[1]

Category	Adjusted 12-mo restraint limit[1]
433	7,741 dozen.
444	5,191 dozen.
443/643/644	16,220 dozen of which not more than 13,540 dozen shall be applied to All TSUSA numbers in these categories except 379.8351, 379.8352, 379.8920 and 379.9560.

[1] The restraint limits have not been adjusted to reflect any imports exported after December 31, 1983.

The Committee for the Implementation of Textile Agreements has determined that these actions falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements

[FR Doc. 84-32366 Filed 12-11-84; 8:45 am]

BILLING CODE 3510-DR-M

[1] According to the terms of the bilateral agreement of September 15, 1980 and March 20, 1981 within the aggregate and applicable group limits of the agreement, specific limits may be exceeded by designated percentages; these same limits may be increased for carryover and carryforward; and andinistrative arrangements of adjustments may be made to resolve minor problems arising in the implementation of the agreement.

DEPARTMENT OF ENERGY

Inventory of Commercial Activities

AGENCY: Department of Energy (DOE).

ACTION: Notice of DOE commercial activities scheduled for review in accordance with the OMB Circular A-76.

SUMMARY: Pursuant to the requirements of the revised OMB Circular A-76 (dated August 1983), the DOE developed and published a partial inventory of its commercial activities in 49 FR 28432, July 12, 1984, of the **Federal Register.** The formation contained in this Notice adds a commercial activity to the Department's inventory.

Organization and commercial activity	Geographic location	Date of review
Assistant Secretary, Management and Administration Payroll services.	MD: Germantown.	January 1985.

FOR FURTHER INFORMATION CONTACT: Ray S. Mayfield, Cheif, Management Systems Development and Evaluation Branch, Department of Energy (MA-213.2), Room 4B-194, Forrestal Building, 1000 Independence Avenue SW., Washington, D.C. 20585.

Issued in Washington, D.C. December 3, 1984.

William S. Heffelfinger,

Director of Administration.

[FR Doc. 84-32355 Filed 12-11-84; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. CP85-106-000]

Creole Gas Pipeline Corp.; Application

December 6, 1984.

Take notice that on November 8, 1984, Creole Gas Pipeline Corporation (Creole), P.O. Box 2511, Houston, Texas 77001, filed in Docket No. CP85-106-000 an application pursuant to Section 7(c) of the Natural Gas Act and § 284.222 of the Commission Regulations for a blanket certificate of public convenience and necessity for authorization to transport, and sell natural gas as defined in Subparts C, D, and E of Part 284 of the Commission's Regulations, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Creole states that during the most recent 12-month period, October 1983 through September 1984, it received 26,734,870 Mcf of natural gas from all sources, all of which was received within or at the state boundary, and was exempt from the Commission's jurisdiction under the Natural Gas Act pursuant to section 1(c) of the Natural Gas Act in Docket No. 75-241.

Creole asserts that it would charge a rate of up to 25.772 cents per billion Btu for all transportation services rendered under this blanket certificate, stating such rate is currently in effect for certain contracts approved by the Office of Conservation for the State of Louisiana. Creole further states that such transportation charge represents a fair and equitable rate for all comparable transportation to be conducted under the blanket certificate applied for herein.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory 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 or its designee on this application if no motion 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 motion 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 Creole to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32304 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-123-000]

El Paso Natural Gas Co.; Application

December 6, 1984.

Take notice that on November 20, 1984, El Paso Natural Gas Company (El Paso), Post Office Box 1492, El Paso, Texas 79978, filed in Docket No. CP85-123-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon certain existing mainline compressor facilities, with associated appurtenances, to facilitate the reconfiguration and modernization of El Paso's interstate natural gas transmission system, all as more fully set forth in the application on file with the Commission and open to public inspection.

The application states that El Paso has undertaken a comprehensive mainline transport capacity study involving, *inter alia*, supply, market, engineering design and cost factors which collectively support the conclusions that: (i) The future sales levels on El Paso's interstate transmission pipeline system, together with volumes of natural gas transported by El Paso for others, do not require the full utilization of the system's certificated maximum day design capacity of approximately 4,125,000 Mcf;[1] (ii) the projected available gas supply for sale, supplemented as necessary with withdrawals from storage, would not support (or increase) sales on El Paso's system above approximately 3,600,000 Mcf per day on a peak day basis; and (iii) El Paso's interstate transmission pipeline system should be reconfigured and modernized in order to achieve optimum operational capability. El Paso has concluded through this comprehensive mainline capacity study that the optimum maximum design configuration for its mainline system is approximately 3,661,000 Mcf daily. It is stated that, based on these conclusions, El Paso has determined that: (i) A reduction in its certificated mainline transport capacity is warranted; (ii) certain remaining facilities should be reconfigured; and (iii) the modernization of El Paso's system by way of the installation of automation equipment is necessary and desirable. Towards this end, El Paso is of the opinion that the necessary reduction in transport capacity, together with the reconfiguration and modernization of the system, can be achieved through, generally, the phased idlement and subsequent abandonment of certain mainline compressor facilities, the rewheeling of certain compressor facilities and the installation of automation equipment by year-end 1986.

The application further states that as a part of the ongoing operation of El Paso's interstate transmission pipeline system, El Paso continues to evaluate its system facilities that are required to render service to its customers so that El Paso may continue to provide service at the highest level of efficiency and lowest obtainable cost. El Paso states that its evaluation of its system facilities is based on actual and projected system supply and market factors and the efficient utilization of the existing transport capacity. In this connection, El Paso states that upon review and evaluation of its supply and market factors, it has determined that its system capacity would not, in the future, be fully utilized to transport and deliver gas to its existing customers. Accordingly, El Paso has determined that certain compressor facilities situated on its interstate transmission pipeline system can be abandoned so as to facilitate the necessary reduction in the existing system transport capacity and that certain facility reconfigurations and modernization of the system after the proposed abandonment are necessary and prudent.

As stated in the application, El Paso has determined: (i) That a total of 137,320 horsepower located at six compressor stations situated on El Paso's California mainline system and San Juan mainline system can be abandoned and removed from natural gas service; (ii) that eighteen centrifugal mainline compressor units at ten compressor stations can be rewheeled to obtain a more efficient loading operation thus reconfiguring the operating parameters of El Paso's system; and (iii) that twenty-three mainline compressor stations would be totally semi-automated and six mainline compressor stations would be semi-automated.

El Paso states that the compressor facilities which it proposes to abandon were installed at an orginal cost of approximately $40.8 million. It is asserted that removal of such compressor facilities from natural gas service would reduce the transport capacity of El Paso's transmission system by approximately 464,000 Mcf per day to a level of 3,661,000 Mcf per day. El Paso estimates that the annual cost savings associated with reduced labor, operating expenses and fuel, attributable to the proposed abandonment would approximate $16.4 million when the project is completed. El Paso states that from a rate standpoint, El Paso's project would represent a total savings of some 1.71 cents per Mcf or about ten percent of the mainline transportation costs. It is asserted that such potential decrease in sales rates would be a direct benefit to El Paso's customers at no sacrifice in actual *required* delivery capability based on reasonable supply, market and transportation forecasts.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory 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 or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or it the Commission on its own Motion believes that a formal hearing is required, further notice of such hearing will be duly given.

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[1] The stated capacity includes a mainline fuel requirement of 117,000 Mcf daily which results in a peak day sales capacity of 4,008,000 Mcf daily, it is indicated.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for El Paso to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32305 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP75-104-044]

High Island Offshore System; Petition to Amend

December 6, 1984.

Take notice that on November 20, 1984, High Island Offshore System (Petitioner), One Woodward Avenue, Detroit, Michigan, 48226, filed in Docket No. CP75-104-044 a petition to amend the order issued June 4, 1976, in Docket No. CP75-104, pursuant to section 7(c) of the Natural Gas Act so as to authorize Petitioner to establish a new delivery point to Texas Gas Transmission Corporation (Texas Gas), all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

Petitioner states that it is currently authorized to deliver gas to Texas Gas at one delivery point, the interconnection between Petitioner and ANR Pipeline Company in West Cameron Area Block 167, offshore Louisiana. Petitioner is currently authorized, it is asserted to deliver Texas Gas' currently effective contract demand to 190,500 Mcf per day at that point.

It is stated that Texas Gas has requested Petitioner to establish an additional point of delivery at the interconnection between Petitioner and facilities owned by Stingray Pipeline Company in High Island Area Block A-330, offshore Texas. It is further stated that the purpose in establishing the new delivery point would be to provide additional flexibility to Texas Gas in having its gas transported to shore. Petitioner also notes that its total delivery obligation to Texas Gas would remain unchanged.

Any person desiring to be heard or to make any protest with reference to said petition to amend should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion to intervene in accordance with the Commission's Rules.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32306 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CS72-1063, et al.]

John Lee Turner, et al.; Applications for "Small Producer" Certificates [1]

December 6, 1984.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7(c) of the Natural Gas Act and § 157.40 of the Regulations thereunder for a "small producer" certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce, all as more fully set forth in the applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make protest with reference to said applications should on or before December 26, 1984 file with the Federal Energy Regulatory 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 385.211, 214). 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.

Under the procedure herein provided for, unless otherwise advised, it will be unnnecessary for Applicants to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

Docket No.	Date filed	Applicant
CS72-1063	Nov. 5, 1984 [1]	John Lee Turner (John Lee Turner Trust), 800 Diamond Shamrock Tower, Dallas, TX 75201
CS85-7-000	Nov. 8, 1984	BHI Energy Corp., 107 Broadmoor, Borger, TX 79007
CS85-14-000	Nov. 19, 1984	SMK Energy Corp., P.O. Box 4910, Tyler, TX 75712
CS85-15-000	Dec. 27, 1984	Sand Creek Production Co., P.O. Box 960, Bristow, OK 74010
CS85-19-000	Nov. 29, 1984	Pelican Bay Exploration Inc., P.O. Box 270863, Huston, TX 77277

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

[1] Letter received November 5, 1984, requesting that the small producer certificate issued to the John Lee Turner Trust be redesignated to reflect that John Lee Turner is now the small producer cetificate holder.

[FR Doc. 84-32307 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-42-000]

Midwestern Gas Transmission Co.; Filing

December 5, 1984.

Take notice that on November 30, 1984, Midwestern Gas Transmission Company (Midwestern) requested the Federal Energy Regulatory Commission (Commission) to allow it to defer until December 31, 1984, the filing of the Purchased Gas Cost Adjustment (PGA) for its Northern System, which otherwise would be made on or before December 1, 1984. To accomplish the deferral, Midwestern requests any necessary waivers of the Commission's regulations and of Article XVIII of Volume No. 1 of Midwestern's FERC Gas Tariff. Midwestern states that the PGA filing for its Southern System will not be affected by this request.

Midwestern states that Midwestern and ANR Pipeline Company (ANR), Midwestern's largest Northern system customer, have recently negotiated amendments to Midwestern's gas purchase contracts with TransCanada Pipe Lines Ltd. (TransCanada), the sole supplier of gas for Midwestern's Northern System, which substantially reduces the price Midwestern pays for Canadian gas, establishes separate price structures for ANR and Midwestern's other requirements, allows for future market-oriented price adjustments, and eliminates or liberalizes future take-or-pay and minimum purchase obligations. Midwestern also states that it has reached agreement with TransCanada and ANR regarding revisions to an agreement among Midwestern, TransCanada and ANR dated February 3, 1984, pursuant to which ANR agrees to assume certain of Midwestern's obligations to TransCanada under the gas purchase contracts. Midwestern states further that on November 26, 1984, if filed in Docket No. TA85-1-5 an

interim rate reduction to reflect the reduced gas costs under the amended gas purchase contracts, but explains that the tariff provisions for its Northern System must be significantly revised in order to accurately reflect on a permanent basis the changes brought about by these amendments and the amendments to February 3, 1984 agreement among Midwestern, TransCanada and ANR.

Midwestern anticipates filing the new tariff sheets and conforming Northern System rates on or before December 31, 1984. Midwestern asserts that these revisions would effectively moot the December 1, 1984 PGA filing and render it a nullity. Midwestern further asserts that the need to prepare a PGA filing for the Northern System by December 1, 1984 would delay the completion of these essential revisions to its FERC Gas Tariff and would serve no useful purpose.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before December 12, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 84-32308 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-114-000]

National Fuel Gas Supply Corp.; Application

December 6, 1984.

Take notice that on November 15, 1984, National Fuel Gas Supply Corporation (National Fuel), Ten Lafayette Square, Buffalo, New York, 14203 filed in Docket No. CP85-114-000 an application pursuant to section 7 of the Natural Gas Act for permission and approval to abandon the existing Henderson Storage compressor station and for a certificate of public convenience and necessity authorizing the construction and operation of a new Henderson Storage compressor station to be constructed on a site adjacent to such existing station, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

National Fuel proposes to replace eight compressor units, totaling a capacity of 1175 horsepower, and related equipment at its Henderson Storage compressor station in the Township of Mineral, Venango County, Pennsylvania. It is explained that the replacement is necessitated due to the deteriorating condition of the present compressor facilities which are dated 1934 through 1949. National Fuel also proposes to modify the configuration of the station piping to enhance the flexibility of its operations to take full advantage of the Henderson storage field and to permit an increase in its ability to take gas into its Line N from Texas Eastern Transmission Corporation at Wind Ridge, Pennsylvania. National Fuel states that the proposed replacement compressors would consist of two 1,300 horsepower reciprocating units which would operate more efficiently while requiring less fuel gas than the existing units.

The application reflects that the existing facilities would be removed and sold for scrap. The total estimated cost of the project, as set forth in the application, is $3,912,500.

National Fuel asserts that such construction would be financed with internally generated funds and/or interim short-term bank loans.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion 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 Energy Regulatory Commission section 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 or its designee on this application if no motion 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 and permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion 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 National Fuel to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32309 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-87-000]

Northern Natural Gas Company, Division of InterNorth, Inc.; Application

December 6, 1984.

Take notice that on November 5, 1984, Northern Natural Gas Company, Division of InterNorth, Inc. (Northern), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP85-87-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon and remove one 112 horsepower compressor unit located in Mesa County, Colorado, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Northern states that the Mesa County No. 2 gathering station originally installed in 1980 to gather the gas produced from the Vega Field has been idled since October 1983 and that since installation of the gathering system, only one well, the Vega #2 well was connected by Northern's Vega System. It is explained that the production from this single well has declined substantially from its initial flow rate of 240 Mcf of gas per day to an average rate of 30 Mcf per day in 1983. Northern maintains that the low production from the Vega Field resulted in extremely high operation costs and that in October the Vega #2 well was shut in and the Mesa County 2 Station was idled. Northern states that it continues to pay the rental fees associated with the 112 horsepower compressor unit and, accordingly, proposes to abandon it.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal

Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 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 motion 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 Energy Regulatory 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 or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion 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 Northern to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32310 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-118-000]

Northwest Pipeline Corp.; Application

December 6, 1984.

Take notice that on November 16, 1984, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84108, filed in Docket No. CP85-118-000 an application pursuant to section 7(c) of the Natural Gas Act for a limited-term certificate of public convenience and necessity authorizing the transportation of natural gas in interstate commerce for the account of Reichhold Chemicals, Inc. (Reichhold), all as more fully set forth in the application which is on file and open to public inspection.

Northwest proposes to transport, on a best-efforts basis, up to 10 billion Btu's of natural gas per day for the account of Reichhold pursuant to a gas transportation agreement (agreement) dated October 26, 1984, for a term of up to six months.

Northwest states that Reichhold has arranged to purchase up to 10,000 Mcf of Canadian natural gas per day from Czar Resources Ltd. (Czar) for an initial term of twelve months or until a maximum of 3,400,000 Mcf of gas have been purchased. It is explained that Reichhold would purchase the gas from Czar at the existing interconnection between Westcoast Transmission Company Limited (Westcoast) and Northwest at Sumas, Washington, at a price of $3.15 per million Btu.

Northwest proposed to accept up to 10 billion Btu's per day for Reichhold's account at Sumas and to transport and redeliver thermally equivalent volumes to Northwest Natural Gas Company (Northwest Natural) for Reichhold's account at the existing Deer Island Meter Station in Columbia County, Oregon.

It is stated that Northwest Natural then would utilize its existing distribution facilities to transport Reichhold's gas from the Deer Island meter station to Reichhold's fertilizer plant near St. Helens, Oregon, where Reichhhold would use the subject gas as process fuel and feedstock in the manufacture of anhydrous ammonia at its St. Helens fertilizer plant.

Northwest proposes to charge Reichhold a negotiated transportation rate of five cents per million Btu, plus the Gas Research Institute (G.R.I.) charge which is currently 1.18 cents per million Btu.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory 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 or its designee on this application if no motion 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 motion 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 Northwest to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32311 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-130-000]

Phillips Gas Pipeline Co.; Application

December 6, 1984.

Take notice that on November 26, 1984, Phillips Gas Pipeline Company (Phillips Gas), 456 Home Savings & Loan Building, Bartlesville, Oklahoma 74004, filed in Docket No. CP85-130-000 an application pursuant to section 7 of the Natural Gas Act and Subpart F of Part 157 of the Commission's Regulations for a blanket certificate of public convenience and necessity authorizing the construction, acquisition and operation of certain facilities and the transportation and sale of natural gas and for permission and approval to abandon certain facilities and service, all as more fully set forth in the application on file with the Commission and open to public inspection.

Phillips Gas further requests waiver of that portion of § 157.204(a) of the Commission's Regulations that requires a certificate holder to have transportation rates on file that have been accepted by the Commission in order to apply for blanket certificate under Subpart F of Part 157 of the Regulations.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 27, 1984, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the

Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) 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 motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by section 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 or its designee on this application if no motion to intervene is file 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 motion 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.

Kenneth F. Plumb,

Secretary.

[FR Doc. 84-32312 Filed 12-11-84; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Issuance of Decisions and Orders; Week of October 1 Through October 5, 1984

During the week of October 1 through October 5, 1984, the decisions and orders summarized below were issued with respect to appeals and applications for exception or other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Crown Central Petroleum Corp., Oct. 1, 1984; HFA-0242

Crown Central Petroleum Corporation (Crown) filed an Appeal from a determination issued to it by the Acting Disclosure Officer, Office of Special Counsel (Disclosure Officer). In that determination, the Disclosure Officer responded to a request for information submitted by Crown under the Freedom of Information Act. In considering the Appeal, the DOE found that the search performed by the Disclosure Officer was inadequate. Accordingly, the DOE directed the Disclosure Officer to conduct a further search for responsive documents.

John H. Hnatio, Oct. 2, 1984; HFA-0246

John H. Hnatio (Hnatio) filed an Appeal seeking amendment of a Decision and Order issued to him on August 22, 1984 by the Office of Hearings and Appeals (OHA). In that decision, the OHA considered Hnatio's contention that information, other than classification markings, was withheld from three documents released to him. After reviewing the documents, the OHA determined that Hnatio was correct. Accordingly, the Appeal was granted.

John H. Hnatio, Oct. 5, 1984; HFA-0247

John H. Hnatio (Hnatio) filed an Appeal from a determination issued to him by the Freedom of Information and Privacy Act Activities Branch (FOI Branch) of the Department of Energy (DOE). In his Appeal, Hnatio claimed that the FOI Branch had improperly withheld documents responsive to his Freedom of Information Act request for all documents in the custody of the DOE which pertained to him. In support of this Appeal, Hnatio submitted a copy of a document clearly pertaining to him which the FOI Branch had not previously identified or released to him. In considering the Appeal, the DOE noted that the FOI Branch's failure to identify the one additional document cited by Hnatio did not necessarily indicate that its search was inadequate. The DOE also did not find evidence to support Hnatio's contention that the document had been improperly withheld. Nonetheless, the DOE found that the existence of this particular document did raise the possibility that other responsive documents might exist. Accordingly, the DOE directed the FOI Branch to conduct a further search for responsive documents.

The Knoxville Journal, Oct. 5, 1984; HFA-0245

The Knoxville Journal (Journal) filed an Appeal from a denial of a request for a full waiver of search, copying, and computer fees associated with a Request for Information which the Journal had submitted under the Freedom of Information Act. In considering the Appeal, the DOE balanced the significant public interest in the subject matter of the request and the Journal's ability to effectively disseminate the requested information to the public against the commerical interest of the Journal in the requested information and the cost of producing the documents. The DOE determined that a 90 percent reduction of fees was warranted. Accordingly, the Appeal was granted in part.

William F. Lawless, Oct. 2, 1984; HFA-0230

Professor William F. Lawless of Paine College, in Augusta, Georgia, filed an amended Appeal from a decision by the Freedom of Information Officer (Authorizing Official) the Department of Energy's Savannah River Operations Office. The Authorizing Official's decision denied Lawless's request for a waiver of fees in connection with a request which Professor Lawless had submitted under the Freedom of Information Act, seeking disclosure of material pertaining to nuclear waste material management at the Savannah River Plant. In considering the Appeal, the OHA found that there was a significant public interest in the subject matter of the request, that Professor Lawless would effectively communicate the material to the public, and that the requested material would not benefit personal interests of the requester. Accordingly, Professor Lawless's request for a fee waiver was granted on appeal.

Raymond D. Reister, Oct. 5, 1984; HFA-0250

Raymond D. Reister filed an Appeal from a denial by the Assistant Manager for Administration of the DOE San Franscisco Operations Office of a Request for Information which Mr. Reister had submitted under the Freedom of Information Act. In considering the Appeal, the DOE found that the Assistant Manager's search was adequate in scope. Accordingly, Mr. Reister's Appeal was denied.

David D. Yue, Oct. 4, 1984; HFA-0244

David D. Yue filed an Appeal from a denial by the Freedom of Information Officer of the Oak Ridge Operations Office of a request for a waiver of copying fees submitted in connection with the Freedom of Information Act request. In considering the Appeal, the DOE found that approval of Yue's request would not primarily benefit the general public. Accordingly, the Appeal was denied.

Request for Exception

Norge, Division of Magic Chef, Inc., Oct. 3, 1984; HEE-0099

Norge, Division of Magic Chef, Inc. filed an Application for Exception from the provisions of 10 CFR Part 430 in which the firm sought relief from the energy testing requirements with respect to 500 units of Magic Chef model W20DN-4, an automatic clothes washer. In considering the request the DOE found that exception relief was necessary to prevent the firm from experiencing a gross inequity under the DOE testing regulations. Accordingly exception relief was granted.

Interlocutory Order

ERA/Gulf Oil Corp., Oct. 4, 1984; HRZ-0191

The Economic Regulatory Administration (ERA) filed a Motion to Amend a Proposed Remedial Order it has issued to Gulf Oil Corporation (Gulf) of December 21, 1981. In the Motion, the ERA asked that it be allowed to change its audit methodology, and increase the amount of Gulf's alleged violations from $353,445.93 to $1,830,391.36. The ERA also requested that the time covered by the PRO be expanded by seven months to include the period from July 1, 1980 through January 27, 1981. In addition, the ERA stated that it wished to substitute Subpart V proceedings for the remedial measures specified in the PRO.

In considering the ERA Motion, the Department of Energy determined that Gulf would not be unduly prejudiced by the granting of these amendments and also determining that ERA had shown good cause existed for changing the audit methodology to

one which the ERA and Gulf agreed provided a correct basis for calculating any overcharges which may have occurred. However, the DOE found that ERA had failed to show that good cause existed for expanding the time covered by the PRO, since the PRO already requires Gulf to audit itself for the period immediately following the PRO. In addition, the DOE tentatively permitted the change of remedial provisions, pending briefing by all parties.

In addition, the DOE rejected a claim by Gulf that the documents submitted by ERA as exhibits to its Motion to Amend were confidential in their entirety, but permitted the firm to submit a revised claim which provided a full explanation of how release of the exhibits would harm Gulf.

Refund Applications

OKC Corporation/Town and Country Markets, Inc., Oct. 5, 1984; RF13–17

The DOE issued a Decision and Order concerning an Application for Refund filed by Town & Country Markets, Inc. (T&C). T&C sought a portion of the settlement fund obtained by the DOE through a consent order entered into with OKC Corporation. T&C is an independent reseller of petroleum products which purchased motor gasoline from OKC during the period covered by the consent order. T&C requested a refund to compensate it for alleged pricing violations by OKC as well as for alleged OKC violations of the DOE allocation regulations. Upon evaluating T&C's refund request, the DOE concluded that T&C was injured by OKC' pricing practices during the consent order period and was therefore eligible for a refund. In addition, the DOE determined that T&C's claim that it was injured by OKC's alleged allocation violations was meritorious. Accordingly, T&C was also granted a refund to compensate it for OKC's failure to supply it with motor gasoline to which it was entitled. The total refund approved in this proceeding was $1,213,282 plus interest.

Sid Richardson Carbon and Gasoline Co./ Gulf Oil Corp., Enterprise Products Co., Oct. 4, 1984; RF 26–6, RF26–3

Gulf Oil Corporation (Gulf) and Enterprise Products Company (Enterprise) filed Applications for Refund in which the firms sought a portion of the fund obtained by the DOE through a consent order entered into by the agency and the Sid Richardson Carbon and Gasoline Company and Richardson Products Company (Sid Richardson) on August 31, 1979. In considering the requests, the DOE found that Gulf and Enterprise made spot purchases of NGLPs from Sid Richardson during the consent order period. Based on the rebuttable presumption that spot purchasers suffer no economic injury, the DOE concluded that Gulf and Enterprise were not entitled to a portion of the consent order funds and, accordingly, denied the firms' Applications for Refund.

Standard Oil Co. (Indiana)/B & J's Standard, Ken's Standard Service, Oct. 5, 1984; RF21–11396; RF21–11857; RF21–11858.

The DOE issued a Decision and Order concerning three Applications for Refund filed by retailers of Amoco motor gasoline. These firms elected to apply for refunds based upon the presumption of injury and the formulae outlined in *Office of Special Counsel*, 10 DOE ¶85,048 (1982). In considering these applications, the DOE concluded that each of the applicants should receive a refund based upon the total volume of its Amoco motor gasoline purchases. The refunds granted in this proceeding total $887.

Standard Oil Co. (Indiana)/Glenway Service Station, Oct. 3, 1984; RF21–12359.

On June 10, 1983 and February 8, 1984, the Office of Hearings and Appeals (OHA) issued Decisions and Orders granting Applications for Refund filed by retailers of Amoco motor gasoline, including Applications filed by Charles J. Villers, the owner and operator of the Glenway Service Station. *Standard Oil Co. (Indiana)/Art's Standard Service*, 11 DOE ¶85,037 (1983); *Standard Oil Co. (Indiana)/Ray's Standard Service*, 11 DOE ¶85,237 (1983). During a computer check for duplicate submissons as part of its continuing efforts to ensure that refund applicants make truthful representations to the agency, the OHA became aware of the multiple filings on Villers' behalf and Villers' receipt of a double refund. After conducting an investigation, the OHA determined that Villers was not responsible for the fraudulent filing of a duplicate application. The OHA therefore determined to permit Villers to retain the initial refund, and to rescind only the second, duplicate refund.

Standard Oil Co. (Indiana)/Nevada; RQ21–78; Standard Oil Co. (Indiana)/New York; RQ21–09; Standard Oil Co. (Indiana)/Florida; RQ21–106; Belridge Oil Co./Florida; RQ8–105; Palo Pinto Oil and Gas/Florida; RQ51–104; Belridge Oil Co./Mississippi; RQ8–109; Standard Oil Co. (Indiana)/Maine; RQ21–112; Belridge Oil Co./Maine; RQ8–111; Palo Pinto Oil and Gas/Maine; RQ5–110; Northeast Petroleum Industries, Inc./Maine, Oct. 4, 1984; RQ25–113

The States of Nevada, New York, Florida, Mississippi and Maine submitted second-stage refund plans to the Office of Hearings and Appeals (OHA) pursuant to special refund proceedings involving consent orders which the DOE entered into with Standard Oil Company (Indiana) (Amoco), Belridge Oil Company (Belridge), Palo Pinto Oil and Gas (Palo Pinto) and Northeast Petroleum Industries, Inc. (Northeast). Nevada proposed to use $12,462 allotted to it in the *Amoco* Decision and Order (11 DOE ¶85,185 (1983)) to further fund an energy emergency program and to supplement funding of the State Boiler Efficiency Mini-Grants Program. New York proposed to spend $1,074,091 of the Amoco funds on a number of energy conservation projects designed to benefit the residential, commercial and industrial sectors of the state. Florida proposed to use $1,029,239 from Amoco, $3,922 from Belridge and $15,854.10 from Palo Pinto, to fund a Traffic Signal Retiming Program and to implement energy conservation techniques in state schools, hospitals and public care buildings. Mississippi planned to add the $1,081 from Belridge to funds approved for its Conservative Driver Training Program. Maine proposed to use $112,618 from Amoco, $481 from Belridge, $2,562 from Palo Pinto and $4,159.12 from Northeast to expand current van, bus line and rideshare services and to conduct energy audits at residential care facilities. The OHA approved these plans because they benefitted consumers who had been injured by the alleged overcharges of Amoco, Belridge, Palo Pinto and Northeast.

Willis Distributing Co./Gartner-Harf Co., Oct. 4, 1984; RF41–0009

The DOE issued a Decision and Order concerning an Application for Refund filed by Gartner-Harf Company, an end-user of motor gasoline sold by Willis Distributing Co. The firm elected to apply for a refund based upon the presumption of injury and the procedures outlined in *Willis Distributing Co.*, 12 DOE ¶ 85,062 (1984). In considering the application, the DOE concluded that Gartner-Harf should receive a refund of $80 based upon the total volume of its motor gasoline purchases.

Dismissals

The following submissions were dismissed:

Name, and Case No.

Charles J. Honsa; RF21–4243
Gartner-Harf Co.; RF41–00100
Kaiser Cement Corp.; RF45–1
Nordstrom Oil Co.; RQ22–23

Copies of the full text of these decisions and orders are available in the Public Docket Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

Dated: December 3, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 84–32359 Filed 12–11–84; 8:45 am]

BILLING CODE 6450–01–M

Issuance of Decisions and Orders; Week of October 22 Through October 26, 1984

During the week of October 22 through October 26, 1984, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeal

Tighe, Curhan & Piliero, Oct. 26, 1984; HFA–0251

Tighe, Curhan & Piliero filed an Appeal from a partial denial by the Manager of the Department of Energy Idaho Operations Office of a Request for Information which the

firm had submitted under the Freedom of Information Act (the FOIA). In considering the Appeal, the DOE found that the documents withheld under Exemptions 4 and 5 of the FOIA were not adequately described by the Manager and that the Manager had not adequately justified why each individual document should have been withheld. The withheld documents were therefore remanded for further review and a new determination.

Remedial Orders

San Joaquin Oil Co., & San Joaquin Refining Company, Inc., Oct. 22, 1984; HRO–0071

San Joaquin Oil Co., & San Joaquin Refining Co., Inc., (San Joaquin) objected to a Proposed Remedial Order (PRO) which the Economic Regulatory Administration (ERA) issued to San Joaquin on June 4, 1982. In the PRO the ERA found that San Joaquin violated the DOE price regulations by overcharging its customers in sales of refined petroleum products. The primary objections raised by San Joaquin were that: (i) The EPA incorrectly allocated the proceeds which the firm received from sales of fee-free import licenses as a component of its cost of crude oil, (ii) the ERA incorrectly applied the new item/new market rule in determining San Joaquin's May 15, 1973 selling prices for three products, and (iii) the equal application rule applicable to refiners is procedurally and substantively invalid. The Office of Hearings and Appeals (OHA) rejected San Joaquin's arguments with respect to the treatment of fee-free import licenses and the equal application rule. It granted, however, San Joaquin's objection with respect to the new item/new market rule, stating that the ERA had failed to determine May 15, 1973 prices for three of San Joaquin's products in accordance with the rule. The OHA further found that appropriate May 15, 1973 prices for these products could not be determined from the record in the proceeding. Accordingly, the OHA remanded the PRO to the ERA for further consideration on this issue.

Texas Pacific Oil Co., Inc., Oct. 22, 1984; DRO–0165

Texas Pacific Oil Company, Inc. objected to a Proposed Remedial Order (PRO) which was issued by the Economic Regulatory Administration (ERA) to the firm on December 15, 1978. In the PRO, the ERA found that the firm had sold crude oil from four producing tracts at prices in excess of those permitted by 10 C.F.R. Part 212, Subpart D. The PRO alleged that each of the tracts constituted a single property. The firm maintained that each of the tracts constituted multiple properties on the basis of differences in the ownership of the working, royalty and overriding royalty interests, and on the basis of separate accountability for state severance taxes.

The DOE found no merit to Texas Pacific's claim that differences in state tax treatment of crude oil and condensate, or that differences in accountability to different working or overriding royalty owners, formed a basis for multiple property treatment. The DOE found, however, that two of the tracts should be treated as multiple properties because the form was required to account for production from the tracts to different royalty owners. With respect to a third tract, the DOE found that multiple property treatment was not appropriate since key differences in royalty ownership only appeared if the royalty components of the mineral interests were not taken into account. The DOE also found that the remedial provisions of the PRO should be modified to require that any refunds be distributed pursuant to the provisions of 10 C.F.R. Part 205, Subpart V. The PRO, as modified, was issued as a final Remedial Order.

Request for Modification and/or Rescission

Osborne Energy Corporation and E. O. White, Oct. 22, 1984; HRR–0094

Osborne Energy Corporation and E. O. White filed a motion requesting that the Office of Hearings and Appeals (OHA) reverse its denial of their requests for discovery regarding unofficial contemporaneous agency construction of 10 CFR 212.186, including the deposing of representatives of the crude oil industry regarding historic industry practices. *See Osborne Energy Corp.*, 12 DOE ¶ 84,007 (1984). OHA reexamined the regulatory history of § 212.186, the anti-layering regulation, and found the regulation unambiguous. Accordingly, OHA concluded that the discovery requests based on the purported ambiguity of the regulation had been properly denied.

Motion for Evidentiary Hearing

Hydrocarbons, Ltd., Oct. 26, 1984; HRH–0022

On November 30, 1983, Hydrocarbons, Ltd. (Hydrocarbons) filed a Motion for Evidentiary Hearing in connection with its Statement of Objections to a Proposed Remedial Order issued to the firm by the Economic Regulatory Administration on May 10, 1983. In its Motion, the firm requested an Evidentiary Hearing to allow it to present testimony concerning alleged anti-trust ramifications of 10 CFR 212.183(c). Upon consideration of Hydrocarbons' Motion, the DOE concluded that Hydrocarbons had failed to specify a disputed factual issue that it would address at such a hearing, that the firm had failed to identify the witnesses whose testimony would be offered, and that Hydrocarbons had not shown that its position regarding any anti-trust ramifications of § 212.183(c) could be established only through an Evidentiary Hearing. Hydrocarbons' Motion for an Evidentiary Hearing was therefore denied.

Refund Applications

Marion Corporation/Callaway Seafoods, et al., Oct. 26, 1984; RF37–1 et al.

The DOE issued a Decision and Order concerning 17 Applications for Refund filed by certain purchasers of petroleum products from the Marion Corporation. The DOE denied two of the Applications on the basis that the Applicants were spot purchasers and had not rebutted the presumption that spot purchasers were not injured by Marion Corporation's pricing practices. *Marion Corp.*, 12 DOE ¶ 85,014 (1984) (*Marion*). The DOE granted the other 15 Applications under the standards and methods specified in *Marion*. The refunds granted in this proceeding total $113,108, plus interest.

Pan American Liquids Service Company and Desertaire Oil & Gas Co./Farmland Industries, Inc., Oct. 24, 1984; RF36–1

The DOE issued a Decision and Order concerning an Application for Refund filed by Farmland Industries, Inc. Farmland sought a portion of the settlement fund obtained by the DOE through a consent order entered into with Pan American Liquids Service Co. and its subsidiary, Desertaire Oil & Gas Co. (Desertaire). Farmland is an agricultural cooperative association owned by over 2,000 local cooperatives which purchased propane from Desertaire during the period covered by the consent order. Farmland requested a refund to compensate it for alleged Desertaire overcharges. Upon evaluating Farmland's refund request, the DOE concluded that Farmland was injured by Desertaire's alleged pricing practices during the consent order period and was therefore eligible for a refund. Because Farmland was the only firm determined to have been injured by Desertaire's alleged pricing practices and because a DOE audit of Desertaire indicated that the alleged overcharges to Farmland exceeded the total settlement, the DOE determined that Farmland should receive as a refund the total Desertaire settlement fund. The refund granted in the proceeding totals $24,000, plus interest.

Windham Gas & Oil Co./Save 4 Stores, Oct. 26, 1984; RF43–0005

The DOE issued a Decision and Order concerning an Application for Refund filed by Save 4 Stores, a retailer of motor gasoline. Save 4 Stores elected to apply for a refund based upon the presumption of injury set forth in *Windham Gas & Oil Co.*, 12 DOE ¶ 85,074 (1984). In considering the application, the DOE concluded that Save 4 Stores should receive a refund of $775 based upon the total volume of its Windham motor gasoline purchases.

Dismissal

The following submission was dismissed:

Company Name, and Case No.

Lucky Stores, Inc.; HEG–0037

Copies of the full text of these decisions and orders are available in the Public Docket Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

Dated: December 3, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 84–32360 Filed 12–11–84; 8:45 am]

BILLING CODE 6450–01–M

Issuance of Decisions and Orders; Week of October 29 Through November 2, 1984

During the week of October 29 through November 2, 1984, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeal

Barrett & Hanna, Nov. 2, 1984; HFA–0252

Barrett & Hanna filed an Appeal from a denial by the Dallas Office of the Economic Regulatory Administration (ERA) of a Request for Information which the firm had submitted under the Freedom of Information Act. In considering the Appeal, the DOE found that the search for responsive documents had been inadequate. Accordingly, the Appeal was granted and the ERA was ordered to conduct an additional search.

Motions for Discovery

Gulf Oil Corp. Nov. 2, 1984; HRD–0211

Gulf Oil Corporation filed a Motion for Discovery in connection with the firm's Statement of Objections to a Proposed Remedial Order (PRO) issued to it by the Philadelphia Field Office of the Economic Regulatory Administration on December 28, 1981. Gulf sought administrative record and contemporaneous construction discovery concerning December 1978 amendments to the refiner price rule. In considering the motion, the DOE found that Gulf had failed to show that expanded administrative record discovery was warranted. The DOE also found that Gulf had not demonstrated that the regulation at issue was ambiguous and that it had been interpreted inconsistently. Accordingly, contemporaneous construction discovery was denied. However, the DOE decided that ERA's response to an interrogatory dealing with an Emergency Petition for Rulemaking filed by Texaco Inc. could have a bearing on the resolution of the PRO at issue, and directed the agency to respond to that inquiry.

Mid-Continent Systems, Inc., Nov. 2, 1984; HRD–0202, HRH–0202

Mid-Continent Systems, Inc. filed a Motion for Discovery and a Motion for Evidentiary Hearing pertaining to an issue remanded to the OHA by the United States District Court for the Eastern District of Arkansas. The OHA found that the motions did not satisfy the regulatory requirements for the granting of such motions, as set forth at 10 CFR 205.198 and 205.199 and the applicable case law. Accordingly, Mid-Continent's request for discovery and evidentiary hearing were denied. However, Mid-Continent's alternative request for oral argument on the merits of the underlying issue remanded by the District Court was granted.

Implementation of Special Refund Procedures

A. Johnson & Co., Inc., et al., Oct. 29, 1984; *HEF–0472 et al.*

The Office of Hearings and Appeals issued a final Decision and Order setting forth procedures to be used in filing applications for refund for a portion of the funds obtained as the result of consent orders, remedail orders, and court-approved stipulated settlements which DOE entered into with A. Johnson & Company, Inc. and 193 other firms and individauls who were producers, resellers or refiners of crude oil. The funds will be available to identifiable purchasers of the crude oil, participants in the Entitlements Program, and purchasers of refined petroleum products who were injured by the 194 firms' actual or alleged violations. Applications for refund must be postmarked within 90 days of the publication of the decision in the Federal Register. Specific information to be included in refund applications is discussed in the decision.

Refund Applications

Standard Oil Co. (Indiana)/Anoka-Hennepin Independent School District, Nov. 2, 1984; *RF21–12363*

The DOE issued a Decision and Order concerning an Application for Refund filed by Anoka-Hennepin Independent School District (Anoka). Anoka elected to apply for a refund based upon the presumptions of injury and the formulae outlined in *Offcie of Special Counsel,* 10 DOE ¶ 85,048 (1982) (*Amoco*). In considering the application, the DOE concluded that Anoka should receive a refund based upon the total volume of its eligible Amoco motor gasoline purchases. The refund granted in this proceeding totals $1,122.

Standard Oil Co. (Indiana)/Robert West, Joslin's Longboat American Service, Nov. 2, 1984; RF21–10515, *RF21–12309*

The DOE issued a Decision and Order concerning two Applications for Refund filed by retailers of Amoco motor gasoline. These firms did not elect to apply for a refund based upon the presumption of injury and the formulae outlined in *Office of Special Counsel,* 10 DOE ¶ 85,048 (1982). In considering these applications, the DOE found that the applicants had not shown that they were injured to an extent greater than the presumptive levels. Accordingly, the applicants were granted refunds based upon the presumption method. The refunds granted in this proceeding total $$3,755.

Dismissals

The following submissions were dismissed:

Name, and Case No.

Commonwealth Propane Co.; RF21–11334

Copies of the full text of these decisions and orders are available in the Public Docket Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines,* a commercially published loose leaf reporter system.

Dated: December 3, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 84–32361 Filed 12–11–84; 8:45 am]

BILLING CODE 6450–01–M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for filing Applications for Refund from funds obtained from Vangas, Inc., in settlement of enforcement proceedings brought by DOE's Economic Regulatory Administration.

DATE AND ADDRESS: Applications for refund must be postmarked by March 11, 1985 should conspicuously display a reference to case number HEF–0189, and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Thomas O. Mann, Deputy Director, Office of Hearings and Appeals, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 252–2094.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision and Order establishes procedures to distribute funds obtained as a result of consent order between Vangas, Inc., a reseller-retailer of propane whose main office is located in Fresno, California, and DOE. The consent order settled all disputes between DOE and Vangas concerning possible violations of DOE price regulations with respect to the firm's sales of propane and charges for storage tank rental to customers of its California retail division during the September 1, 1973 through October 31, 1977 audit period.

Any members of the public who believe that they are entitled to a refund in this proceeding may file Applications for Refund. All Applications should be postmarked by March 11, 1985 and should be sent to the address set forth at the beginning of this notice. Applications for refunds must be filed in

duplicate and these applications will be made available for public inspection between the hours of 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Docket Room of the Office of Hearings and Appeals, located in Room 1E–234, 1000 Independence Avenue SW., Washington, D.C. 20585.

Dated: December 4, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

Name of Case: Vangas, Inc.
Date of Filing: October 13, 1983.
Case Number: HEF–0189

December 4, 1984.

This proceeding involves a Petition for the the Implementation of Special Refund Procedures filed by the Economic Regulatory Administration (ERA) with the Office of Hearings and Appeals (OHA) pursuant to the provisions of 10 CFR Part 205, Subpart V. Under those procedural regulations of the Department of Energy (DOE), ERA may request that the OHA formulate and implement special procedures to make refunds in order to remedy the effects of actual or alleged violations of DOE regulations. As we have stated in previous decisions, refunding moneys obtained through DOE enforcement proceedings is the focus of Subpart V proceedings. *See, e.g., Office of Enforcment,* 8 DOE ¶ 82,597 (1981). In this case ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a consent order that it entered into with Vangas, Inc.

Vangas marketed petroleum products to resellers and end-users during the period of federal price controls, and was therefore subject to the Mandatory Petroleum Price Regulations set forth at 10 CFR Part 212, Subpart F. Its main office is in Fresno, California. A DOE audit of Vangas's records revealed possible violations of DOE price regulations with respect to the rental of liquid propane gas storage tanks to consumers through its California retail division during the period commencing September 1, 1973 and ending October 31, 1977 (hereinafter referred to as the audit period).

In order to settle all claims and disputes between Vangas and the DOE regarding the firm's sales of propane and charges for storage tank rental during the audit period, Vangas and the DOE entered into a consent order on July 30, 1980. Under the terms of the conset order, Vangas agreed to refund $403,628, plus interest, "to tank rental customers in the California retail division by setting prices for propane two cents ($.02) per gallon below each branch's maximum lawful selling prices or each branch's market prices, whichever are lower, until the total amount has been refunded." The consent order provided that, in the event that the pricing of propane was exempted from the DOE petroleum price regulations before the total amount was refunded, the unrefunded balance would be turned over to the DOE. At the time of decontrol, Vangas had refunded all but $30,362, including interest, which the firm subsequently remitted to the DOE. That sum is being held in an interest-bearing escrow account established with the United States Treasury pending a determination of its proper distribution. As of October 31, 1984, the Vangas escrow account had earned $13,802.70 in interest.

On September 28, 1984, we issued a Proposed Decision and Order tentatively setting forth procedures for distribution of the $30,362 that was deposited into the escrow account, plus the accured interest. 49 FR 39724 (October 10, 1984). This Decision establishes procedures for the filing of claims by tank rental customers in the firm's California retail division. We will describe the information that this type of claimant should submit in order to demonstrate that it is eligible to receive a portion of the consent order funds. We will not, however, propose procedures at this time for the disposition of funds that may remain in the escrow account after all claims have been paid. Our determination concerning the disposition of those funds will necessarily depend on the amount remaining in the account at that time. It is therefore premature for us to address issues regarding the disposition of any remaining funds after all claims have been paid. In response to our September 28, 1984 proposed decision, the state of North Carolina and the Attorneys General of Arkansas, Delaware, Kansas, Iowa, Louisiana, North Dakota, Rhode Island and West Virginia filed comments regarding the disposition of such remaining funds. In light of the above discussion, these comments will not be discussed here.

I. Jurisdiction

We have considered ERA's Petition for the Implementation of Special Refund Procedures and determined that it is appropriate to establish such a proceeding with respect to the Vangas consent order fund. In our proposed decision and in other recent decisions, we have discussed at length our jurisdiction and authority to fashion special refund procedures. *See, e.g., Office of Enforcment,* 9 DOE ¶ 82,553 at 85,284 (1982); *Office of Enforcement, Economic Regulatory Administration: In re Adams Resources and Energy, Inc.,* 9 DOE ¶ 82,284 (1982). We have received no comments challenging our authority to fashion special refund procedures in this case. We will therefore grant ERA's petition and assume jurisdiction over the distribution of the Vangas consent order funds.

II. Refunds to Injured Purchasers

The Vangas consent order funds will be distributed to claimants who satisfactorily demonstrate that they have been injured by Vangas's alleged violations. The information available to us at this time regarding Vangas operations does not provide the names and addresses of the firm's customers. However, the consent order limits the universe of potential refund recipients to those who rented propane tanks through the California retail division. Therefore, the pool of eligible claimants will comprise consumers who rented such tanks from a Vangas branch located within the State of California (or in Sparks, Nevada) during the period September 1, 1973 through October 31, 1977.

The ERA audit materials indicate that charges for tank rentals were assessed yearly and increased with the capacity of the tank rented. In order to receive a refund, each claimant will be required to establish the length of time during the consent order period that it rented its tank or tanks from Vangas. In addition, it must establish the total volume capacity of the tank or tanks it rented for the period.

As stated above, the consent order provides that refunds be made to only one class of purchasers: customers of the firm's California retail division. Therefore, these potential claimants, as ultimate consumers of Vangas petroleum products, were injured by the alleged violations because they had no opportunity to pass on the costs associated with the alleged overcharges. Consequently, applicants will not be required to submit any proof of injury other than evidence of storage tank rental, in order to qualify for a refund. *See Standard Oil Co. (Indiana)/Union Camp Corp.,* 11 DOE ¶ 85,007 (1983); *Standard Oil Co. (Indiana)/Elgin, Joliet, and Eastern Railway,* 11 DOE ¶ 85,105 (1983) (end-users of various refined petroleum products granted refunds solely on the basis of documented purchase volumes).

A successful refund applicant will receive a refund based upon a volumetric method of allocating refunds. Under this method, a volumetric refund amount is calculated by dividing the settlement amount by an estimate of the total storage capacity of Vangas's rental propane tanks during the period covered by the consent order.(*1*) in the present case, based on the information available to us at this time, the volumetric refund amount is $.000539 per gallon of storage capacity rented per year ($30,362 received from Vangas, Inc., divided by 56,249,991 gallons(*2*), the firm's total storage capacity that was rented to California consumers during the audit period), exclusive of interest. Successful claimants' refunds will be calculated by multiplying the capacity of the tanks that they rented by the number of years (or fractions of years) during which they rented from Vangas, then multiplying the result by the per-gallon refund amount. Successful claimants will also receive a proportionate share of the interest accrued on the consent order fund since it was remitted to DOE. As of October 31, 1984, Accrued interest will increase the per-gallon refund amount of $.000785. Although we have proposed a volumetric method for allocating refunds, a claimant may submit additional evidence if it claims that it bore a disproportionate percentage of the alleged overcharges, resulting in a level of economic injury greater than the volumentric figure.

We recognize that many of the affected customers are individuals who rented very little tank capacity and therefore will be entitled to very small refunds. As the state of North Carolina expressed in its comments in opposition to our proposed $15.00 minimum for claims, this sum would not be insignificant to some potential claimants. However, as in prior special refund cases, we will not grant refunds for less than $15.00 (the approximate cost to the government of issuing refund checks) because the cost to the public of issuing such small refunds exceeds the restitutionary benefits that may be achieved. *See, e.g., Uban Oil Co.*, 9 DOE ¶ 82,541 at 85,225 (1982); *see also* 10 CFR 205.286(b). Therefore, honoring North Carolina's request that we issue checks in amounts less than $15.00 would result in a net financial loss to the general public.

III. Application for Refund

After having considered the comments received concerning application procedures for injured purchasers that were tentatively adopted in our September 28, 1984 proposed decision, we have concluded that applications for refund should now be accepted from parties who rented propane storage tanks from Vangas's California retail division. An application must be in writing, be signed by the applicant, and specify that it pertains to the Vangas Consent Order Fund, Case Number HEF–0189.

An applicant should provide the following information in his or her application: the location of the Vangas branch office through which propane storage tanks were rented during the audit period, the capacity of each such tank and the length of time in months for which each such tank was rented. The applicant should report any past or present involvement as a party in DOE enforcement actions. If these actions have terminated, the applicant should furnish a copy of a final order issued in the matter. If the action is ongoing, the applicant should briefly describe the action and its current status. The applicant is under a continuing obligation to keep the OHA informed of any change in status while its application for refund is being considered. *See* 10 CFR 205.9(d).

Each application must also include the following statement: "I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205–283(c); 18 U.S.C. 1001. In addition, the applicant should furnish us with the name, position title, and telephone number of a person who may be contacted by us for additional information concerning the application.

All applications for refund must be filed in duplicate. A copy of each application will be available for public inspection in the Public Docket Room of the Office of Hearings and Appeals, Forrestal Building, Room 1E–234, 1000 Independence Avenue, Washington, D.C. Any applicant that believes that his or her application contains confidential information must so indicate on the first page of his or her application and submit two additional copies of the application from which the confidential information has been deleted, together with a statement specifying why any such information is privileged or confidential.

All applications should be sent to: Vangas Consent Order Refund Proceeding, Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585. Applications for refund of a portion of the Vangas consent order funds must be postmarked within 90 days after publication of this Decision and Order in the **Federal Register.** *See* 10 CFR 205–286. All applications for refund received within the time limit specified will be processed pursuant to 10 CFR 205.284.

IV. Distribution of the Remainder of the Consent Order Funds

In the event that money remains after all claims by eligible consumers have been disposed of, undistributed funds could be distributed in a number of different ways. However, we will not be in a position to decide what should be done with any remaining funds until the refund procedure described above is completed. We will continue to accept comments containing proposals for alternative distribution of the remaining funds upon proper notice to the parties and the interested public.

It Is Therefore Ordered That:

(1) The Petition for the Implementation of Special Refund Procedures filed by the Economic Regulatory Administration in Case No. HEF–0189 is hereby granted.

(2) Applications for Refund from the funds remitted to the Department of Energy by Vangas, Inc., pursuant to the consent order executed on July 30, 1980, may now be filed.

(3) All applications must be postmarked within 90 days after publication of this Decision and Order in the **Federal Register.**

Dated: December 4, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

Notes

(*1*) Volumetric refund amounts are usually calculated by dividing the settlement amount by the total gallonage of products covered by the consent order. In the present case, however, in which the consent order specifies that all alleged overcharges were due to tank rental and not due to the pricing of any product, we have determined that the proposed method will result in the most equitable distribution to injured parties.

(*2*) This figure is equal to 13,500,000 gallons per year multiplied by 4–⅙ years (50 months). We determined that the California retail division rented an estimated average of 13,500,000 gallons of storage capacity in each year of the consent order period by considering the actual storage capacity figures supplied by the firm for the years 1976 and 1977, extrapolating estimates for the earlier years based on those figures, and taking an average of the estimated and actual yearly figures.

[FR Doc. 84–32356 Filed 12–11–84; 8:45 am]

BILLING CODE 6450–01–M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures and solicitation of comments.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy solicits comments concerning the appropriate procedures to be followed in refunding $70,557.23 in consent order funds to members of the public. This money is being held in four separate escrow accounts following the settlement of enforcement proceedings involving Budget Airport Associates, Inc. ($13,688.26), Consolidated Leasing Corp. ($16,500), Grand Rent-A-Car Corp. ($32,500), and Traveler's Rental, Inc. ($7,868.97).

DATE AND ADDRESS: Comments must be filed within 30 days of publication of this notice in the **Federal Register** and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585. All comments should conspicuously display a reference to case numbers HEF–0044 (Budget), HEF–0054 (Consolidated), HEF–0083 (Grand), and HEF–0182 (Traveler's).

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 252–2860.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy, 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision relates to four consent orders entered into by Budget Associates, Inc., Consolidated Leasing Corp., Grand Rent-A-Car Corp., and Traveler's Rental, Inc. Pricing violations allegedly had occurred when each firm charged its motor vehicle rental customers a refueling charge for motor gasoline. The alleged violations in the firms' sales of motor gasoline to vehicle rental customers occurred at the following locations during the following periods:

Budget—L.A. Int'l Airport, Aug. 1, 1979–Aug. 31, 1980
Consolidated—L.A. Int'l Airport, Aug. 1, 1979–Aug. 31, 1980
Grand —L.A. Int'l Airport, Aug. 1, 1979–Jan. 28, 1981
Traveler's—Boston Airport, Aug. 1, 1979–May 31, 1980

The Proposed Decision sets forth the procedures and standards that the DOE has tentatively formulated to distribute the contents of each escrow account funded by the motor vehicle rental companies pursuant to their respective consent orders. The DOE has tentatively decided that refunds should be granted to claimants who satisfactorily demonstrate that they incurred motor gasoline refueling charges from the rental company at the audited location during the respective consent order period. Motorists who demonstrate that they incurred refueling charges will be presumed to have absorbed the alleged overcharges and will not be required to provide further evidence of injury to qualify for a refund. Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of the claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice in the **Federal Register**, and should be sent to the address set forth at the beginning of this notice. All comments received in this proceeding will be available for public inspection between the hours of 1:00 to 5:00 p.m., Monday through Friday, except federal holidays, in the Public Docket Room of the Office of Hearings and Appeals, located in Room 1E–234, 1000 Independence Avenue SW., Washington, D.C. 20585.

Dated: December 4, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy

Special Refund Procedures

Names of Firms: Budget Airport Associates, Inc., Consolidated Leasing Corporation, Grand Rent-A-Car Corporation, Traveler's Rental, Inc.

Date of Filings: October 13, 1983.

Case Numbers: HEF–0044, HEF–0054, HEF–0083, HEF–0182.

Under the procedural regulations of the Department of Energy, the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to make refunds in order to remedy the effects of violations of DOE regulations. *See* 10 CFR Part 205, Subpart V. The Subpart V regulations set forth general guidelines by which the OHA may formulate and implement a plan of distribution for funds received pursuant to a settlement agreement or remedial order. The Subpart V process may be used in situations where the DOE is unable readily to ascertain the persons or firms who were injured as a result of alleged or adjudicated violations, or to ascertain the amount of each person's injury. *See Office of Enforcement*, 9 DOE ¶ 82,553 (1982).

I. Background

Pursuant to the provisions of Subpart V, on October 13, 1983, the ERA filed four Petitions for the Implementation of Special Refund Procedures in connection with consent orders entered into with four motor vehicle rental companies: Budget Airport Associates, Inc. d/b/a Budget Rent-A-Car (Budget), Consolidated Leasing Corporation (CLC) Grand Rent-A-Car (Grand), and Traveler's Rental, Inc. d/b/a/ Dollar Rent-A-Car (Dollar).(*1*) Each of these companies is engaged in the business of renting motor vehicles to the public. In the course of these rental transactions, the firms levy a refueling charge when a customer returns a vehicle with less motor gasoline than when the vehicle was rented. According to the ERA, the firms were therefore "retailers" of motor gasoline as that term was defined in 10 CFR 212.31 and were subject to the DOE Mandatory Petroleum Price Regulations. The ERA audited each of these firms, and those audits revealed possible violations of the DOE price regulations set forth in 10 CFR Part 212, Subpart F. The ERA audits encompassed only the Los Angeles airport operations of Budget, CLC, and Grand, and the Boston airport operations of Dollar. In each case, in order to settle all claims and disputes between the company and the DOE regarding the firm's resale of motor gasoline from its audited airport rental location during the audit period, each firm enterd into a consent order with the DOE. Each consent order noted that the firm disputed the ERA's contention that it was a "retailer" subject to the price regulations, and stated that no finding was made on this issue. The audit periods, which are the same as the consent order periods, and consent order amounts are set forth below:

Budget—Aug. 1, 1979–Aug. 31, 1980, $13,688.26
CLC—Aug. 1, 1979–Aug. 31, 1980, $16,500.00
Grand—Aug. 1, 1979–Jan. 28, 1981, $32,500.00
Dollar—Aug. 1, 1979–May 31, 1980, $7,868.97(*2*)

II. Proposed Refund Procedures

We have determined that it is appropriate to establish a special refund proceeding under Subpart V with respect to each of the four rental companies' consent order funds. *See*

The Hertz Corp., 12 DOE ¶ —— (Case No. HEF-0090) (November 14, 1984) (*Hertz*). Based upon our experience with Subpart V cases, the distribution of funds to persons who were adversely affected by the alleged overcharges will take place in two stages. In the first stage of the process, payment will be made to persons and firms who file applications for refund and demonstrate that they are entitled to a portion of the funds received by the DOE. After meritorious claims are paid in the first stage, remaining funds can be distributed through a second stage refund procedure to entities which would indirectly benefit persons and firms who were likely injured but who failed to filed claims or do not meet the minimum refund threshold. *See generally Office of Special Counsel*, 10 DOE ¶ 85,048 (1982) (*Amoco*) (refund procedures established for first stage applicants; second stage refund procedures tentatively proposed); *Standard Oil Co. (Indiana)*, 11 DOE ¶ 85,185 (1983) (second stage refund procedures established).

With respect to the first stage, we propose that the Budget, CLC, Grand, and Dollar consent order funds be distributed to claimants who satisfactorily demonstrate that they were injured by the respective firm's pricing practices at the audited location during the respective consent order period. In the absence of a showing of a specific level of an alleged overcharge, we propose that refunds from each settlement fund be allocated to injured customers according to a volumetric method.(*3*) Under this method we generally presume that the alleged overcharges were spread equally among all gallons of product sold which were covered by the consent order. In applying the volumetric method, refunds are computed by multiplying an applicant's purchases from the consent order firm by the per gallon volumetric refund amount, which is calculated by dividing the settlement amount by the total volume of motor gasoline subject to the settlement and sold by the consent order firm during the consent order period. At the present time in this proceeding, we do not know the precise amount of motor gasoline sold by each of the rental companies from its audited location during the consent order period. However, each firm has provided a reasonable estimate of the volume of motor gasoline it sold. Based upon these figures, we have established a tentative volumetric amount for each case. The per gallon volumetric amount for each proceeding is set forth below:

Budget—$0.01239 ($13,688.26 divided by 1,105,000)
CLC—$0.01269 ($16,500 divided by 1,300,000)
Grand—$0.00736 ($32,500 divided by 4,413,200)
Dollar—$0.03319 ($7,868.97 divided by 237,070)

An eligible applicant will also receive a proportionate share of the interest which has accrued on the respective consent order fund since its remittance to the DOE.

In the present case, it is likely that all refund claimants will be consumers (end-users) of the motor gasoline which the rental companies supplied. In previous special refund proceedings, we have found that end-users were unable to pass through increased costs resulting from alleged overcharges and therefore incurred injury by purchasing from a firm which settled DOE enforcement claims. Unlike regulated firms in the petroleum industry, end-users were not subject to price controls during the consent order period. *See generally Office of Enforcement*, 10 DOE ¶ 85,069 (1983); *Texas Oil & Gas Corp.*, 12 DOE ¶85,069 (1984) and cases cited therein. In the case of individuals who purchase motor gasoline for their own motoring use, these ultimate consumers' inability to pass through any overcharges is obvious, since there are no down-stream purchasers from whom such a consumer could recover increased costs. *See generally Hertz; Marion Corp.*, 12 DOE ¶ 85,014 (1984) (*Marion*); *Thornton Oil Corp.*, 12 DOE ¶ —— Case No. HEF-0497 (November 14, 1984). Similarly, we now propose that in order to substantiate their claim of injury end-user claimants need not demonstrate cost absorption and that they may demonstrate injury by documenting only the specific quantities of motor gasoline they purchased from the specific rental company outlet (the Los Angeles airport outlets of Budget, CLC, and Grand, and the Boston airport outlet of Dollar) during the applicable consent order period.(*4*)

We recognize that it is likely that many of the affected customers were individual motorists who purchased very small amounts of gasoline in isolated transactions. As a result, the amount of refunds to which most individual customers will be entitled will be very small. As in prior special refund cases, we propose not to grant refunds for less than $15.00 (the approximate cost to the government of issuing refund checks) because the cost to the public of issuing such small refunds exceeds the restitutionary benefits which may be achieved. *See Amoco*, 10 DOE at 88,214.(*5*)

Generally in special refund proceedings, we attempt to identify specific customers who may have been injured by the consent order firm's pricing practices and provide those customers with notice of the refund proceeding. However, in the present case, the audit file material which we have does not contain any names or addresses of customers. As a result, we are unable at this time to identify with certainty any persons or firms who may have been injured by the rental companies' alleged overcharges. Nonetheless, we intend to make additional efforts to identify those persons or firms who may be eligible for a refund. In this regard, we note that it would not be unusual for governmental entities or businesses to patronize regularly a car rental agency, often on a contractual basis. These customers may have purchased sufficient amounts of motor gasoline from the rental companies during the consent order period to qualify for a refund. Although to date none of the rental companies have been able to provide us with any information, we believe that they may be able to assist us in locating these large volume customers. We will therefore continue to seek their cooperation in identifying and apprising such customers of this special refund proceeding. In addition, we are soliciting suggestions from the public on methods of providing adequate notice of this proceeding to potentially affected parties.(*6*)

After all meritorious claimants have received the share of the settlement fund to which they are entitled, the settlement funds provided by Budget, CLC, Grand, and Dollar pursuant to the respective consent orders, while diminished, may not be exhausted. Any remainder of the settlement funds will be distributed during a second stage of the refund process.

It Is Therefore Ordered That:

The refund amounts remitted to the Department of Energy by Budget Airport Associates, Inc., Consolidated Leasing Corporation, Grand Rent-A-Car, and Travelers Rental, Inc. pursuant to their respective consent orders will be distributed in accordance with the foregoing Decision.

Footnotes

(*1*) The Budget, CLC, Grand, and Dollar consent orders were signed on July 7, 1981, March 16, 1981, March 13, 1981, and December 31, 1980 respectively.

(*2*) In the Dollar consent order, the firm agreed to refund $8,398.97 through a price rollback. Dollar began implementing the price rollback; however, after the decontrol of petroleum prices on January 28, 1981, the

price rollback was no longer a valid method of implementing refunds. Therefore, in accordance with the consent order's provisions, Dollar remitted the $7,868.97 balance of its rollback obligation to the DOE.

(3) The recovery of a specified amount for each gallon of motor gasoline purchased is, like the other presumptions we are employing in this proceeding, subject to challenge by refund claimants who seek to establish that the presumption should not be applied in their cases and are able to demonstrate that the alleged overcharges resolved by the consent order were disproportionately borne by them, resulting in a level of probable injury in excess of the volumetric presumption. *See Amoco*, 10 DOE at 88,199.

(4) Many customer receipts do not indicate the number of gallons purchased from the rental company, but instead merely state the dollar amount of the refueling fee. However, by using an assumed price per gallon, applicants will be able to estimate fairly accurately the gallonage which they purchased from the company. In the case of Dollar, the records indicate that during the period August 1, 1979 through November 20, 1979, the firm charged $1.09 per gallon. From November 21, 1979 through May 31, 1980, Dollar charged $1.30 per gallon. (These amounts were also used for a one gallon "top off" fee charged by Dollar to all customers. Claimants who paid this "top off" charge would also be eligible for a refund.)

In the cases of Budget, CLC, and Grand, we have no records that would indicate the prices charged by the firms. At this point, we propose that customers of these rental companies use the data that we have for Dollar to calculate their refueling gallonage. We believe that the Dollar figure would closely approximate the charges levied by other firms since not only were the business operations similar, but the consent order periods overlap. We propose that for purchases made prior to November 21, 1979 applicants apply the $1.09 per gallon amount and that they utilize the $1.30 per gallon amount on all purchases made after November 21, 1979 through the end of the respective consent order periods.

(5) Using the volumetric amounts determined for each consent order firm, we have calculated the minimum number of gallons a customer would have to have purchased in order to qualify for the $15.00 minimum threshold: Budget—1,211 gallons, CLC—1,182 gallons, Grand—2,037 gallons, Dollar—452 gallons.

(6) No claims have been filed with the ERA or the OHA since the execution of the consent orders in 1980 and 1981.

[FR Doc. 84-32357 Filed 12-11-84; 8:45 am]
BILLING CODE 6450-01-M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for filing Applications for Refund from funds obtained from Wallace & Wallace Fuel Oil Company in settlement of enforcement proceedings brought by DOE's Economic Regulatory Administration.

DATE AND ADDRESS: Applications for refund must be postmarked by March 11, 1985, should conspicuously display a reference to case number HEF-0190, and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Thomas O. Mann, Deputy Director, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-2094.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision and Order establishes procedures to distribute funds obtained as a result of consent order between Wallace & Wallace Fuel Oil Company and DOE. The consent order settled all disputes between DOE and Wallace & Wallace concerning possible violations of DOE price regulations with respect to the firm's sales of No. 2 fuel oil during the period November 1, 1973 through December 31, 1974.

Any members of the public who believe that they are entitled to a refund in this proceeding may file Applications for Refund. All Applications should be postmarked by March 11, 1985, and should be sent to the address set forth at the beginning of this notice. Applications for refunds in excess of $100 must be filed in duplicate and these applications will be made available for public inspection between the hours of 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Docket Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue, SW., Washington, D.C. 20585.

Dated: November 29, 1984.

George B. Breznay,

Director, Office of Hearings and Appeals.

November 29, 1984.

Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

Name of Firm: Wallace & Wallace Fuel Oil Company.

Date of Filing: October 3, 1983.

Case Number: HEF-0190.

This proceeding involves a Petition for the Implementation of Special Refund Procedures filed by the Economic Regulatory Administration (ERA) with the Office of Hearings and Appeals (OHA) pursuant to the provisions of 10 CFR, Part 205, Subpart V. Under those procedural regulations, ERA may request that OHA formulate and implement special procedures to make refunds in order to remedy the effects of actual or alleged violations of the Department of Energy (DOE) regulations. ERA filed the petition in this case in connection with a consent order that it entered into with Wallace & Wallace Fuel Oil Company (Wallace).

Wallace is a "reseller-retailer" of No. 2 fuel oil as that term was defined in 10 CFR 211.31, and is located in St. Albans, New York. An ERA audit of Wallace's records revealed possible regulatory violations in the amount of $578,555.09 with respect to the firm's pricing of No. 2 fuel oil during the period November 1, 1973, through December 31, 1974 (hereinafter referred to as the audit period).

In order to settle all claims and disputes between Wallace and ERA regarding the firm's sales of No. 2 fuel oil during the audit period, Wallace and ERA entered into a consent order on July 12, 1979. Wallace agreed to pay $77,476.06 directly to eight different classes of purchasers, plus $50,000 to DOE for payment to Wallace's reseller customers and their downstream consumers who were injured by the alleged overcharges. Thus far, Wallace has made only partial payments to the eight classes of purchasers and paid only $20,000 of the $50,000 which it agreed to pay to DOE. The firm is in bankruptcy, and it is unlikely that Wallace will make any further refund payments under the terms of the consent order in the near future. The $20,000 which Wallace has paid DOE was deposited into an interest-bearing escrow account. As of July 31, 1984, the Wallace escrow account had earned $10,767.91 in interest. On April 20, 1984, we issued a Proposed Decision and Order tentatively setting forth procedures to distribute the money in the Wallace escrow account to the four customers in Wallace's reseller class of purchasers. 49 Fed. Reg. 19402 (May 7, 1984) Those four customers were identified by ERA as having been allegedly overcharged, and they are listed in the Appendix to this Decision and Order. We proposed that in view of the small amount of money involved in the Wallace proceeding and since the record indicates that the four firms are

the parties most likely to have been injured by Wallace's pricing practices, the money in the Wallace escrow account should be distributed to them. We recognized, however, that other customers not identified by the ERA audit may be entitled to a portion of the consent order fund and if additional meritorious claims are filed, the appropriate amount of refund to each firm would be determined after analyzing those claims.

This decision establishes procedures for filing claims in the Wallace refund proceeding. We will describe the information that a purchaser of Wallace No. 2 fuel oil should submit in order to demonstrate that it is eligible to receive a portion of the consent order funds. In establishing these requirements, we will address issues raised by our April 20 proposal.

I. Jurisdiction

We have considered ERA's Petition for the Implementation of Special Refund Procedures and determined that it is appropriate to establish such a proceeding with respect to the Wallace consent order fund. In our proposed decision and in other recent decisions, we have discussed at length our jurisdiction and authority to fashion special refund procedures. *See, e.g., Office of Enforcement,* 9 DOE ¶82,553 at 85,284 (1982). We have received no comments challenging our authority to fashion special refund procedures in this case. We will therefore grant ERA's petition and assume jurisdiction over the distribution of the Wallace consent order funds.

II. First-Stage Refund Procedures

A. Refunds to Injured Purchasers

We have concluded that applications for refund should now be accepted from the four firms listed in the Appendix and other firms in Wallace's reseller class of purchaser. Additionally applications for refund will also be accepted from downstream consumers who believe that they have been injured by Wallace's alleged overcharges in its sales to fuel oil resellers. We find that this distribution of funds would be the most equitable method of accomplishing restitution under the circumstances of this case.

In order to receive a refund, each claimant will be required to submit a schedule of monthly purchases of Wallace No. 2 fuel oil for the period November 1, 1973, through December 31, 1974. If the No. 2 fuel oil was not purchased directly from Wallace, the claimant must include a statement setting forth his reasons for believing the No. 2 fuel oil originated with Wallace. In addition, a reseller or retailer of Wallace No. 2 fuel oil that files a claim generally will be required to establish that it was injured by the alleged overcharges. To make this showing, a reseller or retailer claimant will first be required to show that it maintained "banks" of unrecovered increased product costs in order to demonstrate that it did not subsequently recover those costs by increasing its prices. *See Office of Enforcement,* 10 DOE ¶85,029 and 88,125 (1982) (hereinafter cited as *Ada*). In addition, it will have to demonstrate that, at the time it purchased the No. 2 fuel from Wallace it was unable to increase its prices to pass through the additional costs associated with the alleged overcharges. *See Office of Special Counsel,* 10 DOE ¶85,048 at 88,215 (1982) (hereinafter cited as *Amoco*). Alternatively, a reseller can show injury by demonstrating that the prices it paid for No. 2 fuel oil purchased from other suppliers were lower than those it paid to Wallace. *See, e.g., Tenneco Oil Co./ Racetrac Petroleum, Inc.,* 10 DOE ¶85,023 (1982).

As in many prior special refund cases, we will adopt certain presumptions in order to permit claimants to participate in the refund process without incurring disproportionate expenses, and to enable OHA consider refund applications in the most efficient way possible. *See* 10 CFR 205.282(e). Section 205.282(e) specifically authorizes the use of presumptions in refund cases:

> [I]n establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

Both of the presumptions that we are adopting are desirable from an administrative standpoint, because they allow OHA to process a large number of refund claims quickly and efficiently.

We will first adopt a presumption that the alleged overcharges were spread equally over all gallons of Wallace No. 2 fuel oil marketed by the four firms during the consent order period. This volumetric assumption is sound because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices. However because the impact on an individual purchaser could have been greater, each purchaser is allowed to file an application based on a claim that the alleged overcharges had an actual impact greater than that of the presumed volumetric amount. *See, e.g., Sid Richardson Carbon and Gasoline Co. and Richardson Products Co./ Siouxland Propane Co.,* 12 DOE ¶ 85,054 (1984) and cases cited therein at 88, 164.

We will also adopt a presumption that reseller or retailer claimants seeking smaller refunds were injured by the pricing practices settled in the Wallace consent order. As we have noted in many previous refund decisions, there may be considerable expenses involved in gathering the types of data needed to support a detailed claim of injury. *See, e.g., Uban Oil Co.,* 9 DOE ¶ 82,541 (1982). In the case of small claims, the cost to the firm of gathering detailed factual information regarding the impact of alleged overcharges which took place many years ago, and the cost to OHA of analyzing it, may be many times the expected refund amount. Failure to allow simplified application procedures for small claims could therefore deprive injured parties of the opportunity to obtain a refund. We believe that the establishment of a presumption of injury for all claims of $5,000 or less is reasonable in this case because the volumetric refund amount is fairly low, and the time period covered by the Wallace consent order is quite distant. *See Texas Oil & Gas Corp.,* 12 DOE ¶ 85,069 (1984); *Office of Special Counsel: In the Matter of Conoco, Inc.,* 11 DOE ¶ 85,226 (1984) and cases cited therein.(*1*) Under the presumptions we are adopting, a reseller or retailer claimant will not be required to submit any additional evidence of injury if its refund claim is below the $5,000 threshold level.(*2*)

In addition to the presumptions we are adopting, we are making a finding that end-users or ultimate consumers whose business is unrelated to the petroleum industry were injured by the alleged overcharges covered by the consent order. Unlike regulated firms in the petroleum industry, members of this group were not required to keep records which justified selling price increases by reference to cost increases. An analysis of the impact of the alleged overcharges on the final prices of non-petroleum goods and services would be beyond the scope of a special refund proceeding. *See Office of Enforcement, Economic Regulatory Administration: In the Matter of PVM Oil Associates, Inc.,* 10 DOE ¶ 85,072 (1983); *see also Texas Oil & Gas Corp.,* 12 DOE at 88,209 and cases cited therein. We have therefore concluded that end-users need only document the volume of Wallace No. 2 fuel oil that they purchased from the

four firms in order to prove that they were injured by the alleged overcharges.

If a reseller or retailer made only spot purchases from Wallace, however, it should not receive a refund because it is not likely to have suffered an injury. As we have previously stated with respect to spot purchasers:

> [T]hose customers tend to have considerable discretion in where and when to make purchases and would therefore not have made spot market purchases of [the firm's product] at increased market prices unless they were able to pass through the full amount of [the firm's] quoted selling price at the time of purchase to their own customers.

Vickers at 85,396–97. We believe the same rationale holds true in the present case. Accordingly, a spot purchaser that files a claim should submit sufficient evidence to establish that it was unable to recover the increased prices it paid for Wallace No. 2 fuel oil *See Amoco* at 88,200.

A successful refund applicant will receive a refund based upon a volumetric method of allocating refunds. Under this method, a per-gallon refund amount is calculated by dividing the settlement amount by the total gallons of No. 2 fuel oil covered by the consent order. The refund amount in this case will be $.0018041 per gallon ($20,000 received from Wallace divided by 11,085,914 gallons of No. 2 fuel oil sold by Wallace to its reseller class of purchaser during the audit period), exclusive of interest. Successful claimants' refunds will be calculated by multiplying their eligible purchase volumes by the per-gallon refund amount. Successful claimants will also receive a proportionate share of the interest accrued on the consent order fund since it was remitted to DOE. Although we are adopting a volumetric method for allocating refunds, and claimant that believes it was injured by an amount greater than the volumetric figure may submit evidence to support its claim to a larger refund.

As in previous cases, we will establish a minimum refund amount of $15.00 for first stage claims. We have found through our experience in prior refund cases that the cost of processing claims in which refunds are sought for amounts less than $15.00 outweighs the benefits of restitution in those situations. *See, e.g., Uban Oil Co.*, 9 Doe ¶ 82,541 at 85, 225 (1982); *See also* 10 CFR 205.286(b).

B. Application for Refund

An application must be in writing, signed by the applicant, and specify that it pertains to the Wallace Consent Order Fund, Case Number HEF–0190. An applicant should indicate from whom the No. 2 fuel oil was purchased and, if the applicant is not a direct purchaser from Wallace it should also indicate the basis for its belief that the No. 2 fuel oil which it purchased originated from Wallace. Each applicant should report its volume of purchases by month for the period of time for which it is claiming it was injured by the alleged overcharges. Each applicant should specify how it used the Wallace No. 2 fuel oil, such as whether it was a reseller or ultimate user. If the applicant is a reseller, it should state whether it maintained banks of unrecouped product cost increases from the date of the alleged violation through January 27, 1981. An applicant who did maintain banks should furnish OHA with a schedule of its cumulative banks calculated on a quarterly basis from November 1, 1973, through January 27, 1981. The applicant must submit evidence to establish that it did not pass on the alleged injury to its customers, if the applicant is a reseller. For example, a firm may submit market surveys or information about changes in its profit margins or sales volume to show that price increases to recover alleged overcharges were infeasible. The applicant should report any past or present involvement as a party in DOE enforcement actions. If these actions have terminated, the applicant should furnish a copy of a final order issued in the matter. If the action is ongoing, the applicant should briefly describe the action and its current status. The applicant is under a continuing obligation to keep OHA informed of any change in status during while its application for refund is being considered. *See* 10 CFR 205.9(d). Each application must also include the following statement: "I swear (or affirm) that the information sumbmitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c); 18 U.S.C. 1001. In addition, the applicant should furnish us with the name, position title, and telephone number of a person who may be contacted by us for additional information concerning the application.

All applications for refund must be filed in duplicate. A copy of each application will be available for public inspection in the Public Docket Room of the Office of Hearings and Appeals, Forrestal Building, Room 1E–234, 1000 Independence Avenue, Washington, D.C. Any applicant that believes that its application contains confidential information must so indicate on the first page of its application and submit two additional copies of its application from which the confidential information has been deleted, together with a statement specifying why any such information is privileged or confidential.

All applications should be sent to: Wallace Consent Order Refund Proceeding. Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue SW., Washingtion, D.C. 20585. Applications for refund of a portion of the Wallace consent order funds must be postmarked within 90 days after publication of this Decision and Order in the Federal Register. *see* 10 CFR 205.286. All applications for refund received within the time limit specified will be processed pursuant to 10 CFR 205.284.

It Is Therefore Ordered That:

(1) The Petition for the Implementation of Special Refund Procedures filed by the Economic Regulatory Administration in Case No. HEF–0190 be granted.

(2) Applications for Refunds from the funds remitted to the Department of Energy by Wallace & Wallace Fuel Oil Company pursuant to the consent order excuted on July 12, 1979, may now be filed.

(3) All applications must be postmarked within 90 days after publication of this Decision and Order in the **Federal Register.**

Date: November 29, 1984.

George B. Breznay,

Director Office of Hearings and Appeals.

(*1*) In *Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 (1984), we noted that describing the threshold in terms of a dollar amount rather than a purchase volume figure would better effectuate our goal of facilitating disbursements to applicants seeking relatively small refunds. *Id.* at 88,210. We believe that the same approach should be followed in this case.

(*2*) In this case, the presumption of injury for small claims not exceeding the $5,000 threshold figure is equivalent to purchases of approximately 200,000 gallons per month during the Wallace consent order period. Applicants whose refund claims exceed the sum of $5,000 during the consent order period, but who cannot furnish additional evidence showing that they were injured by a greater amount, or who choose to limit their claims to the threshold amount, will be eligible for a refund up to the $5,000 threshold amount, without being required to submit any additional evidence of injury. *See* Office of Enforcement, 8 DOE ¶ 82,597 at 85,396 (1981) hereinafter *Vickers*); *See also Ada* at 88,122.

Appendix

Customer

Al Jones Fuel Oil, 110–14 Merrick Blvd., Jamaica, NY 11433
Soho Fuel, 134–04 Farmers Blvd., Jamaica, NY 11434
Vanguard Fuel Oils, Inc., 1255 Atlantic Avenue, Brooklyn, NY 11213
Peoples Fuel, Inc., c/o Ken Pollack, Carib Oil Company, Inc., Brooklyn, NY 11203.

[FR Doc. 84–32358 Filed 12–11–84; 8:45 am]
BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50627; FRL–27342]

Issuance of Experimental Use Permits; American Cyanamid Co., et al.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted experimental use permits to the following applicants. These permits are in accordance with, and subject to, the provisions of 40 CFR Part 172, which defines EPA procedures with respect to the use of pesticides for experimental purposes.

FOR FURTHER INFORMATION CONTACT: By mail, the product manager cited in each experimental use permit at the address below: Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

In person or by telephone: Contact the product manager at the following address at the office location or telephone number cited in each experimental use permit: 1921 Jefferson Davis Highway, Arlington, VA.

SUPPLEMENTARY INFORMATION: EPA has issued the following experimental use permits:

241–EUP–106. Renewal. American Cyanamid Company, P.O. Box 400, Princeton, NJ 08540. This experimental use permit allows the use of 400 pounds of the insecticide (±)cyano(3–phenoxyphenyl)methyl(+)–4–(difluoromethoxy)–alpha–(1 methylethyl)benzeneacetate on various crops to evaluate the control of various insects. A total of 5,000 acres are involved; the program is authorized only in the States of Alabama, Arkansas, Georgia, Louisiana, and Mississippi. The experimental use premit was previously effective from July 18, 1983 to July 18, 1984. The permit is now effective from September 7, 1984 to September 7, 1985. A temporary tolerance for residues of the active ingredient in or on soybeans has been established. (Timothy Gardner, PM 17, Rm. 207, CM#2, (703–557–2690))

1471–EUP–75. Extension. Elanco Products Company, 740 South Alabama St., Indianapolis, IN 46285. This experimental use permit allows the use of 429.75 pounds (361 pounds for apples and 68.75 pounds for grapes) of the fungicide fenarimol on apples and grapes to evaluate the control of certain fungus diseases. A total of 950 acres are involved; the program is authorized only in the States of California, Georgia, Illinois, indiana, Maryland, Michigan, North Carolina, New York, Ohio, Oregon, Pennsylvania, South Carolina, Virginia, Washington, and West Virginia for apples and in the States of California, Michigan, New York, Ohio, Oregon, and Washington for grapes. The experimental use premit is effective from April 19, 1985 to April 19, 1986. A temporary tolerance for residues of the active ingredient in or on apples and grapes has been established. (Henry Jacoby, PM 21, Rm. 227, CM#2, (703–557–1900))

359–EUP–66. Issuance. Rhone-Poulenc, Inc., P.O. Box 125, Black Horse Lane, Monmouth Junction, NJ 08852. This experimetal use permit allows the use of 15,000 pounds of the fungicide iprodione on peanuts to evaluate the control of Sclerotinia blight. A total of 5,000 acres are involved; the program is authorized only in the States of Georgia, North Carolina, Oklahoma, Texas, and Virginia. The experimental use permit is effective from August 20, 1984 to September 30, 1984. A temporary tolerance for residues of the active ingredient in or on peanuts has been established. (Henry Jacoby, PM 21, Rm. 227, CM#2, (703–557–1900))

Persons wishing to review these experimental use permits are referred to the designated product managers. Inquiries concerning these permits should be directed to the persons cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8:00 a.m. to 4:00 p.m., Monday through Friday, excluding legal holidays.

(Sec. 5, Pub. L. 95–396; 92 Stat. 828 (7 U.S.C. 136c))

Dated: November 14, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84–32093 Filed 12–11–84; 8:45 am]
BILLING CODE 6560–50–M

[OPP–30000/30B; FLR–2732–3]

Pentachlorophenol; Preliminary Notice of Determination Concluding the Rebuttable Presumption Against Registration of Pesticide Products Containing Pentachlorophenol for Non-Wood Preservative Uses; Proposed Notice of Intent To Cancel Such Registrations; Notice of Availability of Position Document 2/3

AGENCY: Environmental Protection Agency (EPA).

SUMMARY: This Notice sets forth EPA's preliminary determination regarding the risks and benefits associated with the non-wood preservative uses of pentachlorophenol. On October 18, 1978, EPA issued Notices of Rebuttable Presumption Against Registration (hereafter referred to as Special Review) of pesticide products containing pentachlorophenol for all registered uses. This Notice announces the Agency's proposed decision to cancel registrations of most non-wood uses and modify the terms and conditions of registrations of remaining uses.

DATE: Written comments must be received on or before February 11, 1985.

ADDRESS: Written comments should be sent by mail to: Information Services Section, Program Management and Support Division (TS–757C), Office of Pesticide Program, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

In person bring comments to: Rm 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

In order to facilitate the work of the Agency and of others inspecting the comments, registrants and other interested persons should submit three copies of their comments. The comments should bear the identifying notation OPP–30000/30B. All comments are available for public inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked CBI may be publicly disclosed by EPA without prior notice to the submitter.

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (TS–767C), Office of Pesticide Programs,

Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.
Office location and telephone number: Rm. 711, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703–557–7452).

Copies of the Position Document are available from the contact person at the address given above.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Environmental Protection Agency issued a notice of rebuttable presumption against registration (hereafter referred to as Special Review) for the uses of pesticide products containing pentachlorophenol which was published in the **Federal Register** of October 18, 1978 (48 FR 48443). Issuance of the Notice initiated the Agency's Special Review of the risks and benefits of these products. The rebuttable presumption was issued on the basis of fetotoxicity. The Position Document 1 (PD 1) issued with the Notice of Rebuttable Presumption describes in detail the studies that form the basis for the presumption. In January, 1981, a Position Document 2/3 (PD 2/3) addressed the risks and benefits of the wood preservative uses of pentachlorophenol. Studies indicating the oncogenicity of chlorinated dibenzo-p-dioxins (HxCDD) and hexachlorobenzene (HCB), contaminants of pentachlorophenol, were also detailed in the PD 2/3. Thus a presumption of oncogenicity was added to the previous presumption of fetotoxicity.

This Notice sets forth EPA's preliminary determination regarding the risks and benefits of the non-wood uses of pentachlorophenol. EPA has also prepared a Position Document 2/3 on these uses which describes in detail the reasons for the regulatory actions being proposed here. Copies of this preliminary Notice of Determination and the Position Document are being transmitted to the Secretary of Agriculture, members of the Scientific Advisory Panel, and the registrants of these products. Other interested persons may obtain a copy of the Position Document from the contact person at the address given above. Comments from these groups, as well as from other interested members of the public, are welcome. The Agency will review any comments received in reaching its final regulatory determination.

In broad summary, the Agency has determined that current non-wood preservative uses of pentachlorophenol meet or exceed the risk criteria outlined in 40 CFR 162.11. The Agency has also analyzed the economic, social, and environmental benefits of these uses. In balancing risks and benefits, the Agency considered whether the risks of each use are outweighed by the benefits of the use, what risk reductions could be achieved, and how risk reduction mearsures would affect the benefits of the use.

The Agency has determined that the risks of the non-wood preservative uses of pentachlorophenol are greater than the social, economic, and environmental benefits of these uses. Accordingly, the Agency is proposing to deny applications for and to cancel the registration of products for the following uses:

1. Herbicidal uses:
   a. Greenhouses.
   b. Ornamental lawns and edging.
   c. Rights-of-way.
   d. Commercial and industrial non-crop areas.
   e. Domestic dwellings.
   f. Public facilities.
   g. Golf courses and sand traps.
   h. Wasteland and aquatic areas.
2. Antimicrobial uses:
   a. Evaporative condensors, air washers, cooling towers.
   b. Adhesives, sealants, and canning cements.
   c. Gaskets.
   d. Photographic solutions.
   e. Other uses including latex paints/rubber, defoaming agants, paper coatings, polyvinyl chloride emulsions, zinc-silicone dioxide coatings, and feathers.
   f. Textiles/cordage.
   g. Leather tannery.
   h. Marine caulking/paints.
3. Disinfectant uses:
   a. Mushroom houses.
   b. Construction materials.
4. Mossicide uses:
   a. Roofs.
   b. Lawns.
5. Defoliants.

The Agency is proposing to continue the registered oil well water and pulp/paper mill uses of products containing pentachlorophenol, but with amended terms and conditions of registration. These terms include the use of protective clothing and a reduction in the level of HxCDD contaminants in pentachlorophenol products.

This Notice is organized into five units. Unit I is this Introduction. Unit II, entitled "Legal Background," provides a general discussion of the regulatory framework within which this action is taken. Unit III sets forth a summary of the bases for the regulatory actions which the Agency proposes to implement concerning the non-wood uses of pentachlorophenol. Unit IV sets forth the Agency's proposed regulatory actions. Unit V, Procedural Matters, describes the procedures which EPA will follow in implementing its final regulatory decision.

II. Legal Background

In order to obtain a registration for a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), an applicant for registration must demonstrate that the pesticide satisfies the statutory standard for registration. That standard requires, among other things, that the pesticide perform its intended function without causing "unreasonable adverse effects on the environment". FIFRA section 3(c)(5). The term "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." FIFRA section 2(bb). This standard requires a finding that the benefits of each use of the pesticide exceed the risks of use, when the pesticide is used in accordance with commonly recognized practice and in compliance with the terms and conditions of registration.

The burden of proving that a pesticide satisfies the registration standard is on the proponents of registration and continues as long as the registration remains in effect. Under section 6 of FIFRA, the Administrator may cancel the registration of a pesticide or require modification of the terms and conditions of registration whenever it is determined that the pesticides causes unreasonable adverse effects on the environment. The Agency created the Special Review process to facilitate the identification of pesticide uses which may not satisfy the statutory standard for registration and to provide an informal procedure to gather and evaluate information about the risks and benefits of these uses.

The regulations governing the Special Review process provide that a rebuttable presumption shall arise if a pesticide meets or exceeds a risk criterion set out in the regulations. 40 CFR 162.11(a) and (b). The Agency announces that a Special Review has arisen by issuing a notice for publication in the **Federal Register.** Registrants and other interested persons are invited to review the data upon which the review is based and to submit data and information to rebut the presumption by showing that the Agency's initial determination of risk was in error, or by showing that use of the pesticide is not likely to result in any significant risk to humans or the environment. In addition

to submitting evidence to rebut the risk presumption, commenters may submit evidence as to whether the economic, social, and environmental benefits of the use of the pesticide outweigh the risks of use. Unless all presumptions of risk are rebutted, the Special Review is concluded by issuance of a Notice of Intent to Cancel.

Section 6(b) of FIFRA requires EPA to submit all proposed Notices of Intent to Cancel to the Secretary of Agriculture for comment. Accordingly, the Agency has sent a copy of this Notice and the Position Document to the Secretary and has requested comment within the next 30 days. Section 25(d) of FIFRA requires EPA to solicit the views of the Scientific Advisory Panel, as well. The Agency has provided the same materials to the members of the Panel, asking for their comments within 30 days.

In addition, while not required to do so by statute, EPA has decided to afford all interested persons an opportunity to comment on the basis for the proposed action while the proposed action is under review by the Secretary of Agriculture and members of the Scientific Advisory Panel. Accordingly, appropriate steps are being taken to make copies of the position document available to registrants and other interested persons at the time the decision documents are transmitted for external review. Interested persons will be allowed a 60-day period of time to comment.

After this review period, the Agency will make any changes in the proposed action which are deemed appropriate as a result of the comments received. The Agency will then proceed to implement the desired regulatory action by preparing appropriate documents and issuing them in the manner prescribed by the statute and by the Agency's rules. These procedures are described in Unit IV.

In determining whether the use of a pesticide poses risks which are greater than the benefits, the Agency considers possible changes to the terms and conditions of registration which can reduce risks, and the impacts of such modifications on the benefits of use. If the Agency determines that such changes reduce risks to the level where the benefits outweigh the risks, it may require that such changes be made in the terms and conditions of the registrations. Alternatively, the Agency may determine that no change in the terms and conditions of a registration will adequately assure that use of the pesticide will not pose an unreasonable adverse effect. In the latter case, the Agency will issue a Notice of Intent to Cancel the registration. Adversely affected persons may also request a hearing on the cancellation of a specified registration and use, and, if they do so in a legally effective manner, that registration and use will be maintained pending a decision at the close of an administrative hearing.

III. Determinations and Announcement of Regulatory Actions

The Agency has considered information regarding the risks of the non-wood preservative uses of pentachlorophenol as well as the economic and other benefits associated with the use of these chemicals. Detailed information on the risk and benefit information considered by the Agency appears in the PD 2/3, which sets forth the Agency's reasons for concluding this special Review.

A. Determinations of Risk

Pentachlorophenol, commonly called "penta," is a buff colored crystal manufactured by the chlorination of molten phenol with a catalyst. The major commercial forms of penta are as an unmodified phenol, a sodium salt and, to a lesser extent, a potassium salt.

The pentachlorophenol Special Review was based on information indicating that pentachlorophenol poses the risks of fetotoxicity and, due to the HxCDD and HCB contaminants, oncogenicity to humans. The range of Margins of Safety (MOS) for fetotoxic effects for pentachlorophenol is .18—>10,000. The ranges of MOS values for fetotoxic effects for HxCDD are .39—>10,000 and 5.9—>10,000, considering 15 ppm and 1 ppm, respectively. The oncogenic risk estimates using average daily lifetime HxCDD exposure range from 10^{-2}—10^{-6} considering 15 ppm HxCDD, and 10^{-3}—10^{-8} considering 1 ppm HxCDD. In assessing risks associated with these chemicals, the Agency has considered two factors: The toxic effects of the chemical and the anticipated extent of exposure. Each will be discussed below.

Fetotoxicity. The Agency has reviewed studies on the fetotoxic effects of purified and commercial grade penta in rats. Teratogenic effects were reported when rats were exposed to two unspecified isomers of HxCDD and mice were exposed to HCB.

The Agency has evaluated the data regarding the fetotoxic effects of pentachlorophenol and has concluded that it has the potential of fetotoxcity in humans.

Oncogenicity. The Agency has evaluated studies in which oral administration of HxCDD to both rats and mice caused an increased incidence of neoplastic nodules and carcinomas. Dietary administration of HCB to hamsters caused in increased incidence of hepatomas. References to these studies appear in the PD 2/3, along with the Agency's analyses of public comments concerning oncogenicity.

Exposure assessment. Exposure data indicate that applicators are subject to dermal and inhalation exposure to products containing penta. The application of pentachorophenol into oil well flood waters and pulp/paper mill solutions is by injection pump. There is negligible exposure as a result of this use of pentachlorophenol. Quantitative exposure estimates for each use are listed in Table II–6 of the PD 2/3 for the non-wood preservative uses of pentachlorophenol.

B. Determination of Benefits

The risks for all use situations are of sufficient magnitude to require the Agency to determine whether they are offset by their social, economic, or environmental benefits.

The non-wood uses of pentachlorophenol fall into the following categories: Herbicides, antimicrobials, disinfectants, mossicides, and defoliants.

Pentachlorophenol is registered for use on the following sites as a non-specific, non-residual contact herbicide: Greenhouses, ornamental lawns, rights-of-way, commerical and industrial non-crop areas, domestic dwellings, medical facilities, schools, golf courses, sand traps, wasteland areas, aquatic areas and drainage ditch banks.

Uses of pentachlorophenol as an antimicrobial agent to control bacterial and fungal growth include: Working solutions (oil well flood waters, evaporative condenser cooling waters, cooling tower waters, air washers); finished product preservative (adhesives and sealants, latex paints, rubber articles, defoaming agents, paper coatings, polyvinyl chloride emulsions in food-related products, zinc-silicone dioxide matrix coatings in reusable bulk food storage containers, and water-based gasketing compounds for food applications, photographic developing solutions, cements in food can ends and seams, feathers); working fluids and process chemicals in the textile industry; pulp and paper mill solutions and products; leather tannery solutions and products; and, marine anti-fouling agents.

Pentachlorophenol is also used as a disinfectant in mushroom houses and a mildewicide in a variety of construction materials.

As a mossicide, pentachlorophenol is used to control moss on lawns and roofs.

Pentachlorophenol is registered as a defoliant aid in seed crop harvesting of alfalfa, clover, birds foot trefoil, and lespedeza.

A brief summary of the projected economic impact for each use is provided below. A more detailed discussion of the economic impacts is found in the PD 2/3.

1. Herbicidal uses: There are numerous, less costly alternatives whose efficacy is equal to or greater than penta. The Agency does not expect the cancellation of these uses to cause significant economic impact.

2. Antimicrobial Uses:

a. *Oil well water and pulp/paper mill solutions.* Pentachlorophenol is used to control microorganism growth in oil well water and pulp/paper mill solutions. While there are no data to quantitatively estimate the benefits associated with these uses, data indicate that pentachlorophenol is effective against fungi and some of the available alternatives have disadvantages such as foaming and corrosion of surfaces.

b. *Evaporative condensors, air washers, and cooling towers.* The Agency believes the economic impacts of cancellation of these uses to be small, based on low usage and availability of alternatives.

c. *Adhesives, sealants, and canning cements.* Alternatives are available for these uses and the economic impact of cancellation will not be significant.

d. *Gaskets.* While there are no viable alternatives, the economic impact of cancellation will not be significant because of low usage.

(e) *Photographic developing solutions.* While there are no alternatives for this use, aside from improved housekeeping practices, the economic impact is not expected to be significant because of low usage.

f. *Other uses including latex paints/rubber, defoaming agents, paper coatings, polyvinyl chloride emulsions, zinc-silicone dioxide coatings, and feathers.* The Agency believes that cancellation of these uses will not result in significant economic impacts based on the low usage and the cost differences between available alternatives and pentachlorophenol.

g. *Textile/cordage.* There are numerous alternatives for these uses and data indicate that usage has dropped between 1978 and 1981. The Agency does not believe that cancellation will result in a significant economic impact.

h. *Leather tannery.* There are numerous alternatives for these uses and data indicate that usage has dropped over the years. The Agency does not believe that cancellation will result in a significant economic impact.

i. *Marine caulking/paints.* Alternatives exist for these uses and the Agency does not believe that cancellation will result in a significant economic impact.

3. Disinfectant uses:

a. *Mushroom houses.* Alternatives exist for this use and, despite its usage by approximately one third of the mushroom industry, cancellation is expected to have a minor impact, relative to the value of the affected produce.

b. *Construction materials.* The Agency has no data indicating that pentachlorophenol is still used in these materials. The Agency believes that any economic impact will not be significant.

4. Mossicide Uses:

a. *Roofs.* Few alternatives are available for this use. Significant local impacts from cancellation may occur; these impacts will probably be confined to the northwestern States.

b. *Lawns.* Few alternatives are available for this use. Significant local impacts from cancellation may occur and should be confined to the northwestern States.

5. Defoliant uses: Alternatives for these uses are available and the impact of cancellation will not be significant.

C. Determination of Unreasonable Adverse Effects

Based on the determinations summarized above and discussed in greater detail in the PD 2/3, the Agency is proposing to initiate the following regulatory actions and this document shall constitute its notice of intent regarding these actions.

The Agency has determined that the risk arising from all uses, except the oil well water injection and pulp/paper mill uses, are greater than the social, economic, and environmental benefits arising from these uses and that the registrations of these uses should be cancelled and applications for these uses should be denied. The use of pentachlorophenol as mossicide on lawns and roofs may result in a significant economic impact in the northwestern States of Washington and Oregon. However, the estimated oncogenic risks associated with this use range from 10^{-3} to 10^{-5} for 15 ppm and 1 ppm HxCCD, respectively. The MOS values for fetotoxic effects range from .39 to 3.3 for 15 ppm HxCDD and 5.9 to 50 for 1 ppm, respectively.

The Agency has determined that the risks associated with the oil well water and pulp/paper mill uses do not outweigh the social, economic, and environmental benefits provided impermeable gloves are worn during the handling of pentachlorophenol; eating, drinking, and smoking is prohibited during application; and the level of HxCCD is reduced to 1 ppm.

D. Proposed Regulatory Actions

Based on the determinations summarized above and discussed in greater detail in the PD 2/3, the Agency has determined that most uses of pesticide products containing pentachlorophenol do not meet the statutory standard for registration under FIFRA and that there are no modifications of the terms and conditions of registration which could bring these products into compliance with the statute. Accordingly, EPA proposes to take the following regulatory actions necessary to eliminate environmental exposure to pentachlorophenol products.

1. *Federally registered pesticide products.* Unless comment on this Notice convinces the Agency otherwise, EPA proposes to continue the registrations of pentachlorophenol products registered for use in oil well water and pulp/paper mills but amend the terms and conditions of the registration to require that impermeable gloves be worn during the handling of pentachlorophenol and that the HxCDD content be required to be reduced from 15 ppm to 1 ppm. Labels of pentachlorophenol products registered for the two uses mentioned above would be modified to include the following statement:

Applicators must wear gloves impervious to pentachlorophenol (e.g., polyvinyl acetate (PVA), polyvinyl choride (PVC), neoprene, NBR (Buna-N), and nitrile) in all situations where dermal contact is expected.

Additionally, EPA proposes to cancel the registration of each Federally registered pesticide product for non-wood preservative uses of the active ingredient pentachlorophenol whether registered under FIFRA sec. 3 or sec. 24(c).

1. Heribicidal uses:

a. Greenhouses.

b. Ornamental lawns and edging.

c. Rights-of-way.

d. Commercial and industrial non-crop areas.

e. Domestic dwellings.

f. Public facilities.

g. Golf courses and sand traps.

h. Wasteland and aquatic areas.

2. Antimicrobial uses:
a. Evaporative condensors, air washers, cooling towers.
b. Adhesives, sealants, and canning cements.
c. Gaskets.
d. Photographic solutions.
e. Other uses including latex paints/rubber, defoaming agents, paper coatings, polyvinyl chloride emulsions, zinc-silicone dioxide coatings, and feathers.
f. Textiles/cordage.
g. Leather tannery.
h. Marine caulking/paints.
3. Disinfectant uses:
a. Mushroom houses.
b. Construction materials.
4. Mossicide uses:
a. Roofs.
b. Lawns.
5. Defoliants.

2. *"Intrastate" pesticide products.* Using the procedures described in Unit IV.B of this Notice, EPA will require producers of "intrastate" products containing pentachlorophenol to submit applications for Federal registration of their pesticide products. If a timely application is not received, EPA will treat the producer's previously submitted Notice of Intent to Apply as an application. Unless comment on this Notice convinces the Agency otherwise, EPA proposes to deny all such applications.

3. *Existing stocks.* Under the authority of FIFRA section 6(a)(1) and (b), EPA proposes to establish certain limitations on the sale, distribution, and use of existing stocks of pentachlorophenol products subject to any final cancellation Notice. EPA proposes to define the term "existing stocks" to mean any quantity of pentachlorophenol product in the United States on the date of the Agency's final Notice of Intent to Cancel that has been formulated, packaged, and labeled and that either is being held for shipment or release or has been shipped or released into commerce.

EPA proposes to allow the sale and distribution of those existing stocks of pentachlorophenol products for up to 1 year after publication of the Agency's final Notice of Intent to Cancel in the **Federal Register.** Further, EPA proposes to allow use of existing stocks for up to 2 years following the date of publication of the Agency's final Notice of Intent to Cancel in the **Federal Register.** In order to implement this proposed requirement, EPA may also require registrants to relabel existing stocks in their possession to indicate the time limitations on distribution, sale, and use. In addition, EPA may also require registrants to contact commercial distributors of pentachlorophenol products, to inform them of the time limitations on distribution, sale, and use, and to provide supplemental labeling reflecting the time limitations for existing stocks in the possession of the commercial distributors.

Following expiration of the time limitations on distribution, sale, or use of existing stocks, disposal of existing stocks would be in accordance with the requirements of the Resources Conservation and Recovery Act.

IV. Procedural Matters

This Notice announces the Agency's proposal to prohibit use of pentachlorophenol by cancelling all Federally registered uses and by denying all applications for Federally registered use of intrastate products, except the oil well water and the pulp/paper mill uses. This unit of the Notice describes the procedures for referral of this Notice to the Secretary of Agriculture and the Scientific Advisory Panel for review as required by FIFRA sections 6(b) and 25(d). In addition, this unit describes the procedures EPA will follow to implement its regulatory decision for intreatate pesticide products once a final decision is issued.

Finally, under sections 6(b)(1) and 3(c)(6) of FIFRA, applicants, registrants, and certain other adversely affected parties would be able to request a hearing on any cancellation and denial actions that the Agency finally initiates. Unless a hearing is properly requested with regard to a particular registration or application, the registration would be cancelled or the application denied. This unit of the Notice also explains how such persons will be able to request a hearing in the event that EPA issues a final cancellation and denial Notice (and the consequences of requesting a hearing and failing to request a hearing in accordance with those procedures).

A. Referral to the Secretary of Agriculture and the Scientific Advisory Panel

As required by FIFRA secs. 6(b) and 25(d), EPA has transmitted copies of this Notice, together with the supporting PD 2/3, to the Secretary of Agriculture and the Scientific Advisory Panel. (See Unit II.)

If either the Secretary or the Panel comments in writing on EPA's proposed action within 30 days of receipt of the proposal, EPA must issue the comments and EPA's responses with the final Notice of Intent to Cancel for publication in the **Federal Register.** Moreover, unless the time constraints are waived or modified, the Agency may not issue the final Notice of Intent to Cancel sooner than 60 days after sending this Notice to the Secretary and the Panel. If neither the Secretary nor the Panel comments within the 30 days, however, EPA could issue its final Notice of Intent to Cancel at the end of the 30-day comment period.

B. Intrastate Products

Historically, the registration requirements imposed on intrastate products have differed from the requirements for products distributed in interstate commerce. As described below, these differences dictate that the Agency use special procedures for bringing intrastate products into conformity with the final regulatory decisions reached in this Special Review.

Prior to 1972, pesticides produced and distributed solely in intrastate commerce were not subject to registration or any other requirements of FIFRA. The 1972 amendment to FIFRA for the first time made it a violation of Federal law to sell or distribute unregistered intrastate pesticide products. EPA issued registration regulations (40 CFR Part 162) implementing the 1972 amendments which, among other things, required immediate registration of all intrastate products unless the products were currently registered by a State and the producer submitted a notice of application for Federal registration to the Agency. 40 CFR 162.17. Under this regulation, notices of application were filed for numerous pentachlorophenol products which are now being considered in this Special Review proceeding. The regulation further provided that, before taking any enforcement action against any unregistered intrastate product complying with 40 CFR 162.17, the agency would notify the producer of the product that he was required to submit a complete application for Federal registration, and the Agency would review and rule on the application.

Accordingly, in order to bring these intrastate products into conformity with the Agency's final regulatory decision, EPA hereby notifies the producers of all potentially affected intrastate pentachlorophenol products that they are required to submit a complete application for Federal registration. The Agency has decided to require that these applications must be submitted within 60 days of the date on which this Notice is published in the **Federal Register** or the date on which the intrastate producer receives a copy of this Notice, whichever is later. If an intrastate producer fails to submit a

timely application, EPA will consider his Notice of Intent to Apply as an application for Federal registration for purposes of the review described below.

In addition, for purposes of FIFRA Section 3(c)(6), this Notice also constitutes a Notice of Intent to Deny applications of most non-wood preservative uses of pentachlorophenol, submitted pursuant to 40 CFR 162.17. The statute provides applicants with a 30-day period in which to correct the application to make it acceptable for registration. EPA, however, has proposed a determination that there are no changes in the terms and conditions of most non-wood preservative uses of pentachlorophenol products that would make pentachlorophenol products acceptable for registration. Intrastate producers may, if they choose, submit applications for registration with additional terms and conditions on use that they feel would satisfy the statutory standards for registration. If EPA issues a final notice of intent to cancel registrations for most non-wood uses of pentachlorophenol, it will also issue a final notice denying applications pursuant to 40 CFR 162.17.

EPA will review all applications submitted. If EPA decides, based on comments received on this Notice, to issue a final notice allowing continued use of most non-wood preservative uses of pentachlorophenol under some circumstances, EPA will notify intrastate producers of that decision and allow them at least 30 days in which to make changes that would allow EPA to approve the application. If the application has not been corrected within the period allowed so that EPA would approve it, the application may be denied. On the other hand, if, after reviewing the comments on this Notice, EPA decides that it is still necessary to cancel most registered uses of the non-wood preservative uses of pentachlorophenol, the Agency will issue a final Notice of Denial for all applications for Federally registered non-wood preservative uses of intrastate pesticide products containing pentachlorophenol.

Under FIFRA section 3(c)(6), the issuance of a denial entitles an applicant, or other interested person with the concurrence of the applicant, to request an adjudicatory hearing to challenge the denial decision. The procedures for requesting a hearing and the consequences of not filing a request are discussed below in Unit IV.C.

Concurrent with publication of this Notice, EPA will send a letter, together with a copy of this Notice, to the producers of all potentially affected intrastate pesticides. This letter will announce that EPA has issued its Preliminary Notice of Determination and that the public may comment on the Agency's proposed regulatory position regarding the registrability of various non-wood preservative uses of pentachlorophenol. This letter will also describe the procedures that the Agency will follow in assuring that all sale and distribution of intrastate products will comply with the terms of the final decision on the non-wood preservative uses of pentachlorophenol. Specifically, the letter will inform intrastate producers that they are required to file applications for Federal registration of their products within 60 days of receipt of the Agency's letter or within 60 days of publication of this Notice in the **Federal Register**, whichever is later. Finally, the letter will explain other rights and obligations of intrastate producers under FIFRA, the registration regulations, and the procedures described in this Notice.

C. Procedures for Requesting a Cancellation or Denial Hearing

Registrants, applicants, and other parties who would be adversely affected by any decision to cancel or deny applications for the registration for the non-wood preservative uses of pentachlorophenol would be entitled to request a hearing in which to contest EPA's final decision to cancel registrations and deny applications. Under FIFRA, they must submit their requests for a hearing within 30 days either of receipt of the final Notice of Intent to Cancel or Notice of Denial or of its publication in the **Federal Register**, whichever is later. In addition, a hearing request would have to contain certain information concerning the basis of the request, as EPA will explain in detail in any final Notice of Intent to Cancel or Notice of Denial. If a timely, properly formulated hearing request is submitted, the product registrations which are the subject of the request will remain in effect during the cancellation hearing. Similarly, applications with respect to which valid and timely hearing requests have been filed remain pending unless and until they are denied or granted by order of the Administrator at the conclusion of the hearing.

If a proper and timely hearing request is not submitted for a product, registration of that product would be cancelled, or in the case of intrastate products, the application would be finally denied by operation of law 30 days after the final Notice of Intent to Cancel or Notice of Denial was issued. A final cancellation or denial would have the effect of prohibiting further sale and distribution, except as specified in the existing stocks provisions of the Notice.

It should be noted that registrants and applicants are not required to request a hearing at this time in order to be allowed to continue to sell and distribute their products.

Dated: November 20, 1984.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 84-31968 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[PP1G2539/T468; FRL-2732-5]

Methoprene; Renewal of Temporary Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has renewed temporary tolerances for residues of the insect growth regulator methoprene in or on certain raw agricultural commodities.

DATE: These temporary tolerances expire September 21, 1986.

FOR FURTHER INFORMATION CONTACT:

By mail: Timothy Gardner, Product Manager (PM) 17, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460

Office location and telephone number: Rm. 207, CM#2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-2690).

SUPPLEMENTARY INFORMATION: EPA issued a notice that was published in the **Federal Register** of November 17, 1982 (47 FR 51790) stating that temporary tolerances had been established for residues of the insect growth regulator methoprene (isopropyl (*E,E*)-11-methoxy-3, 7,11-trimethyl-2,4 dodecadienoate in or on the raw agricultural commodities almonds, cashews, chestnuts, cocoa beans, coffee beans, hazelnuts, macadamia nuts, pecans, walnuts, dried beans and dried peas at 10.0 parts per million (ppm) and would expire June 21, 1984. These tolerances were renewed in response to pesticide petition PP 1G2539 submitted by Zoecon Corporation, 975 California Ave., Palo Alto, CA 94304. A related food additive regulation [FAP 1H5312/R711] establishing temporary tolerances for the insect growth regulator in or on raisins, wheat flour, macaroni (wheat), rice cereal, rye cereal, barley cereal, wheat cereal, corn cereal, corn meal, grits, hominy, oat cereal, spices, dry dog food, dried apples, dried apricots, dried

peaches, and dried prunes at 10.0 ppm appears elsewhere in this issue of the Federal Register.

These temporary tolerances will permit the marketing of the above raw agricultural commodities when treated in accordance with the provisions of experimental use permit 20954–EUP–20, which is being renewed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, (Pub. L. 95–396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that a renewal of the temporary tolerances will protect the public health. Therefore, the temporary tolerances have been renewed on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active ingredient to be used must not exceed the quantity authorized by the experimental use permit.

2. Zoecon Corp. must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance, and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

These tolerances expire September 21, 1986. Residues not in excess of this amount remaining in or on the above raw agricultural commodities after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerances. These tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–534, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

(Sec. 408(j), 68 Stat. 516 (21 U.S.C. 345a(j)))

Dated: November 27, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84–31967 Filed 12–11–84; 8:45 am]

BILLING CODE 6560–50–M

[PP 4G3037/T472; FRL–2734–3]

Iprodione; Establishment of Temporary Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established temporary tolerances for the combined residues of the fungicide iprodione, its isomer, and its metabolite in or on certain raw agricultural commodities. These temporary tolerances were requested by Rhone-Poulenc, Inc.

DATE: There temporary tolerances expired September 30, 1984.

FOR FURTHER INFORMATION CONTACT: By mail: Henry Jacoby, Product Manager (PM) 21, Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460 Office location and telephone number: Rm. 229, CM#2, 1921 Jefferson Davis Highway, Arlington, VA (703–557–1900).

SUPPLEMENTARY INFORMATION: Rhone-Poulenc, Inc., Agrochemical Division, P.O. Box 125 Monmouth Junction, NJ 08852, has requested in pesticide petition PP 4G3037 the establishment of temporary tolerances for the combined residues of the fungicide iprodione [3–(3,5-dichlorophenyl)-*N*-(1-methylethy l)-2,4-dioxo-1-imidazolidine-carboxamide], its isomer [3-(1-methylethy l]-*N*-3,5-dichloropheny l)-2,4-dioxo-1-imidazolidinecarboxamide], and its metabolite [3–(3,5-dichloropheny l)-2,4-dioxo-1-imidazolidinecarboxamide], in or on the raw agricultural commodities peanuts at 0.1 part million (ppm), peanut forage and haw at 150 ppm, and peanut hulls at 7.0 ppm; and for the combined residues of iprodione and its non-hydroxylated metabolites in or on the raw agricultural commodities meat, fat, and meat byproducts (excluding liver and kidney) of cattle, hogs, goats, horses, and sheep at 0.6 ppm, kidney of cattle, hogs, goats, horses, and sheep at 3.0 ppm, liver of cattle, hogs, goats, horses, and sheep at 2.0 ppm, meat, fat, and meat byproducts of poultry at 0.05 ppm, and eggs at 0.01 ppm.

These temporary tolerances will permit the marketing of the above raw argicultural commodities when treated in accordance with the provisions of the experimental use permit 359–EUP–66, which is being issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, (Pub. L. 95–396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that establishment of the temporary tolerances will protect the public health. Therefore, the temporary tolerances have been established on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active ingredient to be used must not exceed the quantity authorized by the experimental use permit.

2. Rhone-Poulenc, Inc., must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

These tolerances expired September 30, 1984. Residues not in excess of these amounts remaining in or on the raw agricultural commodities after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerances. These tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocations is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirments of section 3 of Executive Order 12291.

Pursuant to the requireemnts of the Regulatory Flexibility Act (Pub. L. 96–534, 94 Stat. 1164, 5 U.S.C. 610–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

(Sec. 408(j), 68 Stat. 516 (21 U.S.C. 346a(j)))

Dated: November 14, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84-32089 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[OPP-100016; FRL-2733-5]

Battelle Columbus Laboratories; Transfer of Data to Contractor

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA plans to transfer information submitted under sections 3, 6, and 7 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to Battelle Columbus Laboratories, 505 King Avenue, Columbus, OH 43201, under Contract No. 68-03-3229. This contractor shall perform services for the Office of Pesticide Programs (OPP) of EPA. Some of the information that will be made available to the contractor has been claimed to be confidential business information (CBI). Information will be transferred to the contractor consistent with the requirements of 40 CFR 2.301(h). This action will enable the contractor to fulfill the obligations of the contract, and this notice serves to notify affected persons.

DATE: Columbus Battelle Laboratories will be given access to these documents no sooner than December 17, 1984.

FOR FURTHER INFORMATION CONTACT:

By mail: William C. Grosse, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 222, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-2613).

SUPPLEMENTARY INFORMATION: Under this contract, Battlelle Columbus Laboratories shall review and evaluate reports in assessment of hazards posed by chemical pollutants in support of EPA's regulatory programs.

Section 10(e) of FIFRA provides that information that is considered by the submitter to be trade secret or commercial or financial as described by FIFRA section 10(d) may be disclosed to an authorized contractor when such disclosure is necessary for the performance of the contract. EPA routinely receives such CBI as part of the data that are submitted by pesticide registrants and others as provided for in FIFRA sections 3, 6, and 7.

Contractors are authorized to receive such data if the EPA program office managing the contract makes the determinations specified in 40 CFR 2.301(h)(2) as referenced in § 2.307. Such determinations have been made concerning the contract with Battelle Columbus Laboratories.

FIFRA section 10(f) provides a criminal penalty for wrongful disclosure of confidential business information, whether such disclosure is made by an EPA employee or an EPA contractor.

The contract with Battelle Columbus Laboratories, specifically prohibits disclosure of confidential business information to any third party in any form without written authorization from EPA, and pesonnel of this contractor will be required to sign a nondisclosure agreement before thay are permitted access to such information.

Dated: November 29, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

[FR Doc. 84-32096 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[OPP-100015; FRL-2733-6]

Versar, Inc., and Arthur D. Little, Inc.; Transfer of Data to Contractors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA plans to transfer information submitted under sections 3, 6, and 7 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to Versar, Inc., 6850 Versar Center, P.O. Box 1549, Springfield, VA 22151, under Contract No. 68-01-6740 and to Arthur D. Little, Inc., Acorn Park, Cambridge, MA 02140, under Contract No. 68-01-6951. These contractors shall perform services for the Office of Pesticide Programs (OPP) of EPA. Some of the information that will be made available to the contractors has been claimed to be confidential business information (CBI). Information will be transferred to the contractors consistent with the requirements of 40 CFR 2.301(h). These actions will enable the contractors to fulfill the obligations of the contracts, and this notice serves to notify affected persons.

DATE: Versar, Inc., and Arthur D. Little, Inc., will be given access to these documents no sooner than December 17, 1984.

FOR FURTHER INFORMATION CONTACT:

By mail: William C. Grosse, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 222, CM#2, 1921 Jefferson Davis Highway, Arlington, Virginia (703-557-2613).

SUPPLEMENTARY INFORMATION: Under this contract, Versar, Inc., and Arthur D. Little, Inc., shall organize, inventory, and analyze pesticide information in support of EPA's regulatory programs.

Section 10(e) of FIFRA provides that information that is considered by the submitter to be trade secret or commercial or financial as described by FIFRA section 10(d) may be disclosed to an authorized contractor when such disclosure is necessary for the performance of the contract. EPA routinely receives such CBI as part of the data that are submitted by pesticide registrants and others as provided for in FIFRA sections 3, 6, and 7. Contractors are authorized to receive such data if the EPA program office managing the contract makes the determinations specified in 40 CFR 2.301(h)(2) as referenced in § 2.307. Such determinations have been made concerning the contracts with Versar, Inc., and Arthur D. Little, Inc.

FIFRA section 10(f) provides a criminal penalty for wrongful disclosure of confidential information, whether such disclosure is made by an EPA employee or an EPA contractor.

The contracts with Versar, Inc., and Arthur C. Little, Inc., specifically prohibit disclosure of confidential business information to any third party in any form without written authorization from EPA, and personnel of these contractors will be required to sign a nondisclosure agreement before they are permitted access to such information.

Dated: November 29, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

[FR Doc. 84-32095 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[PF-398; FRL-2731-6]

Pesticide Tolerance Petitions; Certain Companies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received pesticide, food and feed additive petitions relating to the establishment of tolerances for certain pesticide chemicals in or on certain agricultural commodities.

ADDRESS: By mail, submit comments identified by the document control number [PF–398] and the petition number, attention Product Manager (PM–21), at the following address:

Information Services Section (TS–757C), Program Managaement and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

In person, bring comments to:

Information Services Section (TS–757C), Environmental Protection Agency, Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed in response to this notice will be available for public inspection in the Information Services Section office at the address given above, from 8 a.m., to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT:

By mail: Henry Jacoby, (PM–21), Registration Division (TS–767C), Environmental Protection Agency, Office of Pesticide Programs, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 229, CM#2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703–557–1900).

SUPPLEMENTARY INFORMATION: EPA has received pesticide (PP) and food/feed additive petitions (FAP) relating to the establishment of tolerances for certain pesticide chemicals in or on certain agricultural commodities.

Initial Filings

1. *PP 4F3150.* Rhone Poulenc Inc., P.O. Box 125, Black Horse Lane, Monmouth Junction, NJ 08852. Proposes to amend 40 CFR 180.399 by establishing tolerances for the combined residues of the fungicide iprodione [3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboximide], its isomer [3-(1-methylethyl)-*N*-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide], and its metabolite [3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide] in or on the commodities as follows:

Commodities	Parts per million (ppm)
Beans, dry	2.0
Beans, forage	30.0
Beans, hay	90.0
Beans, succulent	2.0

The proposed analytical method for determining residues is gas liquid chromatography with electron capture detection.

2. *FAP 4H5440.* Rhone Poulenc, Inc. Proposes amending 21 CFR Parts 193 (food commodity), and 561 (feed commodity), by establishing tolerances for the combined residues of the fungicide iprodione [3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboximide], its isomer [3-(1-methylethyl)-*N*-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide], and its metabolite [3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide] in or on the commodities as follows:

Petition ID	CFR affected	Commodities	Parts per million (ppm)
FAP 4H5440	21 CFR Part 193	Oil, crude (of peanut fractions)	1.0
FAP 4H5440	21 CFR Part 561	Soapstock (of peanut fractions)	10.0

3. *PP 4F3129.* Rhone Poulenc Inc. Proposes amending 40 CFR 180.399 by establishing tolerances for the combined residues of the fungicide iprodione and its metabolites in or on the commodities as follows:

a. Iprodione [3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboximide], its isomer [3-(1-methylethyl)-*N*-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboximide], and its metabolite [3-(3,5-dichloro-phenyl)-2,4-dioxo-1-imidazolidinecarboximide], in or on peanuts at 0.5 ppm, peanut forage and hay at 150 ppm, and peanut hulls at 7.0 ppm.

b. Iprodione 3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboximide and its non-hydroxylated metabolites (expressed as Iprodione equivalents) in or on the following:

Commodities	Parts per million (ppm)
Eggs	0.01
Kidney of cattle, goats, hogs, horses and sheep	3.0
Liver of cattle, goats, hogs, horses, and sheep	2.0
Meat, fat, and meat byproducts (mbyp) (excluding liver and kidney) of cattle, goats, hogs, horses, and sheep	0.6
Meat, fat, and mbyp of poultry	0.05

c. Iprodione [3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboximide and its non-hydroxylated and hydroxylated metabolites (expressed as iprodione equivalents) in or on milk at 0.4 ppm.

The proposed analytical method for determining residues is gas liquid chromatography with electron capture detection.

4. *FAP 5H5449.* E.I. duPont de Nemours & Co., Wilmington, DE 19898. Proposes amending 21 CFR Part 561 by establishing a regulation permitting residues of the fungicide bis(4-fluorophenyl)methyl(1*H*-1,2,4-triazol-1-ylmethyl)silane in or on apple pomace at 1.5 ppm.

5. *FAP 5H5447.* E.I. duPont de Nemours & Co. Proposes amending 21 CFR Part 193 by establishing a regulation permitting residues of the above fungicide (FAP 5H5449) in or on peanut oil at 1.5 ppm.

(Sec. 408(d)(2) 68 Stat. 512, (21 U.S.C. 346a(d)(2)). 409(c)(1), 72 Stat. 1786 (21 U.S.C. 348(c)(1)))

Dated: November 28, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84–32284 Filed 12–11–84; 8:45 am]

BILLING CODE 6560–50–M

[PF–397; FRL–2731–8]

Pesticide Tolerance Petitions; Certain Companies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received pesticide petitions relating to the establishment and/or amendment of tolerances for certain pesticide chemicals in or on certain raw agricultural commodities.

ADDRESS: By mail, submit comments indentified by the document control number [PF–397] and the petition number, attention Product Manager (PM) named in each petition, at the following address:

Information Services Section (TS–757C), Program Management and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

In person, bring comments to:
Information Services Section (TS–757C), Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed in response to this notice will be available for public inspection in the Information Services Section office at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays

FOR FURTHER INFORMATION CONTACT: By mail: Registration Division (TS–767C), Attn: (Product Manager (PM) named in each petition), Environmental Protection Agency, Office of Pesticide Programs, 401 M St., SW., Washington, D.C. 20460.

In person: Contact the PM named in each petition at the following office location/telephone number:

Product manager	Office location and telephone No.	Address
PM–12, Jay Ellenberger.	Rm. 202, CM#2 (703–557–2386).	EPA, 1921 Jefferson Davis Hwy, Arlington, VA 22202.
PM–16, William Miller.	Rm. 211, CM#2 (703–557–2600).	Do.
PM–23, Richard Mountfort.	Rm. 247, CM#2 (703–557–1830).	Do.

SUPPLEMENTARY INFORMATION: EPA has received pesticide petitions (PP) relating to the establishment and/or amendment of tolerances for certain pesticide chemicals in or on certain agricultural commodities.

I. Initial Filing

PP 5F3162 & *PP 5F3163.* FMC Corp., 2000 Market St., Philadelphia, PA 19103. Proposes amending 40 CFR 180.254 by establishing tolerances for the combined residues of the insecticide carbofuran (2, 3-dihydro-2,2-dimethyl-7-benzofuranyl-*n*-methylcarbamate);its carbamate cholinesterase-inhibiting metabolites (2,3-dihydro-2,2-dimethyl-3-hydroxy-7-benzofuranyl-*n*-methyl carbamate; 2,3-dihydro-2,2-dimethyl-3-keto-7-benzofuranyl-*n*-methylcarbamate) and its phenolic metabolites (2,3-dihydro-2,2-dimethyl-7-benzofuranol; 2,3-dihydro-2,2-dimethyl-3-oxo-7-benzofurandiol and 2,3 dihydro-2,2-dimethyl-3,7-benzofurandiol benzofruandiol) in or on the raw agricultural commodities as follows:

Petition ID	Commodities	Parts per million (ppm)
PP 5F3162	Sorghum fodder (of which no more than 1.0 ppm is carbamates).	9.0
PP 5F3162	Sorghum grain (of which no more than 0.1 ppm is carbamates).	0.6
PP 5F3163	Alfalfa green (of which no more than 5 ppm are carbamates).	10.0
	Alfalfa hay (of which no more than 20 ppm are carbamates).	40.0
	Kidney and liver of cattle, goats, hogs, horses, and sheep; (of which no more than .02 ppm is carbamates).	.05
	Meat, fat and meat byproducts (mbyp) (except liver and kidney) of cattle, goats, hogs, horses, and sheep (of which no more than .02 ppm is carbamates).	.05
	Milk (of which no more) than .02 ppm is carbamates.	0.1

The proposed analytical method for determining residues is gas chromatography with a nitrogen-phosphorus flame ionization detector. (PM-12).

II. Amended Petitions

1. *PP 3F2958.* Ciba-Geigy Corp., Agricultural Division, P.O. Box 18300, Greensboro, NC 27419. EPA issued a notice published in the **Federal Register** of September 30, 1983 (48 FR 44903) which announced that Ciba Geigy Corp., had submitted pesticide petition 3F2958 to the Agency proposing to amend 40 CFR 180.368 by establishing tolerances for the combined residues of the herbicide metolachlor [2-chloro-*N*-(2-ethyl-6-methylphenyl)-*N*-(2-methoxy-1-methylethyl) acetamide] and its metabolites determined as 2-[(2-ethyl-6-methylphenyl)-amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as parent metolachlor in or on the commodities almond hulls at 0.3 ppm; almond shells at 0.1 ppm; and nutmeats at 0.1 ppm.

Ciba-Geigy has amended the petition by increasing the tolerance level for almond hulls from 0.3 ppm to 0.5 ppm, deleting almond shells, and changing the commodity expression "nutmeats" to "tree nuts" at 0.1 ppm. The proposed analytical method for determining residues is gas chromatography. (PM-23).

2. *PP OF2356.* Mobay Chemical Corp., P.O. Box 4913, Kansas City, MO 64120. EPA issued a notice published in the **Federal Register** of July 9, 1980 (45 FR 46201) which announced that: Mobay Chemical Corp., has submitted pesticide petition OF2356 to the Agency proposing to amend 40 CFR 180.320 by establishing a tolerance for the insecticide/bird repellent 3,5-dimethyl-4-(methylthio) phenyl methylcarbamate and its cholinesterase-inhibiting metabolites in or on the agricultural commodity grapes at 10 ppm.

The petition was amended in a notice published in the **Federal Register** of December 1, 1982 (47 FR 54159) by increasing the proposed tolerance level on grapes from 10 to 50 ppm, adding the commodities milk at 0.5 ppm, and cattle (fat, meat, and mbyp) at 0.1 ppm.

Mobay Chemical Corp., has further amended the petition by proposing tolerances for fat, meat, and mbyp of poultry, and eggs at .02 ppm; and fat, meat, and mbyp of goats, hogs, horses and sheep at 0.1 ppm.

The proposed analytical method for determining residues is gas chromatographic procedure equipped with a flame photometric detector operating in the sulfur-mode. (PM-16).

(Sec. 408(d)(2) 68 Stat. 512 (21 U.S.C. 346a(d)(2)))

Dated: November 20, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84-32265 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[OPP-180661; FRL-2731-5]

Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted specific exemptions for the control of various pests to the four States listed below and the U.S. Department of Agriculture during the period of October 18, 1984 to November 6, 1984. Also listed are three crisis exemptions initiated by the U.S. Department of Agriculture. These exemptions are subject to application and timing restrictions and reporting requirements designed to protect the environment to the maximum extent possible. Information on these restrictions is available from the contact persons in EPA listed below.

DATES: See each specific and crisis exemption for its effective dates.

FOR FURTHER INFORMATION CONTACT: See each specific and crisis exemption for the name of the contact person. The following information applies to all contact people.

By mail: Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 716, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, (703–557–1192).

SUPPLEMENTARY INFORMATION: EPA has granted specific exemptions to the:

1. California Department of Food and Agriculture for the use of triadimefon on tomatoes to control powdery mildew; October 18, 1984 to January 31, 1985. (Jim Tompkins)

2. California Department of Food and Agriculture for the use of sethoxydim on dry bulb onions to control grassy weeds; October 26, 1984 to March 15, 1985. (Gene Asbury)

3. Connecticut Department of Environmental Protection for the use of methiocarb on wine grapes to control depredating birds; October 18, 1984 to November 30, 1984. (Gene Asbury)

4. Florida Department of Agriculture and Consumer Services for the use of permethrin on watercress to control diamondback moths; October 18, 1984 to September 1, 1985. Florida had initiated a crisis exemption for this use. (Jim Tompkins)

5. Florida Department of Agriculture and Consumer Services for the use of anilazine on watercress to control leaf spot caused by *Cercospora nasturitii;* October 18, 1984 to August 31, 1985. (Libby Welch)

6. Oklahoma Department of Agriculture for the use permethrin on greens (kale, mustard, collards, and turnips) to control cabbage loopers; October 18, 1984 to October 31, 1984. (Jack E. Housenger)

7. U.S. Department of Agriculture for the use of calcium cyanide on bee colonies (domesticated) to eradicate the acarine mite throughout the U.S.; November 6, 1984 November 5, 1985. USDA had initiated a crisis exemption for this use. (Jack E. Housenger)

Crisis exemptions were initiated by the:

1. U.S. Department of Agriculture on October 10, 1984, for the use of sodium hypochlorite on citrus (in packing houses) to eradicate the citrus canker in Florida. Since it was anticipated that this program would be needed for more than 15 days, USDA has requested a specific exemption to continue it. The need for this progarm is expected to last for 1 year. (Jack E. Housenger)

2. U.S. Department of Agriculture on October 16, 1984, for the use of certain quaternary ammonium compounds on equipment and clothing to eradicate the citrus canker in Florida. Since it was anticipated that this program would be needed for more than 15 days, USDA has requested a specific exemption to continue it. The need for this program is expected last for 1 year. (Jack E. Housenger)

3. U.S. Department of Agriculture for the use of calcium cyanide on bee colonies to eradicate the acarine mite in Nebraska and South Dakota. Since it was anticipated that this program would be needed for more than 15 days, USDA has requested a specific exemption to continue it. The need for this progam is expected to last for 1 year. (Jack E. Housenger)

(Sec. 18, as amended, 92 Stat. 819 (7 U.S.C. 136))

Dated: November 28, 1984.

Steven Schatzow,

Director, Office of Pesticide Programs.

[FR Doc. 84–32266 Filed 12–11–84; 8:45 am]

BILLING CODE 6560–50–M

[OPP–50616; PH–FRL 2735–1]

Issuance of Experimental Use Permits; Elanco Products Co. et al.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted experimental use permits to the following applicants. These permits are in accordance with, and subject to, the provisions of 40 CFR Part 172, which defines EPA procedures with respect to the use of pesticides for experimental purposes.

FOR FURTHER INFORMATION CONTACT: By mail, the product manager cited in each experimental use permit at the address below: Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

In person or by telephone: Contact the product manager at the following address at the office location or telephone number cited in each experimental use permit: 1921 Jefferson Davis Highway, Arlington, VA.

SUPPLEMENTARY INFORMATION: EPA has issued the following experimental use permits:

1471–EUP–88. Issuance. Elanco Products Company, 740 South Alabama St., Indianapolis IN 46285. This experimental use permit allows the use of 100 pounds of the herbicide alpha-(1-methylethyl)alpha-[4-(trifluoromethoxy)phyenl]-5-pyrimidinemethanol on non-crop areas to evaluate the control of various weedy plants. A total of 67 acres are involved; the program is authorized only in the States of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The experimental use permit is effective from March 14, 1984 to March 14, 1986. (Robert Taylor, PM 25, Rm. 245, CM#2, (557–1800))

8730–EUP–13. Extension. Health-Chem Corporation, 1107 Broadway, New York, NY 10010. This experimental use permit allows the use of 4.4 pounds of the biological insecticide 9-dodecenyl acetate in or on forests and residential areas to evaluate the control of the adult western pineshoot borer. A total of 250 acres are involved; the program is authorized only in the States of Idaho and Montana. The experimental use permit is effective from April 22, 1984 to April 22, 1985. (Timothy Gardner, PM 12, Rm. 207, CM#2 (703–557–2690))

10182–EUP–35. Issuance. ICI Americas Inc., Concord Pike and New Murphy Road, Wilmington, DE 19897. This experimental use permit allows the use of 1,305 pounds of the herbicide butyl (*RS*)-2-[4-[[5-trifluoromethyl)-2-pyridinyl]oxy] phenoxy]propanoate on cotton and soybeans to evaluate the postemergence control of annual and perennial grasses. A total of 3,300 acres are involved; the program is authorized only in the States of Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. The experimental use permit is effective from March 30, 1984 to March 31, 1985. This permit is issued with the limitation that the permittee will oversee the destruction of all treated crops and the date and method of corp destruction will be on each report at the conclusion of each test. (Richard Mountfort, PM 23, Rm. 237, CM#2, (703–557–1830))

50534–EUP–22. Extension. SDS Biotech Corporation, 7528 Auburn Road, P.O. Box 348, Painesville, OH 44077. This experimental use permit allows the use of 6,255 pounds of the fungicide chlorothalonil on apples to evaluate the control of apple scab. A total of 700 acres are involved; the program is

authorized only in the States of Illinois, Indiana, Kentucky, Michigan, Maine, Massachusetts, Missouri, New York, North Carolina, Ohio, Pennsylvania, Virginia, Washington, and Wisconsin. The experimental use permit is effective from April 4, 1984 to May 31, 1984. A temporary tolerance for residues of the active ingredient in or on apples has been established. (Henry Jacoby, PM 21, Rm. 229, CM#2, (703–557–1900))

7182–EUP–22. Renewal. 3M Company, 3M Center, Building 232–GSE–04, St. Paul, MN 55144. This experimental use permit allows the use of 765 pounds of the plant growth regulator mefluidide on pasturegrasses to evaluate its effect on pasture quality. A total of 3,060 acres are involved; the program is authorized only in the States of Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee, and Virginia. The permit was previously effective from August 2, 1982 to August 6, 1983. The permit is now effective from March 14, 1984 to August 31, 1984. Temporary tolerances for residues of the active ingredient in or on pasturegrasses; pasturegrass hay; milk; meat of cattle, sheep, goats, and horses; fat of cattle, goats, and horses; and meat byproducts of cattle, sheep, goats, and horses have been established. (Robert Taylor, PM 25, Rm. 245, CM#2, (703–557–1900))

264–EUP–62. Extension. Union Carbide Agricultural Products Company, Inc., P.O. Box 12014, T.W. Alexander Drive, Research Triangle Park, NC 27709. This experimental use permit allows the use of 4,868 pounds of the plant growth regulator ethephon on wheat and barley to evaluate the control of lodging. A total of 9,724 acres are involved; the program is authorized only in the States of Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming. The experimental use permit is affective from April 20, 1984 to April 21, 1985. Temporary tolerances for residues of the active ingredient in or on barley grain, barley straw, wheat grain, and wheat straw have been established. Food and feed additive regulations for residues of the active ingredient in or on barley and wheat milling fractions (except flour) have been established (21 CFR 193.186 and 561.225). (Robert Taylor, PM 25, Rm. 253 CM#2, (703–557–1800))

Persons wishing to review these experimental use permits are referred to the designated product managers. Inquiries concerning these permits should be directed to the persons cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8:00 a.m. to 4:00 p.m., Monday through Friday, excluding legal holidays.

(Sec. 5, Pub. L. 95–396; 92 Stat. 828 (7 U.S.C. 136c))

Dated: November 20, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84–32351 Filed 12–11–84; 8:45 am]

BILLING CODE 6560–50–M

[PP 4G3039/T471; FRL–2734–7]

Plant Growth Regulator Lactic Acid; Establishment of Exemptions From the Requirement of Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established exemptions from the requirement of tolerances for residues of the plant growth regulator lactic acid in or on certain agricultural commodities.

DATE: These temporary exemptions from the requirement of tolerances expire October 11, 1985.

FOR FURTHER INFORMATION CONTACT: By mail: Robert Taylor, Product Manager (PM) 25, Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460. Office location and telephone number: Rm. 245, CM#2, 1921 Jefferson Davis Highway, Arlington, VA (703–557–1800).

SUPPLEMENTARY INFORMATION: Brea Agricultural Services, Inc., Drawer I, Stockton, CA 95201, has requested in pesticide petition PP 4G3039 the establishment of exemptions from the requirement of tolerances for residues of the plant growth regulator lactic acid in or on the raw agricultural commodities grapes, citrus, tomatoes, alfalfa, almonds, cherries, prunes, apples, peaches, nectarines, beans (green and dry), corn (sweet and field), onions, pepper, potatoes, strawberries, sugar beets, cucumbers, squash, melons, barley, and wheat.

These temporary exemptions from the requirement of tolerances will permit the marketing of the above raw agricultural commodities when treated in accordance with the provisions of experimental use permit 9018–EUP–1 which is being issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (Pub. L. 95–396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that the exemptions from the requirement of tolerances will protect the public health. Therefore, the temporary exemptions from the requirement of tolerances have been established on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active ingredient to be used must not exceed the quantity authorized by the experimental use permit.

2. Brea Agricultural Services, Inc., must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records or production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

These temporary exemptions from the requirement of tolerances expire October 11, 1985. Residues remaining in or on the raw agricultural commodities after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary exemptions from the requirement of tolerances. These temporary exemptions from the requirement of tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirement of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–534, 94 Stat. 1164, 5 U.S.C. 610–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in

the Federal Register of May 4, 1981 (46 FR 24950).

(Sec. 408(j), 68 Stat. 516, (21 U.S.C. 346a(j)))

Dated: December 4, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 84-32352 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59174B; TSH-FRL 2735-2]

Approval of Test Marketing Exemptions; Certain Chemicals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The notice announces EPA's approval of an application for a test marketing exemption (TME) under section 5(h)(6) of the Toxic Substances Control Act (TSCA), TME-85-4. The test marketing conditions are described below.

EFFECTIVE DATE: December 5, 1984.

FOR FURTHER INFORMATION CONTACT: James Alwood, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Room E-613C, 401 M Street, SW., Washington, DC. 20460 (202-382-3374).

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use and disposal of the substances for test marketing purposes will not present any unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present any unreasonable risk of injury.

EPA hereby approves TME-85-4. EPA has determined that test marketing of the new chemical substance described below, under the conditions set out in the TME application, and for the time period and restrictions (if any) specified below, will not present any unreasonable risk of injury to health or the environment. Production volume must not exceed those specified in the application. All other conditions and restrictions described in the application and in this notice must be met.

The following additional restrictions apply to TME-85-4. A bill of lading accompanying each shipment must state that use of the substance is restricted to that approved in the TME. In addition, the Company shall maintain the following records until five years after the date they are created, and shall make them available for inspection or copying in accordance with section 11 of TSCA:

1. The applicant must maintain records of the quantity of the TME substance produced and must make these records available to EPA upon request.

2. The applicant must maintain records of the dates of shipment to each customer and the quantities supplied in each shipment, and must make these records available to EPA upon request.

3. The applicant must maintain copies of the bill of lading that accompanies each shipment of the TME substance.

TME-85-4

Date of Receipt: October 25, 1984.

Notice of Receipt: November 2, 1984 (49 FR 44143).

Applicant: Morton Thiokol, Inc.

Chemical: (G) Sodium Salt of Sulfated Linear C_{8-11} Alcohol Ethoxylate.

Use: (G) Surfactant.

Production Volume: Confidential.

Number of Customers: Confidential.

Worker Exposure: 1-2 dermal.

Test Marketing Period: 120 days.

Commencing on: December 5, 1984.

Risk Assessment: No significant health concerns were identified. Therefore, the test market substance will not present any unreasonable risk of injury to health. EPA identified potential environmental concerns. However, estimated releases of the test market substance will be below levels of concern. Therefore, under these conditions the test market substance will not pose any unreasonable environmental risk.

Public Comments: None.

The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information come to its attention which casts significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: December 5, 1984.

Don R. Clay,

Director, Office of Toxic Substances.

[FR Doc. 84-32350 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

[FRL No. 2734-8]

Pesticide Emergency Exemption Negotiated; Rulemaking Advisory Committee; Open Meetings

As required by the Federal Advisory Committee Act (Pub. L. 94-463), we are giving notice of two meetings of the Pesticide Emergency Exemption Negotiated Rulemaking Advisory Committee.

The meeting previously scheduled [See Federal Register of 14 November 1984] to be held on 18 December in Arlington, Virginia has been rescheduled to be held on December 17th and 18th in Washington, D.C.

The Committee will convene on the 17th, at 9:00 a.m. and meet until completion. The Committee will reconvene on the 18th, at 8:30 a.m. and meet until 3:30 p.m. This meeting will be held at the National Institute For Dispute Resolution, 1901 L Street NW. (Suite 600), Washington, D.C.

The Committee will meet again on January 15 and 16th. The meeting will start on January 15 at 1:00 p.m. and run until completion. The Committee will reconvene on Wednesday the 16th, at 8:30 a.m. and meet until 2:00 p.m. This meeting will be held in Conference Room 1112, Crystal Mall, Building #2, Arlington, Virginia.

The purpose of the meetings is to reach consensus on language to be used as the section 18 Pesticide Emergency Exemption Notice of Proposed Rulemaking.

If interested in attending, or in receiving more information, please contact Chris Kirtz at (202) 382-7565.

Milton Russell,

Assistant Administrator.

December 6, 1984.

[FR Doc. 84-32354 Filed 12-11-84; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

[MM Docket Nos. 84-1112, et al., File Nos. BRH-781002 WR, et al.]

RKO General, Inc. et al.; Hearing Designation Order

In re Applications of:	
RKO General, Inc. (WAXY-FM), Fort Lauderdale, FL.	MM Docket No. 84-1112, file No. 781002WR.
For Renewal of License:	
Adwave Company; Fort Lauderdale, FL.	MM Docket No.84-1113 file No. BPH-830510AL.
South Jersey Radio, Inc., Fort Lauderdale, FL.	MM Docket No. 84-1114 file No. BPH-830511AK.

Spanish Radio for South Florida, Inc., Fort Lauderdale, FL.	MM Docket No. 84-1115, file No. BPH-830512AD.
Cozzin Communication Corporation, Fort Lauderdale, FL.	MM Docket No. 84-1116, file No. BPH-830512AW.
Minority Women in Broadcasting, Inc., Fort Lauderdale, FL.	MM Docket No. 84-1117, file No. BPH-830512CI.
Rosemarie A. Reardon, d/b/a LAUDERSEA BROADCASTING COMPANY, Fort Lauderdale, FL.	MM Docket No. 84-1118, file No. BPH-830512CP.
First City Communications, Inc., Fort Lauderdale, FL.	MM Docket No. 84-1119, file No. BPH-830512CU.
Florida Southern Broadcasters, Limited Partnership, Fort Lauderdale, FL.	MM Docket No. 84-1120, file No. BPH-830512DA.
Stephen E. Powell, Fort Lauderdale, FL.	MM Docket No. 84-1121, file No. BPH-830512DC.

For Construction Permit.

Memorandum Opinion and Order

Adopted: November 8, 1984.
Released: December 6, 1984.

By the Commission.

1. The Commission has under consideration the license renewal application of RKO General, Inc. (RKO) for Station WAXY–FM, Fort Lauderdale, Florida [1] and the above-captioned mutually exclusive applications to operate on the same channel with identical facilities. In addition, we have before us motions for leave to amend and accompanying amendments filed by RKO [2] and South Jersey Radio, Inc. (South Jersey), [3] and related pleadings. In view of the matters already being considered in the KHJ–TV case, note 1 *supra*, and in view of the fact that those matters may have a bearing upon the ultimate resolution of this case, we believe that it would be premature to commence any consideration of either RKO's qualifications or the comparative elements of the applicants' proposals, pending the outcome of the KHJ–TV case. Accordingly, in the interest of managing and ordering our docket of adjudicatory proceedings so as to permit the most efficient and effective utilization of Commission resources, we direct the parties to deal first with any petitions to enlarge issues and/or basic qualifying issues that involve the mutually exclusive applicants (i.e., applicants other than RKO) who seek construction permits to operate on the channel(s) now held by RKO. Upon completion of all appropriate proceedings, including such evidentiary hearings as may be warranted, relating to these questions concerning the mutually exclusive applications for construction permits, the presiding Administrative Law Judge should so inform the Commission and await guidance from the Commission before setting the date for filing any proposed findings and conclusions or going forward with any further proceedings. In other cases involving multiple license owners, we have assigned all of the proceedings to single Administrative Law Judge for the purpose of considering the impact of common qualifications questions on each of the owner's stations, *e. g., Intercontinental Radio, Inc.*, 88 FCC 2d 819 (1981). Here, we have already made provision for consideration of the questions concerning RKO's overall qualifications by a single ALJ in the Los Angeles, California, KHJ–TV proceeding. Thus, the procedures used in cases such as *Intercontinental, supra,* are unnecessary for the instant proceeding. Indeed, the *Intercontinental* approach, if applied here, involving substantial numbers of comparative hearings and competing applicants presided over a single Judge, will inevitably delay resolution of these matters. Instead, we believe that the interests of administraive efficiency will be better served by providing for assignment of a presiding Administrative Law Judge for this proceeding by the Chief Administrative Law Judge in accordance with his regular and ordinary rotational procedures.

2. *Adwave Company (Adwave) application.* In the event Adwave is awarded a grant in the instant case, the applicant's principals have agreed to divest themselves of all the stock owned in Raystay Company, TV Cable of Waynesboro, Inc. and West Shore Broadcasting Co. An appropriate condition will be specified.

3. On April 2, 1984 (four days after the "B" cut-off date), the applicant filed an amendment to its application without an accompanying Petition for Leave to Amend. Given the ministerial nature of this filing, the amendment will be accepted.

4. Applicants for new broadcast stations are required to give local notice of the filing of their applications in accordance with Section 73.3580 of the Commission's Rules. Adwave has published the required notice, but the notice is deficient in that: the notice was only published once a week for two weeks, the power is not given, and studio location is said "to be determined", despite the fact that the applicant has certified it will be using the current WAXY facility. To remedy this deficiency, the applicant must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 20 days of the release of this Order.

5. *The Spanish Radio for South Florida, Inc. (Spanish Radio) application.* The applicant's principals have agreed to divest all other interests in and connections with media of mass communication, including, but not limited to, Station WSUA, Miami, Florida, in the event of a grant here. An appropriate condition will be specified.

6. The Spanish Radio application indicates that a principal, Herbert M. Levin, is a defendant in a pending action. As we lack at this time sufficient information to asses the impact of the litigation on the applicant's qualifications to be a licensee, we will specify no issues or conditions. Spanish Radio should keep the presiding Administrative Law Judge informed of any changes in the status of the suit, though, and he in turn may take such action as he deems appropriate in light of this information.

7. *The COZZIN Communications Corporation (COOZIN) application.* For data not supplied in Sections V–B and V–G of Form 301, applicant has stated that such material is "On File in WAXY FCC File". However, there is no direct statement in the application that COZZIN intends to use the WAXY facility *as is*, without modification. An appropriate amendment is thus necessary to render the application complete.

8. *The Stephen E. Powell (Powell) application.* The Powell application was not complete when filed in that Powell's applications for other facilities now operated by RKO were not listed. Given the public nature of this information, no

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[1] We have designated the license renewal application of RKO's Station KHJ–TV, Los Angeles, California, as the forum for inquiring into the impact of RKO's disqualification as the licensee of WNAC–TV, Boston, Massachusetts on its overall basic and comparative qualifications to remain a licensee elsewhere. See our Memorandum Opinion and Order adopted this same date, *RKO General, Inc. (WHBQ–TV)*, —— FCC 2d —— (1984), for a full discussion of this matter.

[2] Since "B" cut-off date (March 29, 1984), RKO has filed several petitions for leave to amend and accompanying amendments to its revewal application. The purpose of these amendments is to update information previously submitted to the Commission. We have reviewed the motions and amendments and find that in each case good cause exists for accepting the amendments for § 1.65 purposes only.

[3] For the reasons set forth in *RKO General, Inc. (WHBQ–TV), supra,* concerning a similar pleading filed by South Jersey, we will grant the motion and accept the amendment.

motive to conceal or misrepresent is apparent. Hence, we will specify no issues in this regard. Powell should amend its application here to reflect all pending proposals, however.

9. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, it is ordered, that pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications are designated for hearing in a consolidated proceeding, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

11. It is further ordered, that the petitions for leave to amend filed by RKO General, Inc. are granted and the amendments accompanying those motions are accepted for the purposes of § 1.65 of the Commission's Rules.

12. It is further ordered, that in the event of a grant of the Adwave Company application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, permittee shall certify to the Commission that the principals of Adwave have divested all stock ownership in Raystay Company, TV Cable of Waynesboro, Inc., and West Shore Broadcasting Company.

13. It is further ordered, that the late filed amendment submitted by the Adwave Company is accepted for the purposes of § 1.65 of the Commission's Rules.

14. It is further ordered, that Adwave shall comply with the local notice provision of § 73.3580 of the Commission's Rules and shall advise the presiding Administrative Law Judge within 20 days after this Order is released.

15. It is further ordered, that the motion for leave to amend filed by South Jersey Radio Inc. is granted and the accompanying amendment is accepted *nunc pro tunc.*

16. It is further ordered, that in the event of a grant of the Spanish Radio for New York, Inc. application, the construction permit shall be conditioned as follows:

Prior to the Commencement of operation of the station authorized herein, permittee shall certify to the Commission that the following have divested all other interests in and connections with media of mass communications: Julio Rumbaut, Norma Martinez de Arizala Levin, Sergin R. Fuentefria and Herbert Levin.

17. It is further ordered, that COZZIN Communication Corporation shall file the amendment specified herein with the presiding Administrative Law Judge within 20 days after this Order is released.

18. It is further ordered, that Stephen E. Powell shall file the amendment specified herein with the presiding Administrative Law Judge within 20 days after this Order is released.

19. It is further ordered, that in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, NW., Washington, D.C. 20554.

20. It is further ordered, that the Initial Decision in this proceeding shall consider the findings in Docket No. 16679 (KHJ-TV) as to RKO's basic or comparative qualifications.

21. It is further ordered, that to avail themselves of the opportunity to be heard, the applicants shall, pursuant to § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

22. It is further ordered, that the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and § 74.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g) of the Rules.

23. Finally, copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Secretary of the Commission.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 84-32378 Filed 12-11-84; 8:45 am]

BILLING CODE 6712-01-M

[MM Docket Nos. 84-1085, et al.; File Nos. BRH-790801A3, et al.]

RKO General, et al.; Hearing Designation Order

In re Applications of:

RKO General, Inc. (WFYR-FM), Chicago, IL.	MM Docket No. 84-1085, file No. BRH-790801A3.
For Renewal of License:	
East Lake Communications, Inc., Chicago, IL.	MM Docket No. 84-1086, file No. BPH-830318AA.
Johnson Communications, Inc., Chicago, IL.	MM Docket No. 84-1087, file No. BPH-830429AD.
Spanish Radio for Chicago, Inc., Chicago, IL.	MM Docket No. 84-1088, file No. BPH-830512AC.
Windy City Broadcasting, Ltd., Chicago, IL.	MM Docket No. 84-1089, file No. BPH-830512AG.
Systers Broadcasting Corporation, Chicago, IL.	MM Docket No. 84-1090, file No. BPH-830512AU.
First City Communications, Inc., Chicago, IL.	MM Docket No. 84-1091, file No. BPH-830512AX.
Stephen E. Powell, Chicago, IL.	MM Docket No. 84-1092, file No. BPH-830512AZ.
Lakefront FM Radio, Chicago, IL.	MM Docket No. 84-1093, file No. BPH-830512BH.
Cozzin Communications Corporation, Chicago, IL.	MM Docket No. 84-1094, file No. BPH-830512BK.
Donnie Simpson Enterprises, Inc., Chicago, IL.	MM Docket No. 84-1095, file No. BPH-830512BM.
South Jersey Radio, Inc., Chicago, IL.	MM Docket No. 84-1096, file No. BPH-830512CA.
AJCR Radio, a Partnership, Chicago, IL.	MM Docket No. 84-1097, file No. BPH-830512CF.

For Construction Permit:

Erratum

Released December 4, 1984.

The Memorandum Opinion and Order in the above entitled proceeding (FCC 84-539, mimeo No. 35046) released on November 29, 1984 is corrected to show the adopted date as November 8, 1984. In addition the phrase "By the Commission" is added beneath the Adopted Date: caption.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 84-32377 Filed 12-11-84; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for approval in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067–0103
Title: FEMA Nuclear Power Plant Alerting and Notification System: Public Telephone Survey
Abstract: FEMA with its technical support contractor, shall randomly telephone survey the residents within the Emergency Planning Zone of 55 nuclear power plants as stipulated in Appendix 3 of NUREG 0654/FEMA–REP–1, Rev. 1. From an approximate sample of 2,500 households, between 250 and 350 residences will be voluntarily surveyed.
Type of respondents: Individual or Households
Number of respondents: 16,775
Burden hours: 805

Copies of the above information collection clearance package can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley (202) 287–9906, Federal Plaza Center, 500 C. Street, SW., Washington, D.C. 20472.

Written comments and recommendations for the proposed information collection package should be sent to Mike Weinstein, Desk Officer, OMB, Reports Management Branch, Room 3235, New Executive Office Building, Washington, D.C. 20503.

Dated: December 6, 1984.

Walter A. Girstantas,

Director, Administrative Support.

[FR Doc. 84–32339 Filed 12–11–84; 8:45 am]

BILLING CODE 6718–01–M

[FEMA–719–DR]

Colorado; Amendment to Notice of a Major-Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Colorado (FEMA–719–DR), dated July 27, 1984, and related determinations.

DATE: December 4, 1984.

FOR FURTHER INFORMATION CONTACT: Sewall H.E. Johnson, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, D.C. 20472, (202) 287–0501.

NOTICE: The notice of a major disaster for the State of Colorado, dated July 27, 1984, is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 27, 1984:

Eagle County for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Samuel W. Speck,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 84–32340 Filed 12–11–84; 8:45 am]

BILLING CODE 6718–02–M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 15 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202–010270–007.
Title: Gulf-European Freight Association.
Parties:
Atlantic Cargo Services, AB
Compagnie Generale Maritime
Hapag Lloyd AG
Intercontinental Transport (ICT) BV
Lykes Bros. Steamship Co., Inc.
Sea-Land Service, Inc.
Trans Freight Lines, Inc.

Synopsis: The proposed amendment would expand the geographic scope of the agreement to include the United Kingdom and Republic of Ireland trades. It would also revise the agreement to conform to the format, organization and content requirements of the Commission's rules and would revise the provisions of the agreement to mirror and read substantially identically to those of the North Europe-U.S. Gulf Freight Association Agreement (FMC No. 202–010656) covering the same essential trade in the westbound direction.

By Order of the Federal Maritime Commission.

Dated: December 6, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–32323 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202–000161–043.
Title: Gulf-United Kingdom Conference.
Parties:
Atlantic Cargo Service, AB
Compagnie Generale Maritime
Hapag Lloyd AG
Intercontential Transport (ICT) BV
Lykes Bros. Steamship Co., Inc.
Sea-Land Service, Inc.
Trans Freight Lines, Inc.

Synopsis: The proposed amendment would terminate the agreement sixty days after the Gulf-European Freight Association Agreement, FMC No. 202–010270–007 becomes effective. The parties have requested a shortened review period.

Agreement No.: 224–002813–003.
Title: San Francisco Terminal Agreement.
Parties:
The San Francisco Port Commission (Port)
California Stevedore & Ballast Co. (CS&B)

Synopsis: The purpose of the amendment is to extend the term of the agreement for an additional five years commencing on the effective date of the

amendment. The compensation to the terminal operator will be modified by the payment of 10% of the wharfage and dockage generated and collected by the Port for operation of the wharfinger and marine terminal in an area at Pier 80, San Francisco.

Agreement No.: 224–004059–002.
Title: San Francisco Terminal Agreement.
Parties:
The San Francisco Port Commission (Port)
California Stevedore & Ballast Co. (CS&B)

Synopsis: The purpose of this amendment is to extend the term of the basic agreement until June 30, 1986, with all other existing terms and conditions remaining in force. The basic agreement provides for the operation by CS&B of an area within Pier 80, Shed D, in the Port of San Francisco, to be used as a container freight station and freight distribution station.

Agreement No.: 224–004128–001.
Title: San Francisco Terminal Agreement.
Parties:
The San Francisco Port Commission (Port)
Lykes Bros. Steamship Co., Inc. (Lykes)

Synopsis: Agreement No. 224–004128–001 extends the term of the basic agreement from its present expiration date of June 30, 1985 to December 31, 1986. It also increases revenue sharing from the Port to the users from 30% to 50% of all charges from users' dockage, wharfage, storage and demurrage. It also increased the minimum tonnage utilization from 200,000 to 275,000 metric revenue tons.

Agreement No.: 224–004159–001.
Title: San Francisco Terminal Agreement.
Parties:
San Francisco Port Commission (Port)
National Galleon Shipping Corporation (NGSC)
National Shipping Corporation of the Philippines (NSCP)

Synopsis: The purpose of this amendment is to effect an assignment of the basic agreement from NGSC to NSCP, subject to all existing provisions of the basic agreement, and concurred in by the Port. The basic agreement granted NGSC the non-exclusive right to use Piers 94 and 96 in San Francisco, for the handling of its vessels.

Agreement No.: 202–010636–002.
Title: U.S. Atlantic-North Europe Conference
Parties:
Atlantic Container Line (G.I.E.)
Dart-ML Limited
Hapag-Lloyd AG
Sea-Land Service, Inc.
Trans Freight Lines, Inc.
United States Lines, Inc.

Synopsis: The proposed amendment would permit the parties to also exercise their right of independent action with respect to commodities exempted from the tariff filing requirements of section 8(a)(1) of the Shipping Act of 1984. The parties have requested a shortened review period.

Agreement No.: 224–010695.
Title: San Francisco Terminal Agreement.
Parties:
The San Francisco Port Commission (Port)
Nedlloyd Lines (Nedlloyd)

Synopsis: Agreement No. 224–010695 provides for the lease by the Port to Nedlloyd of premises within the Port of San Francisco. Nedlloyd agrees to utilize the Port as its published regularly scheduled Northern California port of call for its liner service. Nedlloyd shall pay to the Port 60% of all revenue from dockage and wharfage generated under the Agreement for Port facilities in lieu of 100%.

Agreement No.: 224–010696.
Title: Gulfport Marine Terminal Agreement.
Parties:
The Mississippi State Port Authority at Gulfport (Authority)
Hub City of Louisiana Terminals Inc. (HUB)

Synopsis: Agreement No. 224–010696 provides that HUB will lease from the Authority at Gulfport certain premises for the conduct of operations related to foreign and domestic trade including inland intermodal transportation between the Port of Gulfport and interior points throughout the United States and Canada. The primary term of the agreement will be for one year with options to extend the term for two renewal periods of one year each.

By Order of the Federal Maritime Commission.

Dated: December 6, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–32325 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

Ocean Freight Forwarder License Revocations; McLendon Forwarding Co., Inc., et al.

Notice is hereby given that the following ocean freight forwarder licenses have been revoked by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR 510.

License No.	Name and address	Date revoked
1083	McLendon Forwarding Co., Inc., 15955 West Hardy, Suite 222, Houston, TX 77273.	Nov. 28, 1984.
2260	Containers Freight Forwarding Corp., 790 W. 20th Street, Hialeah, FL 33010.	Do.
1547	J.B. Fong & Co., Inc., dba J.B. Fong & Co., 838 Grant Avenue, San Francisco, CA 94108.	Dec. 1, 1984.
1236	Imperial Van Lines Inc. of California, 3565 Torrance Blvd., Torrance, CA 90503.	Do.

Robert G. Drew,

Director, Bureau of Tariffs.

[FR Doc. 84–32324 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

Security for the Protection of the Public; Indemnification of Passengers for Nonperformance of Transportation; Issuance of Certificate (Performance); Ocean Cruise Lines S.A.

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation pursuant to the provisions of Section 3, Pub. L. 89–777 (80 Stat. 1357, 1358) and Federal Maritime Commission General Order 20, as amended (46 CFR Part 54): Ocean Cruise Lines, S.A. and OCEANIC ENDEAVOUR S.A. c/o Ocean Cruise Lines, 2 Executive Drive, Fort Lee, New Jersey 07024.

Dated: December 6, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–32326 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C.

20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in section 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202–010636–003.

Title: U.S. Atlantic-North Europe Conference.

Parties:

Atlantic Container Line (G.I.E.)
Dart-ML Limited
Hapag-Lloyd AG
Sea-Land Service, Inc.
Trans Freight Lines, Inc.
United States Lines, Inc.

Synopsis: The proposed amendment would permit Double Eagle Lines, Inc. to become a party to the agreement. The parties have requested a shortened review period.

Agreement No.: 203–010698.

Title: Atlanttrafik Express Service Ltd/Rederiaktiebolaget Transocean Non-Compete Agreement.

Parties:

Atlanttrafik Express Service Ltd. (AES)
Rederiaktiebolaget Transocean (Transocean)

Synopsis: The proposed agreement would provide that, in connection with the acquisition of assets from Transocean by AES, AES will be protected against competition from the previous owners, Transocean, its subsidiaries, affiliates and associated companies, for a period of three years or until September 18, 1987. The agreement would be restricted to the trade between the U.S. Atlantic Coast and Australia and New Zealand.

Agreement No.: 213–010699.

Title: PAD Line Forest Products/Bulk/Parcel Cooperative Working Agreement.

Parties:

Pacific Australia Direct Line
Transpacific Bulk Marine Limited
Associated Container Transportation (Australia) Ltd.

Synopsis: The proposed agreement would permit the parties to discuss and agree upon scheduling of sailings to meet shipper requirements, and to cooperate to inform shippers of availability of space on vessels of the other parties and to arrange bookings in the trade between United States and Canadian West Coast ports and Australia (including intermediate ports but not in the U.S. domestic trade) and to or between inland points via such ports. It would also permit the parties to employ a common agent.

By Order of the Federal Maritime Commission.

Dated: December 7, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–32393 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Actof 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, within 15 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 212–010697.

Title: The Japan-U.S. pooling Agreement.

Parties:

Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed agreement would permit the parties to pool revenues from cargoes originating and terminating in the trade between ports on the U.S. Pacific Coast and Alaska and ports in Japan and inland points via such ports with the exception of bulk liquid cargo moving in deep tanks. The amount of revenue to be pooled shall not exceed $300.00 U.S. per TEU.

By Order of the Federal Maritime Commission.

Dated: December 7, 1984.

Francis C. Hurney,

Secretary.

[FR Doc. 84–32394 Filed 12–11–84; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Fleet Financial Group, Inc., et al.; Applications to Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact there are in dispute, summarizing the evidence that would be presented at hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 31, 1984.

A. **Federal Reserve Bank of Boston** (Richard E. Randall, Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02106:

1. *Fleet Financial Group, Inc.*, Providence, Rhode Island; to engage *de novo* through its subsidiary in providing data processing services within the limitations set forth in section 225.25(b)(7) of Regulation Y.

B. **Federal Reserve Bank of New York** (A. Marshall Puckett, Vice President) 33 Liberty Street, New York, New York 10045:

1. *Compagnie Financiere de Suez*, Paris, France; to engage *de novo* through its subsidiary, Indosuez Investment Management Services, in acting as an advisory company for mortgage and real estate investment trusts; serving as an investment advisory, as defined in section 2(a)(20) of the Investment

Company Act of 1940, to investment companies registered under such act; providing portfolio investment advice to other persons; furnishing general economic and statistical forecasting services, and industry studies; providing financial advice to state and local governments, such as with respect to the issuance of their securities; and conducting such incidental activities as are necessary to carry out the activities specified above.

C. **Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *NBD Bancorp, Inc.*, Detroit, Michigan; to engage *de novo* through its subsidiary, Corporate Funding, Inc., Detroit, Michigan, in leasing personal property or acting as agent, broker or advisor in leasing such property. This application is for expansion of the geographic scope of a previously approved activity to include the entire United States.

D. **Federal Reserve Bank of St. Louis** (Delmer P. Weisz, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Delta Bancshares, Inc.*, Eudora, Arkansas; to engage *de novo* through its subsidiary, Eudora Insurance Agency, Inc., Eudora, Arkansas, in general insurance activities in a town with a population not exceeding 5,000. These activities will be conducted in Eudora and the surrounding areas.

Board of Governors of the Federal Reserve System, December 6, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-32330 Filed 12-11-84; 8:45 am]

BILLING CODE 6210-01-M

Grange National Banc. Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 1, 1985.

A. **Federal Reserve Bank of Philadelphia** (Thomas K. Desch, Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. *Grange National Banc. Corp.*, Laceyville, Pennsylvania; to become a bank holding company by acquiring 100 percent of the voting shares of The Grange National Bank of Wyoming County, Laceyville, Pennsylvania.

B. **Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President), 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Minooka Bancorp, Inc.*, Minooka, Illinois; to become a bank holding company by acquiring 83.98 percent of the voting shares of Tri-County Bank of Minooka, Minooka, Illinois.

2. *Westbanco, Inc.*, Westville, Illinois; to acquire 45 percent of the voting shares of Minooka Bancorp, Inc., Minooka, Illinois, thereby indirectly acquiring Tri-County Bank of Minooka, Minooka, Illinois.

C. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *First Tule Bancorp, Inc.*, Tulia, Texas; to become a bank holding company by acquiring 80 percent of the voting shares of the The First National Bank of Tulia, Tulia, Texas.

2. *Red River Bancorp, Inc.*, Gainesville, Texas; to become a bank holding company by acquiring 80 percent of the voting shares of The First State Bank, Gainesville, Texas.

Board of Governors of the Federal Reserve System, December 6, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-32331 Filed 12-11-84; 8:45 am]

BILLING CODE 6210-01-M

Worland Holding Co.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under section 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 2, 1985.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Worland Holding Company*, Worland, Wyoming; to acquire Worland Securities Corporation, Worland, Wyoming, thereby engaging in the sale of credit-related insurance, and making a servicing loans and other extensions of credit. These activities would be conducted within an 80 mile radius of Worland, Wyoming.

Board of Governors of the Federal Reserve System, December 6, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-32332 Filed 12-11-84; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1974, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period:

Transaction	Waiting period terminated effective
(1) 84-1017—International Business Machines Corporation's proposed acquisition of voting securities of ROLM Corporation.	Nov. 20, 1984.
(2) 84-1162—United Techonologies Corporation's proposed acquisition of voting securities of Alma Plastics Company, (City Investing Company, UPE).	Do.
(3) 84-1169—Federated Holding Company, Incorporated Ltd. a limited partnership of voting securities of Videoland, Incorporated, (Trevor Glanger, UPE).	Do.
(4) 84-1144—Amoskeag Company's proposed acquisition of voting securities of Fieldcrest Mills, Incorporated.	Nov. 21, 1984.
(5) 84-1153—N. V. AMEV's proposed acquisition of voting securities of Western Life Insurance Company, (The St. Paul Companies, Incorporated, UPE).	Do.
(6) 84-1161—Hawley Group PLC's proposed acquisition of voting securities of Jackson Communications, Incorporated and the Maintenance Company, Incorporated, (Fred Olsen, UPE operating, through Olsen Industries, Incorporated.	Do.
(7) 84-1174—Gulf & Western Industries, Incorporated's proposed acquisition of Prentice-Hall Incorporated.	Do.
(8) 84-1192—Marshall Field's proposed acquisition of voting securities of Pioneer Press, Incorporated, (Time Incorporated, UPE).	Do.
(9) 84-1194—Steven C. Markoff's proposed acquisition of voting securities of Refinement International Company, (Mandel Sherman, UPE).	Do.
(10) 84-1214—GNA Corporation's proposed acquisition of assets of Divisions of Davis Walker Steel & Wire Corporation, (Davis Walker Corporation, UPE).	Do.
(11) 84-1225—Houston Natural Gas Corporation's proposed acquisition of assets of Texoma Pipe Line Company.	Do.
(12) 84-1155—AMR Corporation's proposed acquisition of assets of Braniff Inc., (H Group Holding, Inc., UPE).	Nov. 27, 1984.
(13) 84-1198—The Philadelphia Saving Fund Society's proposed acquisition of voting securities of Midland-Guardian Investment Company, (The Midland Company, UPE).	Do.
(14) 84-1199—The Philadelphia Saving Fund Society's proposed acquisition of assets of Midland Guardian Company, (The Midland Company, UPE).	Do.
(15) 84-1149—Grand Metropolitan Public Limited Company's proposed acquisition of voting securities of Pepsi-Cookeville, (Pepsi-Cola Bottling Company of Cookeville, Inc., (Gladys Owen, UPE).	Nov. 28, 1984.
(16) 84-1145—Tarmac PLC's proposed acquisition of assets of Florida aggregate, ready-mix and block operations, (Lone Star Industries, Inc., UPE).	Do.
(17) 84-1151—Bayer AG's proposed acquisition of voting securities of Matrix Corporation.	Do.
(18) 84-1152—General Defense Corporation's proposed acquisition of voting securities of Hamilton Technology, Inc., (Clabir Corporation, UPE).	Do.
(19) 84-1177—LaFarge Coppee S.A.'s proposed acquisition of assest of Celanese's Ag Products Group, (Celanese Corporation, UPE).	Do.
(20) 84-1193—Imasco Limited's proposed acquisition of voting securities of Rea and Derick, Inc., (American Stores Company, UPE).	Do.
(21) 84-1207—Thomson Investments Limited's, (Kenneth R. Thomson, UPE), proposed acquisition of assets of George N. Gillett, Jr..	Do.
(22) 84-1215—Esterline Corporation's proposed acquisition of assets of Hollis Automation, Inc..	Do.
(23) 84-1069—Honeywell Incorporated's proposed acquisition of voting securities of ISSC Industrial Solid State Controls, Incorporated.	Nov. 29, 1984.
(24) 84-1218—Sheldon Lubar's proposed acquisition of assets of B. Leather, Inc., (Beatrice Companies, Inc., UPE).	Do.
(25) 84-1172—Sir James Goldsmith's proposed acquisition of voting securities of Colgate-Palmolive Company.	Nov. 30, 1984.
(26) 84-1183—The Broken Hill Proprietary Company Limited's proposed acquisition of voting securities of Energy Reserves Group, Inc..	Do.
(27) 84-1184—Houston Natural Gas Corporation's proposed acquisition of voting securities of Transwestern Pipeline Company, (Texas Eastern Corporation, UPE).	Do.
(28) 84-1185—Synergy Group, Incorporated's proposed acquisition of assets of Skelgas, Inc., (Texaco, Inc., UPE).	Do.
(29) 84-1190—First Boston, Incorporated's proposed acquisition of voting securities of American Sterilizer Company.	Do.
(30) 84-1191—First Boston, Incorporated's proposed acquisition of voting securities of American Sterilizer Company.	Do.
(31) 84-1197—Bristol-Meyers' proposed acquisition of voting securities of AMSCO/Hall Surgical Division, (First Boston, Incorporated UPE).	Do.
(32) 84-1201—W. B. Dunavant, Jr.'s proposed acquisition of assets of the McFadden Division and voting securities of 13 related coprporations, from Valmac Industries, Inc., (Don Tyson, UPE).	Do.
(33) 84-1213—TDC Development Corporation's proposed acquisition of voting securities of Consolidated Wholesale Company, Incorporated.	Do.
(34) 84-1221—Harbor View Hotels Incorporated's (Lui Che Woo, UPE) proposed acquisition of assets of Holiday Inns, Incorporated.	Do.
(35) 84-1222—Syncom Corporation's proposed acquisition of voting securities of four corporate subsidiaries, (Farm House Foods Corporation, UPE).	Do.
(36) 84-1231—S & P Company's (Paul and Lydia Kalmanoitz, UPE) proposed acquisition of voting securities of Pabst Brewing Company.	Do.
(37) 84-1212—Bristol-Myers Corporation's proposed acquisition of assets of AMSCO/Hall Surgical Division, (Kelso Partners, II, UPE).	Dec. 3, 1984.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Legal Technician, Premerger Notification Office, Bureau of Competition, Room 301, Federal Trade Commission, Washington, D.C. 20580. (202) 523-3894.

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 84-32345 Filed 12-10-84; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Aid to Families With Dependent Children, Medicaid, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 1985 Through September 30, 1987

Correction

In FR Doc. 84-31256 appearing on page 46957 in the issue of Thursday, November 29, 1984, make the following correction:

On page 46957, third column, in the table, in the entry for "Michigan", last column, "56.76" should have read "56.79".

BILLING CODE 1505-01-M

Food And Drug Administration

Advisory Committee Meeting; Amendment

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is amending an advisory committee meeting notice to revise the agenda and schedule of the Blood Products Advisory Committee meeting announced in the **Federal Register** of November 20, 1984 (49 FR 45810). The announcement of the Blood

Products Advisory Committee meeting is revised to read as follows:

Blood Products Advisory Committee

Date, time, and place. December 13 and 14, 8:30 a.m., Auditorium, Lister Hill Center, National Library of Medicine, Bldg. 38A, 8600 Rockville Pike, Bethesda, MD.

Type of meeting and contact person. Open public hearing, December 13, 8:30 a.m. to 9:30 a.m.; closed presentation of data and closed committee deliberations, December 13, 9:30 a.m. to 5 p.m., and December 14, 9 a.m. to 12 m.; open committee discussion, December 14, 1 p.m. to 3 p.m.; closed committee deliberations (if necessary), December 14, 3 p.m. to 4 p.m.; Issac F. Roubein, Executive Secretary, Center for Drugs and Biologics (HFN–32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4696.

General function of the committee. The committee reviews and evaluates available data on the safety, effectiveness, and appropriate use of blood products intended for use in the diagnosis, prevention, or treatment of human diseases.

Agenda—Open public hearing. Interested persons requesting to present data, information, or views, orally or in writing, on issues pending before the committee should communicate with the committee executive secretary.

Open committee discussion. The committee will discuss the reclassification of the following Category IIIA products under the provisions of 21 CFR 601.26: (1) Fibrinolysin and Desoxyribonuclease Combined (Bovine), powder for solution and ointment, and (2) Fibrinolysin and Desoxyribonuclease Combined (Bovine) with chloramphenicol ointment. These products are marketed under License Number 1, Parke-Davis, Division of Warner-Lambert Co.

Closed presentation of data. The committee will hear trade secret or confidential commercial information relevant to investigational new drug applications and biologic product license applications for the test for antibody to HTLV–III. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 522b(c)(4)).

Closed committee deliberation. The committee will discuss trade secret or confidential commercial information relevant to investigational new drug applications and biologic product license applications for the test for antibody to HTLV–III. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 522b(c)(4)).

Dated: December 5, 1984.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 84–32314 Filed 12–11–84; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 82N–0096; DESI 12152]

Drugs for Human use; Drug Efficacy Study Implementation; Prescription Drug for Cough, Cold, or Allergy; Withdrawal of Approval

AGENCY: Food and Drug Administration.

ACTION: Notice .

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of pertinent parts of the new drug application (NDA) for Ornade Spansules. This action does not affect the currently marketed product of this name. FDA is withdrawing approval of the product as previously formulated because that combination of ingredients lacks substantial evidence of effectiveness.

EFFECTIVE DATE: January 11, 1985.

ADDRESS: Requests for an opinion of the applicability of this notice to a specific product should be identified with Docket No. 82N–0096 and reference number DESI 12152 and directed to the Division of Drug Labeling Compliance (HFN–310), Rm. 216, Center for Drugs and Biologics, Food and Drug Administration, 5640 Nicholson Lane, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: David T. Reed, Center for Drugs and Biologics (HFN–366), Food and Drug Administration 5600 Fishers Lane, Rockville, MD 20857, 301–443–3650.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of August 17, 1982 (47 FR 35870), the Director of the Center for Drugs and Biologics revoked a temporary exemption for the drug product described below which permitted the product to remain on the market beyond the time limits scheduled for implementation of the Drug Efficacy Study. FDA also announced the conditions for marketing this product, as reformulated, and offered an opportunity for a hearing concerning the old formulation and indications reclassified to lacking substantial evidence of effectiveness.

NDA 12–152: as it pertains to Ornade Spansules, a controlled release product that now contains 12 milligrams (mg) chlorpheniramine maleate and 75 mg phenylpropanolamine hydrochloride; SmithKline and French Laboratories, 1500 Spring Garden St., P.O. Box 7929, Philadelphia, PA 19101. This product formerly contained 8 mg chlorpheniramine maleate, 50 mg phenylpropanolamine hydrochloride, and 2.5 isopropamide.

No party submitted a hearing request for the product containing isopropamide.

Failure to file an appearance and request a hearing constitutes a waiver of the opportunity for a hearing. Accordingly, FDA is now withdrawing approval of NDA 12–152 as it pertains to the isopropamide containing product.

Any drug product that is identical, related, or similar to the isopropamide-containing product named above and is not the subject of an approved new drug application is covered by the new drug application reviewed and is subject to this notice (21 CFR 310.6). Any person who wishes to determine whether a specific product is covered by this notice should write to the Division of Drug Labeling Compliance (address above.).

The Director to the Center for Drugs and Biologics, under the Federal Food, Drug, and Cosmetic Act (sec. 505, 52 Stat. 1052–1053 as amended (21 U.S.C. 355)) and under authority delegated to him (21 CFR 5.82), finds that, on the basis of new information before him with respect to the drug product, evaluated together with the evidence available to him when the application was approved, there is a lack of substantial evidence that the isopropamide-containing product named above will have the effects it was purported or represented to have under the conditions of use prescribed, recommended, or suggested in its labeling.

Therefore, pursuant to the foregoing findings, approval of NDA 12–152 insofar as it pertains to the isopropamide-containing product named above is withdrawn, and marketing of the isopropamide-containig product is hereby declared unlawful. The effective date of this announcement is January 11, 1985. Shipment in interstate commerce of the product or any identical, related, or similar product that is not the subject of an approved new drug application will then be unlawful.

Dated: December 6, 1984.

Harry M. Meyer, Jr.,

Director, Center for Drugs and Biologics.

[FR Doc. 84–32313 Filed 12–11–84; 8:45 am]

BILLING CODE 4160–01–M

[Docket No. 84M-0386]

Intermedics, Inc.; Premarket Approval of Cybertach™ 60 Model 262-01 Pulse Generator and Model 525-01 Programmer

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Intermedics, Inc., Freeport, TX, for premarket approval, under the Medical Device Amendments of 1976, of the CyberTach™ 60 Model 262-01 Pulse Generator and Model 525-01 Programmer. After reviewing the recommendation of the Circulatory System Devices Panel, FDA notified the applicant that the device had been shown to be safe and effective for use as recommended in the submitted labeling.

DATE: Petitions for administrative review by January 11, 1985.

ADDRESS: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockvile, MD 20857.

FOR FURTHER INFORMATION CONTACT: Donald F. Dahms, Center for Devices and Radiological Health (HFZ-450), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7559.

SUPPLEMENTARY INFORMATION: On June 23, 1982, Intermedics, Inc., Freeport, TX 77541, submitted to FDA an application for premarket approval of the CyberTach™ 60 Model 262-01 Pulse Generator and Model 525-01 Programmer. The device is an implantable pacemaker pulse generator and programmer. The device is indicated for use as a cardiac pacing system with anti-arrhythmic response. The Circulatory Systems Devices Panel, and FDA advisory committee, reviewed and recommended approval of the application. On November 7, 1984, FDA approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, Center for Devices and Radiological Health. Use of the device in the ventricles, however, continues to be investigational.

A summary of safety and effectiveness data on which FDA based its approval is on file in the Dockets Management Branch (address above) and is available upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at the Center for Devices and Radiological Health—contact Donald F. Dahms (HFZ-450), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of FDA's decision to approve this application. A petitioner may request either a formal hearing under Part 12 (21 CFR Part 12) of FDA's administrative practices and procedures regulations or a review of the application and of FDA's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration of FDA's action under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall idenfity the form or review requesting (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register.** If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before January 11, 1985, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated December 6, 1984.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 84-32315 Filed 12-11-84; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N-84-1481]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Robert Neal, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street SW., Wasington, D.C. 20410, telephone (202) 755-6050. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal described below for the collection of information to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

This Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the agency form number, if applicable; (4) how frequently information submissions will be required; (5) what members of the public will by affected by the proposals; (6) an estimate of the total number of hours needed to prepare the information submission; (7) whether the proposal is new or an extension or reinstatement of an information collection requirement; and (8) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Copies of the proposed forms and other available documents submitted to OMB may be obtained from David S. Cristy, Reports Management Officer for the Department. His address and telephone number are listed above.

Comments regarding the proposal should be sent to the OMB Desk Officer at the address listed above.

The proposed information collection requirements is described as follows:

Notice of Submission of Proposed Information Collection to OMB

Proposal: Relocation Reporting Requirements, and Acquisition and Relocation Recordkeeping Requirements in Handbooks 7417.1 and 7417.1 REV-1
Office: Public and Indian Housing
Form Number: None
Frequency of Submission: On occasion
Affected Public: State or Local Governments and Non-Profit Institutions
Estimated Burden Hours: 98
Status: Reinstatement
Contact: Raymond W. Hamilton, HUD, (202) 426-0938 Robert Neal, OMB, (202) 395-7316.

Authority: Sec. 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: December 3, 1984.

Dennis F. Geer,

Director, Office of Information Policies and Systems.

[FR Doc. 84-32400 Filed 12-11-84; 8:45 am]

BILLING CODE 4210-01-M

Office of Environment and Energy

[Docket No. I-84-131]

Intended Environmental Impact Statements; Decatur, IL

The Department of Housing and Urban Development gives notice that an Areawide Environmental Impact Statement (AEIS) is intended to be prepared the Decatur, Illinois, National Register Historic District. This Notice is required by the Council on Environmental Quality Under its rules (40 CFR Part 1500).

Interested individuals, governmental agencies, and private organizations are invited to submit information and comments concerning the area to the specific person or address indicated in the appropriate part of the appendices.

Particularly solicited is information on reports or other environmental studies planned or completed in the project area, issues and data which the EIS should consider, recommended mitigating measures and alternatives, and major issues associated with the proposed project. Federal agencies having jurisdiction by law, special expertise or other special interests should report their interests and indicate their readiness to aid the AEIS effort as a "cooperating agency."

Each Notice shall be effective for one year. If one year after the publication of a Notice in the Federal Register a Draft EIS has not been filed on a project, then the Notice for that project shall be cancelled. If a Draft AEIS is expected more than one year after the publication of the Notice in the **Federal Register**, then a new and updated Notice of Intent will be published.

Issued at Washington, D.C., December 6, 1984.

Francis G. Haas,

Deputy Director, Office of Environment and Energy.

Appendix—A EIS on the Decatur, Illinois National Register Historic District

The Department of Housing and Urban Development (HUD) Region V Office intends to prepare an Areawide EIS for the Decatur, Illinois, National Register Historic District. The Department hereby solicits comments and information for consideration in this AEIS. The Department published a previous AEIS Notice in the **Federal Register** on December 17, 1981. Initial work was undertaken but due to the complexity of the work, a AEIS was delayed. This Notice is meant to update the original one.

Description: The Historic District is irregularly shaped, its approximate boundaries include Eldorado on the North, Union/Church on the east, Hayworth/Crea on the west, and Lincoln Park Dr./Edward St. on the south. Area structures include many and varied architectural styles and building types.

Need: An EIS is being prepared as any new construction activity, or major rehabilitation action, within the District may have an effect on the District. An EIS is seen as the most appropriate method to fulfill the Department's environmental and historic preservation and responsibilities in a historic district that is attractive for housing development.

Alternatives: The EIS will consider the range of site and design alternatives possible for housing within the District. The purpose of the EIS is to develop a set of guidelines to be used by HUD in reviewing projects being considered for Federal participation in the historic district.

Scoping: Comments received from appropriate government agencies and service organizations as a result of this and the previous notice will be taken into consideration in the preparation of the statement. For that reason no scoping meeting is believed necessary. Potential issues include impact on historic resources, sewer capacity, noise, and parking congestion.

Comments: Comments should be sent within 15 days following publication of this notice in the **Federal Register** to: Harry P. Blus, Regional Environmental Officer, Department of Housing and Urban Development, Chicago Regional Office, 547 W. Jackson Blvd., Chicago, Illinois 60606.

[FR Doc. 84-32399 Filed 12-11-84; 8:45 am]

BILLING CODE 4210-29-M

DEPARTMENT OF THE INTERIOR

Geological Survey

Map Prices; Price Change

Notice is hereby given that effective January 1, 1985, the price of maps published by the U.S. Geological Survey will be increased. The increase is needed to recover the costs of reproduction and distribution. The new map prices will be as follows:

Topographic, image, and related maps	Price
Standard Topographic Quadrangles [1] (1:24,000; 1:25,000; 1:50,000; 1:62,500; 1:63,360)	$2.50
Orthophotoquads and Orthophotomaps	2.50
National Atlas Separates	3.10
1:100,000 Maps	4.00
1:250,000 Maps	4.00
Alaska Boundary Series 1:250,000 Maps	2.50
Alaska Federal Conservation Maps	4.00
Major Ecosystems of Alaska	4.00
County Maps (1:50,000; 1:100,000)	4.00
State Maps (No Contours, Black and Blue—1:500,000; Black—1:1,000,000) (per sheet)	3.10
State Maps (No Contours, Multicolor—1:500,000) (per sheet)	4.00
State Maps (Topographic or Shaded Relief—1:500,000) (per sheet)	4.00
North America 1:10 million	3.10
International Maps of the World (1:1,000,000) (per sheet)	4.00
World Map, Relief Edition, 3 scales:	
1:30 million—Single sheet 56 × 42"	4.30
1:22 million—3 sheets 57 × 34"	10.80
1:14 million—6 sheets 56 × 42"	36.00
The World (outline map):	
1:40 million, 48 × 33"	3.10
1:80 million, 25 × 18"	1.70
Political Map of the World	3.10
National Park Maps	4.00
Coastal Ecological Inventory Maps	4.00
Antarctic Topographic Maps	2.40-4.00
Satellite Image Maps	2.40-6.60
Appalachian Region Map	3.10
Maps of the United States (Base, contour, outline, and physical divisions in various scales, colors, sheet sizes, and number of sheets per map)	0.70-6.10
Thematic Maps	
Hydrologic Unit Map of (State)	2.10-7.30
Hydrologic Unit Map of U.S.	6.10
Basement Rock Map of the U.S. (set)	6.10
Basement Rock Map of North America	2.10
Bouguer Gravity Anomaly Map of the U.S.	1.90
Coal Fields of the U.S.	4.30
Coal Fields of Alaska	3.60
Fold and Thrust Belts of U.S. (set)	9.90
Geologic Map of (State)	7.30-16.90
Geologic Map of the U.S. (set)	9.90
Geologic Map of North America (set)	9.90
Geothermal Gradient Map of N.A.	7.90
Preliminary Metallogenic Map of N.A. (set)	12.00
Subsurface Temperature Map of N.A. (set)	7.90
Tectonic Map of North America (set)	9.90
World Seismicity Map	3.10

[1] Includes new maps, revised maps, and reprints.

The Geological Survey also publishes specialized scientific maps, including:

(1) Geologica Quadrangle Maps
(2) Miscellaneous Field Studies Maps
(3) Miscellaneous Investigations Maps
(4) Geophysical Investigations Maps
(5) Hydrologic Investigations Maps
(6) Coal Investigations Maps
(7) Mineral Investigations (Resource) Maps
(8) Oil and Gas Investigations Charts and Maps
(9) Land Use Maps
(10) Antarctic Geologic Maps.

Prices for these maps vary. Specific price information may be obtained from the following Geological Survey maps sales offices:

Alaska:

4230 University Drive, Anchorage, AK 99508–4664
Room E–146, Federal Building, 701 C Street, Anchorage, AK 99513, (907) 271–4307
Room 126, New Federal Building, 101 12th Avenue, Fairbanks, AK 99701, (907) 456–0244

California:

Room 7638, Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012, (213) 688–2850
Building 3, MS 533, 345 Middlefield Road, Menlo Park, CA 94025, (415) 323–8111, ext. 2817
Room 504, Customhouse, 555 Battery Street, San Francisco, CA 94111, (415) 556–5627

Colorado:

Building 41, Federal Center, Denver, CO 80225, (303) 236–7477
Room 169, Federal Building, 1961 Stout Street, Denver, CO 80294, (303) 837–4169

District of Columbia:

Room 1028, General Services Administration Building, 19th and F Streets, NW., Washington, D.C. 20244, (202) 343–8073

Mississippi:

Building 3101, National Space Technology Laboratories, NSTL Station, MS 39529, (601) 688–3541

Missouri:

1400 Independence Road, Rolla, MO 65401, (314) 341–0851

Texas:

Room 1C–45, Federal Building, 1100 Commerce Street, Dallas, TX 75242, (214) 767–0198

Utah:

Room 8105, Federal Building, 125 South State Street, Salt Lake City, UT 84138, (801) 524–5652

Virginia:

1200 South Eads Street, Arlington, VA 22202, (703) 557–2781
Room 1C–402, National Center, 12201 Sunrise Valley Drive, Reston, VA 22092, (703) 860–6167

Washington:

Room 678, U.S. Courthouse, West 920 Riverside Avenue, Spokane, WA 99201, (509) 456–2524.

Dated: December 4, 1984.

R.B. Southard,

Chief, National Mapping Division, U.S. Geological Survey.

[FR Doc. 84–32320 Filed 12–11–84; 8:45 am]

BILLING CODE 4310–31–M

Bureau of Land Management

Eastern States; Unleased Federal Mineral Ownership Within Known Geologic Structures

AGENCY: Bureau of Land Management, Interior.

ACTION. Notice of availability of computeried list of unleased Federal tracts within Eastern States Known Geologic Structures (KGS's), call for nominations of listed lands for competitive oil and gas sale.

SUMMARY: The Eastern States Office has recently completed a survey of KGS's in seven States as to determine locations of unleased Federal mineral ownership within those KGS's. The result of that survey is a computerized location list for approximately 38,000 acres of unleased Federal tracts within KGS's in Arkansas, Louisiana, Mississippi, Alabama, Florida, Virginia, and Kentucky. At this time, the Eastern States Office is making single copies of the list available to interested parties at no charge. Requests may be made in writing or by telephone, and should be directed to Mr. Robert Hall, Bureau of Land Management, Eastern States Office, 350 South Pickett Street, Alexandria, Virginia 22304, (703) 274–0140.

In addition, in accordance with 43 CFR 3120.3, the Eastern States Office is soliciting nominations of parcels for competitive sale from among those tracts included in the computerized list. Written nominations should specify the State, County, KGS name, and tract description as shown in the printout, and should be submitted by March 12, 1985, to Ms. Lonna McKenna, Bureau of Land Management, Eastern States Office, 350 South Pickett Street, Alexandria, Virginia 22304.

FOR FURTHER INFORMATION CONTACT:

Mr. Robert Hall, Bureau of Land Management, Eastern States Office, 350 South Pickett Street, Alexandria, Virginia 22304, (703) 274–0145.

Pieter J. VanZanden,

Acting State Director.

[FR Doc. 84–32134 Filed 12–11–84; 8:45 am]

BILLING CODE 4310–GJ–M

[CA 15556]

Indio Resource Area; Realty Action for the Exchange of Public Lands in Riverside County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action, exchange of public lands (CA 15566).

SUMMARY: The following described public lands have been determined to be suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701:

San Bernardino Meridian

T. 2 S., R. 4 E.
Sec. 18, lots 1 and 2, SE¼NE¼, E½SE¼, SW¼SE ¼, S½NW¼SE¼.
T. 2 S., R. 3 E
Sec. 11, lot 1.
Containing 387.11 acres.

In exchange, the Federal Government will acquire non-Federal lands in Riverside County from the Ditz-Crane Corp., 2295 De La Cruz Blvd, Santa Clara, CA 95050.

The lands are described as:

T. 2 S., R. 3 E.,
Sec. 13, W½;
Sec. 14, All.
Containing 960.00 acres.

The purpose of this exchange is to obtain non-Federal land for use in Federal programs. It will provide improved and more efficient management of Federal land. The exchange is consistent with the Bureau's land management planning and the public interest will be well served by making the exchange. The value of the lands to be exchanged is approximately equal and money will be used to equalize the values by Ditz-Crane. The exchange will include both mineral and surface estates.

There will be reserved to the United States in the applied for lands a right-of-way for ditches or canals constructed by the authority of the United States (43 U.S.C. 945).

Other terms and conditions of the sale are:

1. A reservation for existing right-of-way for Southern California Edison transmission line (R 0959) and for County of Riverside road under RS 2477.

2. Ditz-Crane, Inc. agrees that it takes the real estate in T. 2 S., R. 3 E., SBM, Section 11, Lot 1 subject to the existing grazing use of Jim Wallace, holder of grazing authorization No. 6813. The rights of Jim Wallace to graze domestic livestock on the subject land shall cease on two years from date of this notice. The Ditz-Crane, Inc. is entitled to receive annual grazing fees from Jim Wallace in an amount not to exceed that which would be authorized under the Federal grazing fee published annually in the **Federal Register.**

3. Ditz-Crane, Inc. will obtain a relinquishment or cancellation of the grazing lease on the non-Federal land.

4. The patent will be subject to all valid existing rights and reservation of record.

5. The patent will be subject to right-of-way CA 5412 as it affects land in T. 2 S., R. 3 E., Section 11, Lot 1.

The publication of this notice in the **Federal Register** shall segregate the applied for public land from all other forms of appropriation under the public land laws and the mining laws for a period of two years.

Information concerning the exchange, including the environmental analysis is available for review at the Bureau of Land Management's Californial Desert District Office, 1695 Spruce Street, Riverside, CA 92507.

The publication date of this notice will commence the 45-day comment period. For a period of 45 days from date of first publication of this notice in the **Federal Register,** interested parties may submit comments to the District Manager, California Desert District, 1695 Spruce Street, Riverside, CA 92507. Any adverse comments will be evaluated by the State Director, who may vacate or modify this realty action and issue a final determination. In the absence of any action by the State Director, this realty action will become the final determination of the Department of the Interior.

Dated: November 30, 1984.

Gerald E. Hillier,

District Manager.

[FR Doc. 84-32319 Filed 12-11-84; 8:45 am]

BILLING CODE 4310-40-M

[M-59847]

Montana; Realty Action, Exchange of Public Lands

AGENCY: Bureau of Land Management, Butte District Office, Interior.

ACTION: Notice of realty action, exchange of public lands in Lewis and Clark, Jefferson, Broadwater, Gallatin, Park, and Sweetgrass Counties for private lands in Lewis and Clark County.

SUMMARY: The following described lands have been determined to be suitable for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of 1976; 43 USC 1716:

PRINCIPAL MERIDIAN, MONTANA

Tract No.	County	Acres
	Gallatin	
G-2	T1S, R1E, sec. 14, NW¼NE¼	40
G-3	T2N, R2E, sec. 12, N½	320
G-4	T2S R7E, sec. 20, NE¼NE¼	40
G-5	T3N, R3E, sec. 34, SE¼SE¼	40
G-6	T2N R3E, sec. 8 SE¼NE¼	40
G-7	T4N, R6E, sec. 30, NE¼NE¼	40
G-9	T2S, R2E, sec. 22, NE¼SE¼	40
G-10	T2S, R2E, sec. 18, NE¼SE¼	40
	Sec. 17, Seg. Survey	17.68
G-11	T2S, R2E, sec. 3, NE¼SW¼	40
G-12	T1S, R2E, sec. 33, E½SW¼, SE¼SE¼	120
G-13	T1S, R1E, sec. 22, SW¼SW¼	40
G-14	T2N, R3E, sec. 20, NW¼, W½SW¼, E½ SE¼.	320
	Park	
P-1	T2N, R11E, sec. 6, Lot 4, SE¼SW¼, SW¼SE¼.	104.27
P-2	T1S, R9E, sec. 2, lots 3, 4	80.61
	T1N, R10E, sec. 32, SW¼	160
P-3	T2S, R11E, sec. 14, W½SE¼	80
P-4	T2S, R12E, sec. 10, SE¼NW¼	40
P-6	T8S, R6E, sec. 10, SW¼SE¼	40
P-7	T8S, R6E, sec. 18, lot 1, NE¼NE¼, NE¼ NW¼.	115.42
P-8	T2S, R11E, sec. 21, SW¼SW¼	40
P-9	T3S, R11E, sec. 13, SW¼NW¼	40
P-10	T1N, R10E, sec. 12, E½NE¼	80
P-11	T1S, R10E, sec. 30, N½SE¼, SE¼SE¼	120
	T1S, R9E, sec. 8, SE¼SE¼, NW¼SW¼	80
P-12	T2S, R9E, sec. 4, lots 3, 4, NW¼	160.20
P-13	T1S, R10E, sec. 18, lot 4	33.84
	Sec. 20, S½SE¼	40
	T1N, R8E, sec. 34, SE¼NE¼	40
P-14	T2S, R11E, sec. 10, NE¼SW¼	40
P-15	T2S, R12E, sec. 27, NE¼NE¼	40
P-16	T2S, R12E, sec. 18, SE¼SE¼	40
P-17	T2S, R8E, sec. 4, NW¼NW¼, E½SW¼	120
P-18	T1S, R10E, sec. 20, N½SE¼	80
P-19	T5N, R9E, sec. 20, E½	320
P-20	T2N, R8E, sec. 8, NW¼NW¼	40
	Sec. 20, SE¼NW¼	40
P-21	T1S, R11E, sec. 2, lot 1	47.38
	Sec. 10, W½SW¼	80
	Sec. 22, NW¼NW¼	40
	Sec. 24, E½SE¼	80
	T1S, R12E, sec. 20, N½N½, SE¼NW¼	200
P-22	T1N, R10E, sec. 20, N½NE¼	80
P-23	T3S, R6E, sec. 20, SW¼SW¼	40
P-24	T3S, R9E, sec. 30, lots 3, 4, E½SW¼	159.05
P-25	T2S, R8E, sec. 34, SE¼	160
P-26	T2S, R8E, sec. 30, NE¼NW¼	40
P-27	T3S, R6E, sec. 22, W½	320
P-28	T4S, R9E, sec. 30, lots 3, 4, SE¼SW¼	118.84
	Sec. 20, W½SE¼, SE¼SE¼	120
P-29	T4S, R9E, sec. 32, NW¼SW¼	40
P-30	T5S, R9E, sec. 32, W½NW¼	80
P-31	T7S, R7E, sec. 2, Lot 4	53.45
P-32	T4S, R8E, sec. 26, S½NW¼, N½SW¼	160
P-34	T5N, R9E, sec. 32, E½W½	160
P-35	T2S, R8E, sec. 34, W½SE¼	80
P-36	T4N, R9E, sec. 6, NE¼NW¼	40
	Lewis and Clark	
L-1	T11N, R5W, sec. 24, lots 15, 16	9.93
L-2	T11N, R4W, sec. 22, lot 1	25.41
L-3	T11N, R5W, sec. 2, lot 8	39.67
L-4	T11N, R5W, sec. 29, lot 9	12.12
L-5	T10N R5W, sec. 13, lots 21, 22, 23	15.62
L-6	T10N, R5W, sec. 13, lots 19, 20, 24	
	Sec. 24, lots 15, 16	19.57
L-7	T14N, R3W, sec. 34, lot 17	0.14
L-8	T11N, R5W, sec. 29, lot 11	11.20
L-9	T12N, R6W, sec. 5, SE¼SW¼	40
	T13N, R6W, sec. 17, SE¼SE¼	40
	Sec. 22, NW¼SW¼	40
	Sweetgrass	
P-21	T1N, R12E, sec. 22, S½SW¼	80
	Sec. 32, N½NE¼, SW¼SW¼	120
	Jefferson	
J-2	T8N, R3W, sec. 32, NW¼NW¼NW¼	10
J-3	T2N, R5W, sec. 14, SW¼	160
	sec. 24, NW¼, SE¼NE¼	200
J-5	T6N, R4W, sec. 32, E½SW¼SE¼	20
J-6	T7N, R3W, sec. 17, lot 24	1.07
J-7	T2N, R5W, sec. 26, NW¼NW¼	40
J-8	T8N, R4W, sec. 23, lot 1	23.65
J-9	T8N, R3W, sec. 7, lot 6	
	Sec. 5, lots 10, 16, 21, 31, 32	
	Sec. 4, lot 7	105.57
J-10	T8N, R3W, sec. 9, SE¼NE¼	
	Sec. 10, lots 1, 6, 7, 10, 11, 16	161.93
J-11	T9N, R3W, sec. 21, NE¼SE¼	40
	Broadwater	
B-1	T8N, R3E, sec. 2, N½N½NW¼SE¼, lots 13, 14, 15, 16.	26.64
B-2	T3N, R1E, sec. 27, SW¼NW¼	40
B-3	T3N, R1E, sec. 12, NW¼	160
B-4	T9N, R2E, sec. 20, SW¼NW¼, NW¼ SW¼NE¼, NW¼SE¼NW¼, SW¼SE¼ NW¼.	50

In exchange for an equal value of these public lands, the United States will acquire the following described private lands in Lewis and Clark County from Nick and Mary Wirth:

PRINCIPAL MERIDIAN, MONTANA

T14N, R4W, sec. 27, NW¼, NW¼SW¼	200
Sec. 28, that portion south and east of I-15 excepting certain tracts and roadways.	533.64
Sec. 29, small parcel in the E½E½SE¼	6.69
Sec. 31, all	660.64
Sec. 32, N½, SW¼ excepting highway acres	478.04
Sec. 33, all excepting the highway, railroad, and a small tract	565.21
Total	2,444.22

DATES: For a period of 45 days from the date of this notice, interested parties may submit comments to the address shown below. Any adverse comments will be evaluated by the BLM, Montana State Director, who may vacate or modify this realty action and issue a final determination. In the absence of any action by the State Director, this realty action will become the final determination of the Department of Interior.

FOR FURTHER INFORMATION CONTACT: Information related to the exchange, including the environmental assessment and land report, is available for review at the Butte District Office, P.O. Box 3388, Butte, Montana 59702.

SUPPLEMENTARY INFORMATION: The purpose of the exchange is to acquire additional public land in the Sleeping Giant area near Holter Lake. These lands have high recreational and wildlife values and will provide the first legal public access by land to the

Sleeping Giant area. This is the final step of a two-part exchange. The first step acquired 1,080 acres of the Wirths land. This step will acquire the remaining 2,444.22 acres of private land in exchange for an equal value of the above listed public lands.

The publication of this notice segregates the public lands described above from settlement, sale, location and entry under the public land laws, including the mining laws, but not from exchange pursuant to Section 206 of the Federal Land Policy and Management Act of 1976.

This Notice constitutes formal notification under 43 CFR 4110.4–2(b) that the BLM may cancel grazing authorizations on the above described public lands at any time after two years from the receipt of this Notice by existing grazing lessees or permittees.

The Exchange will be made subject to:

1. A reservation to the United States of a right-of-way for ditches or canals in accordance with 43 USC 945.

2. The reservation to the United States of any identified mineral values on the Federal lands being transferred.

3. All valid existing rights (e.g., rights-of-way, easements and leases of record).

4. Value equalization by cash payments or acreage adjustments.

5. The exchange must meet the requirements of 43 CFR 4110.4–2(b).

This exchange is consistent with Bureau of Land Management policies and planning and has been discussed with State and local officials. The public interest will be served by completion of this exchange.

Gerald L. Quinn,

Acting District Manager.

[FR Doc. 84–32318 Filed 12–11–84; 8:45 am]

BILLING CODE 4310–10–M

Craig District Advisory Council; Meeting

In accordance with Pub. L. 94–579, notice is hereby given that there will be a meeting of the Craig District Advisory Council on January 23, 1985.

The meeting will begin at 10 a.m. at the Little Snake Resource Area Office, 1180 Industrial Avenue, Craig, Colorado.

The Council will discuss the Little Snake Resource Management Plan.

The Meeting will be open to the public and interested persons may make oral statements to the Council beginning at 10:30 a.m. The District Manager may establish a time limit for oral statements, depending on the number of people wishing to speak. Anyone wishing to address the Council or file a written statement should notify the District Manager, Bureau of Land Management, 455 Emerson, Craig, Colorado 81625, by January 16, 1985.

Summary minutes of the Council meeting will be maintained in the Craig District Office and will be available for public inspection and reproduction during regular business hours.

Dated: November 26, 1984.

Terry L. Plummer,

Associate District Manager.

[FR Doc. 84–32322 Filed 12–11–84; 8:45 am]

BILLING CODE 4301–JB–M

[N–219]

Nevada; Partially Denied Proposed Withdrawal; Desert National Wildlife Range; Correction

In **Federal Register** issued of September 2, 1983, page 40002, column 2, first line under T. 8 S., R. 62 E., is corrected to read: Sec. 31, lots 3, 4, SE¼SW¼.

Wm. J. Malencik,

Deputy State Director, Operations.

[FR Doc. 84–32371 Filed 12–11–84; 8:45 am]

BILLING CODE 4310–C–M

INTERNATIONAL TRADE COMMISSION

Termination of Countervailing Duty Investigation Concerning Ampicillin Trihydrate and Its Salts From Spain

AGENCY: United States International Trade Commission.

ACTION: Termination of countervailing duty investigation under section 104(b)(1) of the Trade Agreements Act of 1979, with regard to ampicillin trihydrate and its salts from Spain.

EFFECTIVE DATE: November 30, 1984.

FOR FURTHER INFORMATION CONTACT: Ms. Vera Libeau, Office of Investigations, telephone number (202) 523–0368.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether an industry in the United States would be materially injured, or threatened with material injury, or whether the establishment of such an industry would be materially retarded, if the order were to be revoked. On June 17, 1982, the Commission received a request from the Government of Spain for the review of the outstanding countervailing duty order on ampicillin trihydrate and its salts from Spain. Notice of the countervailing duty order was published on March 22, 1979 in the **Federal Register** (44 FR 17484).

On September 13, 1984, the Commission was notified by letter that Biocraft Laboratories, Inc., the original petitioner for the countervailing duty order, wished to withdraw its request for the imposition of countervailing duties under the above referenced countervailing duty order.

While there is no provision in the Trade Agreements Act of 1979, or in its legislative history, permitting termination of a transition case investigation, termination of a properly instituted countervailing duty investigation is permitted under section 704(a) of the Tariff Act of 1930. That section directs the Commission to solicit public comment prior to termination and approve such termination only if it is in the public interest. Termination authority is explicit in case based on newly filed countervailing duty petitions; it is implied with respect to existing countervailing duty orders.

On October 15, 1984, (49 FR 40232) the Commission published a notice in the **Federal Register** requesting public comment by November 14, 1984, on the proposed termination of the Commission investigation on ampicillin trihydrate and its salts from Spain. No adverse comments were received in response to the Commission's notice.

The Commission is therefore terminating its investigation on ampicillin trihydrate and its salts from Spain (T.D. 79–90). The termination of this investigation has the same effect as a determination that an industry in the United States would not be materially injured, or threatened with material injury, nor would the establishment of such an industry be materially retarded, if the countervailing duty order were to be revoked.

In addition to publishing this *Federal Register* notice, the Commission is serving a copy of this notice on all persons who have written the agency in connection with this investigation and is also notifying the Department of Commerce of its action in this case.

By order of the Commission.

Issued: December 3, 1984.

Kenneth R. Mason,

Secretary.

[FR Doc. 84–32386 Filed 12–11–84; 8:45 am]

BILLING CODE 7020–02–M

[Investigation No. 337-TA-196]

Certain Apparatus for Installing Electrical Lines and Components Therefor

Notice is hereby given that the prehearing conference in this matter will commence at 9:00 a.m. on January 7, 1985, in Hearing Room 6311 at the Interstate Commerce Commission Building at 12th Street and Constitution Avenue NW., Washington, D.C., and the hearing will commence immediately thereafter.

The Secretary shall publish this notice in the **Federal Register**.

Issued: December 4, 1984.

Janet D. Saxon,

Administrative Law Judge.

[FR Doc. 84-32387 Filed 12-11-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-163 (Final)]

Cell-Site Transceivers and Subassemblies Thereof From Japan; Determination

On the basis of the record[1] developed in the subject investigation, the Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)), that an industry in the United States is materially injured by reason of imports from Japan of cell-site transceivers and subassemblies thereof, provided for in item 685.29 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

The Commission further determines, pursuant to section 735(b)(4)(A) of the Act (19 U.S.C. 1673d(b)(4)(A)), that the material injury is not by reason of massive imports to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the antidumping duty on imports of cell-site transceivers and subassemblies thereof from Japan retractively.[3]

Background

The Commission instituted this investigation effective June 12, 1984, following a preliminary determination by the Department of Commerce that imports of the subject merchandise from Japan were being sold in the United States at LTFV within the meaning of section 731 of the Act (19 U.S.C. 1673). Notice of the institution of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the noitce in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and by publishing it in the **Federal Register** on July 5, 1984 (49 FR 27641). Subsequently, the Department of Commerce extended the investigation by 60 days (49 FR 32096, Aug. 10, 1984) and the Commission revised its schedule accordingly (49 FR 33347, Aug. 22, 1984). The hearing was held in Washington, DC, on November 8, 1984, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on December 3, 1984. The views of the Commission are contained in USITIC Publication 1618 (December 1984), entitled "Investigation No. 731-TA-163 (Final), Cell-Site Transceivers and Subassemblies Thereof from Japan."

Issued: December 3, 1984.

By Order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-32388 Filed 12-11-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 104-TAA-24 and 104-TAA-25]

Oleoresins From Spain and India

AGENCY: International Trade Commission.

ACTION: Institution of countervailing duty investigations and scheduling of a hearing to be held in connection with the investigations.

SUMMARY: Pursuant to section 104(b)(2) of the Trade Agreements Act of 1979 (19 U.S.C. 1671 note), the Commission hereby gives notice that it is instituting these investigations to determine whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of oleoresins from Spain and/or oleoresins from India if the outstanding countervailing duty orders regarding such merchandise were to be revoked. Oleoresins are provided for in item 450.20 of the Tariff Schedules of the United States.

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult Part 207, Subparts A, C, and D (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201) of the Commission's rules.

EFFECTIVE DATE: December 5, 1984.

FOR FURTHER INFORMATION CONTACT: Tedford Briggs (202-523-4612), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436.

SUPPLEMENTARY INFORMATION:

Background

On February 28, 1979, the Department of the Treasury issued a countervailing duty order under section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) on oleoresins imported from Spain (T.D. 79-71, 44 FR 11214), and on April 9, 1979, the Department of the Treasury issued a countervailing duty order on oleoresins from India (T.D. 79-107, 44 FR 21009). On January 1, 1980, the Trade Agreements Act of 1979 (Pub. L. 96-39) became effective. That act provided, in section 104(b), that "In the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930 . . . which applies to merchandise which is the product of a country under the Agreement, and which is in effect on January 1, 1980, . . ., the Commission, upon the request of the government of such a country . . ., submitted within 3 years after the effective date of title VII of the Tariff Act of 1930 (January 1, 1980) shall . . . commence an investigation to determine whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by the countervailing duty order if the order were to be revoked."

On June 17, 1982, the Commission received such a request from the Government of Spain, and on December 28, 1982, the Commission received such a request from the Government of India.

Participation in the Investigations

Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's Rules of Practice and Procedure (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the **Federal Register**. Any entry of appearance filed after this date will be referred to the Chairwoman, who will

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[1] The record is defined in § 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(i)).

[2] Vice Chairman Liebeler dissenting.

[3] Had the Commission made an affirmative determination under this provision of the Act, antidumping duties would have been effective on imports entered on or after March 15, 1984. The negative determination means that antidumping duties will be effective on imports entered on or after June 12, 1984.

determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service List

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In accordance with § 201.16(c) of the rules (19 CFR 201.16(c)), each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Staff Report

A public version of the prehearing staff report in these investigations will be placed in the public record on January 25, 1985, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

Hearing

The Commission will hold a hearing in connection with these investigations beginning at 10:00 a.m. on February 12, 1985, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on January 29, 1985. All persons desiring to appear at the hearing and make oral presentations should file prehearing briefs and attend a prehearing conference to be held at 9:30 a.m. on February 4, 1985, in room 117 of the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is February 5, 1985.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any confidential materials must be submitted at least three (3) working days prior to the hearing (see § 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2), as amended by 49 FR 32569, Aug. 15, 1984)).

Written Submissions

All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with § 207.22 of the Commission's rules (19 CFR 207.22). Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on February 19, 1985. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before February 19, 1985.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for confidential business data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6, as amended by 49 FR 32569, Aug. 15, 1984).

This notice is published pursuant to § 207.30 of the Commission's rules (19 CFR 207.30).

Issued: December 7, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-32390 Filed 12-11-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 337-TA-182/188]

Certain Fluidized Supporting Apparatus and Components Thereof; Decision Not To Review An Initial Determination Terminating Investigations

AGENCY: International Trade Commission.

ACTION: Termination of investigations.

SUMMARY: The U.S. International Trade Commission hereby gives notice of its decision not to review an initial determination (ID) terminating the above-captioned consolidated investigations. The ID terminated the investigations on the basis of a joint motion to terminate which in turn was based on an asset purchase agreement implemented by the parties.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0480.

SUPPLEMENTARY INFORMATION: This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and Commission rules § 210.53(c) and (h) (19 CFR 210.53(c) and (h)). No petition for review of the ID was filed, nor were any comments received from Government agencies.

Copies of the ID and all other nonconfidential documents filed in connection with these investigations are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

Issued: December 6, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-32391 Filed 12-11-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-165 (Final)]

Certain Valves, Nozzles, and Connectors of Brass From Italy For Use in Fire Protection Systems

AGENCY: International Trade Commission.

ACTION: Postponement of hearing.

SUMMARY: On December 5, 1984, the Commission received notice from the International Trade Administration, U.S. Department of Commerce (Commerce), that the margin of sales at less than fair value in the subject investigation is de minimis, thereby conflicting with Commerce's notice of final determination published in the Federal Register on November 30, 1984 (49 FR 47066), which had indicated a positive margin of sales at less than fair value of 3.47 percent. Pending the publication of a revised notice of final determination by Commerce, the Commission's public hearing on this investigation, scheduled for Friday, December 7, 1984, is hereby postponed indefinitely. This postponement is pursuant to § 201.14(b) of the Commission's Rules of Practice and Procedure.

EFFECTIVE DATE: December 5, 1984.

FOR FURTHER INFORMATION CONTACT: George L. Deyman (202–523–0481), Office of Investigations, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436.

Authority: This notice is published pursuant to § 201.14 of the Commission's rules (19 CFR 201.14).

Issued: December 7, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84–32389 Filed 12–11–84; 8:45 am]

BILLING CODE 7020–02–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Wage Determination System for Territory of Guam

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice of Temporary Workers Wage Rates for Territory of Guam.

SUMMARY: The Governor of Guam is authorized to continue using the 1980 Adverse Effect Wage Rate (AEWR) established by the Secretary of Labor to make temporary alien labor certification determinations until December 31, 1984. Additional time is needed to resolve problems with the proposed wage determination system submitted by the Governor. While appropriate consultations and revisions to the system are being made, the Governor may use the AEWR until December 31, 1984.

(Secs. 103 and 214 of the Immigration & Nationality Act, as amended; 8 U.S.C. 1103 & 1184)

Dated: December 6, 1984.

Andrew J. Carmichael, Jr.,

Associate Commissioner, Examinations, Immigration and Naturalization Service.

[FR Doc. 84–32379 Filed 12–11–84; 8:45 am]

BILLING CODE 4410–10–M

NATIONAL TRANSPORTATION SAFETY BOARD

Public Hearing in Amazing Grace Marine Accident

In connection with its investigation of the accident involving the sinking of the U.S. Fishing Vessel AMAZING GRACE in the Atlantic Ocean on or about November 14, 1984, the National Transportation Safety Board will convene a public hearing at 10 a.m. (local time) on December 19, 1984, in the Portsmouth City Council Chamber, Portsmouth City Hall, 801 Crawford Street, Portsmouth, Virginia. For more information, contact Mr. Brad Dunbar, Office of Government and Public Affairs, National Transportation Safety Board, 800 Independence Ave., SW., Washington, D.C. 20594, telephone (202) 382–6600.

Dated: December 6, 1984.

H. Ray Smith, Jr.,

Federal Register Liaison Officer.

[FR Doc. 84–32302 Filed 12–11–84; 8:45 am]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–413]

Duke Power Co., et al., Catawba Nuclear Station, Unit No. 1; Issuance of Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission or NRC), has issued Facility Operating License No. NPF–31 to Duke Power Company, North Carolina Electric Membership Corporation, and Saluda River Electric Cooperative, Inc., (the licensees) which authorizes operation of the Catawba Nuclear Station, Unit 1, at reactor core power levels not in excess of 3411 megawatts thermal in accordance with the provisions of the license, revised Technical Specifications, and the Environmental Protection Plan with a condition limiting operation to five percent of full power (170 megawatts thermal).

On July 18, 1984, the Commission issued Facility Operating License No. NPF–24 to the licensees which authorized loading of fuel into the reactor vessel and the conducting of certain mechanical and electrical tests which must be done before the reactor achieves criticality.

License No. NPF–31 supersedes NPF–24.

The Catawba Nuclear Station, Unit 1, is a pressurized water reactor located in York County, South Carolina, approximately 6 miles north of Rock Hill, South Carolina.

The application for the license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter 1, which are set forth in the license. Prior public notice of the overall action involving the proposed issuance of an operating license was published in the **Federal Register** on June 25, 1981 (46 FR 32974). The power level authorized by this license and the conditions contained therein are encompassed by that prior notice.

The Commission has determined that the issuance of this license will not result in any environmental impacts other than those evaluated in the Final Environmental Statement since the activity authorized by the license is encompassed by the overall action evaluated in the Final Environmental Statement.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of relief and the issuance of exemptions included in this license will have no significant impact on the environment (49 FR 46966).

For further details with respect to this action, see (1) Facility Operating License NPF–31; (2) Facility Operating License NPF–24; (3) the Commission's Safety Evaluation Report, dated February 1983 (NUREG–0954), and Supplements 1 through 4; (4) the Final Safety Analysis Report and Amendments thereto; (5) the Environmental Report and supplements thereto; (6) the Final Environmental Statement, dated January 1983 (NUREG–0921); (7) the Partial Initial Decision of the Atomic Safety and Licensing Board, dated June 22, 1984; (8) the Supplemental Partial Initial Decision on Emergency Planning dated September 18, 1984; and (9) the Partial Initial Decision Resolving Foreman Override Concerns and Authorizing Issuance of Operating Licenses dated November 27, 1984.

These items are available at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. 20555, and at the York County Library, 138 East Black Street, Rock Hill, South Carolina 29730. A copy of Facility Operating License NPF–31 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Licensing. Copies of the Safety Evaluation Report and its Supplements (NUREG–0954) and the Final Environmental Statement (NUREG–0921) may be purchased at current rates from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, and through the NRC GPO sales program by writing to the U.S. Nuclear Regulatory Commission, Attention: Sales Manager, Washington, D.C. 20555. GPO deposit account holders may call (301) 492–9530.

Dated at Bethesda, Maryland, this 6th day of December 1984.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Chief, Licensing Branch No. 4, Division of Licensing.

[FR Doc. 84-32395 Filed 12-11-84; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Advisory Committee for Trade Negotiations; Meeting and Determination of Closing of Meeting

The meeting of the Advisory Committee for Trade Negotiations (the Advisory Committee) to be held Wednesday, January 9, 1985, from 1:00 p.m. to 4:00 p.m. in Washington, D.C., will involve a review and discussion of the current issues involving the trade policy of the United States. Pursuant to section 2155(f)(2) of Title 19 of the United States Code, I have determined that this meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions.

More detailed information can be obtained by contracting Phyllis O. Bananno, Director, Office of Private Sector Liaison, Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506.

William E. Brock,

United States Trade Representative.

[FR Doc. 84-32367 Filed 12-11-84; 8:45 am]

BILLING CODE 3190-01-M

SECURITIES AND EXCHANGE COMMISSION

Agency Information Collection Activities Under OMB Review

Agency Clearance Officer—Kenneth A. Fogash (202) 272-2142.

Upon written request, copy available from: Securities and Exchange Commission, Office of Consumer Affairs and Information Services, Washington, D.C. 20549.

Amendment

Form 13F [17 CFR 249.325]

SEC File No. 270-236

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) the Securities and Exchange Commission has submitted for clearance amendments to Form 13F under the Securities Exchange Act of 1934 which were proposed pursuant to Rule 13f-1 (17 CFR 240.13f-1) and governs the quarterly reporting requirements of institutional investment managers who exercise investment discretion over accounts of exchange-traded or NASDAQ-quoted equity securities having in the aggregate a fair market value of at least $100,000,000.

Submit comments to OMB Desk Officer: Ms. Katie Lewin, telephone number (202) 395-7231, Office of Information and Regulatory Affairs, Room 3235 NEOB, Washington, D.C. 20503.

Shirley E. Hollis,

Acting Secretary.

December 5, 1984.

[FR Doc. 84-32344 Filed 12-11-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 33-6561; File No. S7-41-84]

Annual Conference on Uniformity of Securities Laws

AGENCY: Securities and Exchange Commission.

ACTION: Publication of release announcing issues to be considered at conference concerning uniformity of securities laws and requesting written comments.

SUMMARY: The Commission and the North Amercian Securities Administrators Association today published a request for comments on effectuating increased uniformity in the state and federal regulation of securities matters. This inquiry is intended to carry out the policies and purposes of Section 19(c) of the Securities Act of 1933, as adopted as part of the Small Business Investment Incentive Act of 1980, to maximize the effectiveness of securities regulation and reduce burdens on capital formation through increased cooperation between the Commission and the state securities regulatory authorities.

DATES: The conference will be held in February, 1985. Written comments must be received on or before January 14, 1985, in order to be considered by the conference participants.

ADDRESSES: Written submissions should be submitted in triplicate to Shirley E. Hollis, Acting Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549. Comments should refer to File No. S7-41-84. All written submissions will be available for public inspection at the Commission's Public Reference Room, 450 5th Street, NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: H. Steven Holtzman or Hugh T. Wilkinson, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549, (202) 272-2644.

SUPPLEMENTARY INFORMATION:

I. Discussion

A dual system of federal-state securities regulation has existed since the adoption of a federal regulatory structure in the Securities Act of 1933 (the "Securities Act").[1] Issuers attempting to raise capital through securities offerings are responsible for complying with federal securities laws as well as with all the appropriate state regulations. In recent years it has been recognized that there is a need to increase uniformity between federal and state regulatory systems and among the various state systems and to improve cooperation among those regulatory bodies so that capital formation can be made easier while appropriate investor protections are retained.

The importance of facilitating greater uniformity in securities regulation was endorsed by Congress with the enactment of Section 19(c) of the Securities Act[2] in the Small Business Investment Incentive Act of 1980[3] (the "Investment Incentive Act"). Section 19(c) authorizes the Commission to cooperate with any association of state securities regulators which can assist in carrying out the declared policy and purpose of Section 19(c). The declared policy of the section is that there should be greater federal and state cooperation in securities matters, including: (1) Maximum effectiveness of regulation; (2) maximum uniformity in federal and state regulatory standards; (3) minimum interference with the business of capital formation; and (4) a substantial reduction in costs and paperwork to diminish the burdens of raising investment capital, particularly by small business, and to diminish the costs of the administration of the government programs involved. In order to establish methods to accomplish these goals, the Commission is mandated to conduct an annual conference. The first such conference was held in Williamsburg, Virginia, in September 1983.

II. 1985 Conference

The Commission and the North American Securities Administrators Association ("NASAA"),[4] are planning

[1] 15 U.S.C. 77a-77aa (1982).

[2] 15 U.S.C. 77s(c).

[3] Pub. L. 96-77 (October 21, 1980).

[4] NASAA is an association of securities administrators from each of the 50 states, the District of Columbia, Puerto Rico, the Canadian provinces and territories, and Mexico.

the 1985 Conference on Federal-State Securities Regulation (the "Conference") to be held in February 1985. At the Conference, representatives from the Commission and NASAA will meet to discuss methods for improving cooperation in securities matters in order to improve the efficiency and effectiveness of both federal and state securities registration. Attendance will be limited to representatives from the Commission and NASAA in an effort to maximize the ability of Commission and state representatives to engage in frank and uninhibited discussion. Representatives from the Commission and NASAA currently are in the process of formulating an agenda for the Conference. As part of that process, the public, securities associations, self-regulatory organizations, agencies, and private organizations are invited to participate through the submission of written comments, which will be considered by the Conference attendees, on the issues set forth below. In addition, comment is requested on other appropriate subjects that commentators wish to be included in the Conference agenda.

III. Tentative Agenda and Request for Comments

The tentative agenda for the Conference consists of the following selected topics in the areas of market regulation and oversight, investment management, corporation finance and enforcement.

(1) Corporation Finance Issues

a. *Uniform Limited Offering Exemption.* Congress specifically acknowledged the need for a uniform limited offering exemption in enacting Section 19(c) of the Securities Act and authorized the Commission to cooperate with NASAA in its development. Working with the states, the Commission developed Regulation D, the federal regulation governing exempt limited offerings. Regulation D was adopted by the Commission in March 1982. On September 21, 1983, NASAA endorsed a revised form of the Uniform Offering Exemption ("ULOE") that is intended to coordinate with Regulation D and to be uniform among the states.

ULOE provides a uniform exemption from state registration for small issuers. A small issuer raising capital in a state which has adopted ULOE may take advantage of both a state registration exemption and a federal exemption under Regulation D. To date, 29 states have adopted some form of ULOE, although both the Commission and NASAA have made a concerted effort toward universal adoption of ULOE. Adoption of ULOE by all states is a major priority. The Commission and NASAA hope to encourage the 21 remaining states to adopt ULOE in order to achieve the goal of uniformity envisioned by the statute.

In addition to the Commission's attempts to persuade all states to adopt ULOE, the Commission staff currently is working with NASAA to revise Form D. It is expected that the proposed revisions will be published for comment in the near future. The revisions contemplated are intended to make Form D a uniform form which will be suitable for claiming both an exemption pursuant to Regulation D and an exemption from state registration pursuant to ULOE. Of course in order to succeed fully in meeting this goal, it is necessary that ULOE be adopted by all states. Consistent with the Commission's adoption of Regulation D and its cooperation with the states in revising Form D and on ULOE, the Commission staff and a special NASAA committee coordinate on matters of interpretation of Regulation D and ULOE.

Comment is requested on approaches to encourage the states which have not yet adopted ULOE to do so and on other issues of uniformity of exemptions, including the interpretive process.

b. *Electronic Disclosure.* The Commission and NASAA expect to discuss EDGAR (for Electronic Data, Gathering, Analysis and Retrieval), the Commission's electronic disclosure system. The objective of EDGAR is to develop an effective and efficient means of using computer technology to improve the receipt, storage, review and dissemination of filed information. The Commission began receiving and processing filings in EDGAR, on a pilot basis, in September 1984. Also in September, NASAA announced its intent to join the SEC's efforts to implement an electronic disclosure system. Three states—Georgia, Wisconsin and California—have been selected by NASAA to participate in a pilot project whereby EDGAR filings would be made available to the states. Under this pilot, an issuer would be able to submit one electronic filing with EDGAR and have it electronically distributed to the states in which the issuer chooses to register. Comment is requested on possible cooperative efforts between the Commission and the states in the areas of electronic receipt, processing and dissemination systems.

c. *Limited Partnership Disclosure.* The Commission currently is reviewing its disclosure requirements with a view to amending such requirements as they related to the unique aspects of limited partnerships. Commentators are invited to discuss any federal or state disclosure problems which are peculiar to limited partnerships.

d. *Takeover Regulations.* In view of the increase in corporate takeovers in recent years, issues relating to takeovers will be discussed at the Conference. The public is invited to comment on the appropriate role to state and federal regulators in the context of corporate takeovers.

(2) Market Regulation and Oversight

a. *Central Registration Depository.* The National Association of Securities Dealers, Inc. ("NASD") and NASAA have jointly developed the Central Registration Depository, a computerized system for the registration of securities industry personnel with the NASD and the various state securities commissions Phase I of the CRD system, which has been in place for several years, provides for the registration of registered representatives through the filing of Form U–4 with the CRD and the collection of required fees, as well as a means for updating information with respect to those representatives and for facilitating transfer of registration under certain circumstances. Work has begun on the implementation of Phase II of the system, which will enable the CRD to handle the registration of broker-dealers as well as annual renewals of such registrations.

During the sessions, participants will focus on future uses of the CRD by the states, the relationship of the SEC to the CRD and the impact on CRD of the development of the EDGAR System. Commentators are requested to provide input relative to the effectiveness and efficiency of CRD (including any suggestions for improving the system) as well as the future direction of the system.

b. *Forms U–4 and B/D.* In December 1983, the Commission adopted a revised Form B/D for use by the Commission and the states. Adoption of the new form B/D was the culmination of an extensive effort by NASAA, the SEC and the self-regulatory organizations to achieve a uniform form which would provide brokers and dealers with a single form which could be used by all regulatory bodies. During 1984, NASAA has turned its attention to revisions of Forms U–4 and U–5, the uniform forms for registration and termination of registration of registered representatives, and expects to consider such revisions in April 1985. In addition, consideration is being given to some minor fine tuning of Form B/D to

achieve comparability between the items on that form and those on Form U–4. Any such changes, if recommended, will also be considered by NASAA in April 1985 and, if approved, will be considered by the Commission in mid-1985.

Although the proposed changes may not be finalized by the time of the sessions, commentators are welcome to address Forms U–4, U–5 and B/D generically or to make suggestions as to their content or use.

c. *Exemptions From Registration.* Suggestion have been made that the so-called "blue chip" exemption from state securities registration requirements be expanded to include over-the-counter ("OTC") securities, such as those securities in NASDAQ or designated pursuant to SEC rule as national market system securities. Currently, issuers choosing to list on the New York or American Stock Exchange are exempt, almost universally, from state securities registation provisions. Suggestions also have been made that certain OTC securities be granted exemptions similar to exchange-traded securities. Commentators are asked to comment on the desirability of any such exemptions and whether any such change in the exemptions should be conditioned on changes to NASD rules designed to implement standards of corporate conduct similar to those currently contained in exchange listing standards.

d. *Indeterminate Compensation.* The NASD has proposed amendments to its Rules of Fair Practice that would permit NASD members or associated persons that participate in public distributions of direct participation programs ("DPPs") to receive a limited amount of indeterminate compensation.[5] The NADS's rules currently prohibit members from receiving any form of indeterminate compensation. Under the proposed amendment, a broker-dealer may receive compensation only after investors have received distributions equal to one hundred percent of their cash investment plus a six percent cumulative annual return on their adjusted investment. However, this proposal may conflict with NASAA guidelines on indeterminate compensation.

The Commission published the proposal in the **Federal Register** in early November.[6] Commentators are requested to address the NASD's proposal in light of the NASAA Guidelines with respect to compensation in real estate and oil and gas programs.

(3) Investment Management

a. *Investment Companies.* Recently NASAA adopted a number of resolutions supporting more uniform regulation of mutal funds and unit investment trusts. Specifically, the resolutions encourage states to eliminate expense limitations and adopt uniform, streamlined approaches to investment company registration and renewal procedures, the filing of advertising and sales reports and the treatment of oversales. Comment is requested on specific issues that should be addressed by NASAA and the Commission in the next year with respect to regulation of open and closed end management investment companies and unit investment trusts.

b. *Investment Advisers.* There are a number of areas in which the Commission and NASAA believe increased cooperation among the regulatory authorities can improve the investment adviser regulatory system. Most important, and of greatest priority, is developement of a uniform adviser registration system to be used by the Commission and those states which require advisers to register as such. NASAA, with participation by members of the Commission staff, has undertaken to develop uniform requirements for the filing of adviser forms, amendments and annual reports and a uniform approach to a "brochure" rule governing the kinds of disclosure advisers must make to clients and prospective clients. It is expected that a uniform registration form, based on the Commission's Form ADV, will be presented to the NASAA membership for adoption in April 1985 and that, if adopted, it will be considered by the Commission in mid-1985. Comment is requested on the format and content of the form and the development of a uniform registration system.

c. *Financial Planners.* Dramatic growth in the number of financial planners is causing the Commission and NASAA to examine whether existing regulator schemes under state and federal securities laws are suitably tailored to the financial planning industry. Because many financial planners act as investment advisers and receive commissions on the purchase or sale of securities, they are subject to regulations under the securities laws as investment advisers and as brokers or agents of brokers. Some elements of the existing regulatory structure, for example, Form ADV, may need to be tailored or clarified to take into account the nature of financial planner activities. Comment is requested on the effectiveness of the existing regulatory system, including suggestions on whether a more uniform approach to regulation of financial planners should be developed and, if so, how.

(4) Enforcement Issues

In addition to the above stated topics, the state and federal regulators will discuss various enforcement related issues which are of mutual interest.

The Commission and NASAA request specific public comments and recommendations on the above-mentioned topics. Commentators should focus on the agenda but may also discuss or comment on other areas in which the existing scheme of state and federal regulation can be made more uniform while high standards of investor protection are maintained.

IV. Procedures

Interested persons are invited to submit their views on the foregoing no later than January 14, 1985. Written submission should be made in triplicate to Shirley E. Hollis, Acting Secretary, Securities and Exchange Commission, 450 — 5th Street, NW., Washington, D.C. 20549. Please refer to File No. S7–41–84.

By the Commission.

Shirley E. Hollis,

Acting Secretary.

December 6, 1984.

[FR Doc. 84–32348 Filed 12–11–84; 8:45 am]

BILLING CODE 8010–01–M

[5] The NASD interprets indeterminate or continuing compensation as compensation whose value cannot be determined at the time the offering is filed for review.

[6] Exchange Act Release No. 21468 (November 5, 1984) 49 FR 44966.

[Release No. 14268; 812–5973]

Southwestern Apartment Associates Limited Partnership and Potomac Real Estate Group, Inc.; Filing of Application for Exemption

December 6, 1984.

Notice is hereby given that Southwestern Apartments Associates Limited Partnership (the "Partnership"), Suite 500, 1150 17th Street, NW., Washington, D.C. 20036, a District of Columbia Limited Partnership, and its general partner, Potomac Real Estate Group, Inc. (the "Managing General Partner") (together with the Partnership, "Applicants"), filed an application on October 30, 1984, and amendment thereto on November 30, 1984, pursuant to Section 6(c) of the Investment Company Act of 1940 (the "Act"), to exempt the Partnership from all provisions of the Act. All interested persons are referred to the application on file with the Commission for a

statement of the representations contained therein, a summary of which is set forth below, and to the Act and rules thereunder for the text of the applicable provisions.

Applicants state that the Partnership was formed as a vehicle for private investment in government-assisted apartment complexes in accordance with the express determination of Title IX of the Housing and Urban Development Act of 1968. Applicants further state that the Partnership will operate as a "two-tier" limited partnership; i.e., the Partnership, as limited partner, wil hold 98.99% interest in each of four Texas limited partnerships (the "Project Partnerships") which, in turn, will each own and operate an apartment complex, in accordance with the criteria of Investment Company Act Release No. 8456 (August 9, 1974). According to the application, three of the Project Partnerships are receiving interest reduction payments and mortgage insurance from the Department of Housing and Urban Development under Section 236 of the National Housing Act and rental assistance under Section 8 of the United States Housing Act, whereas the fourth Project Partnership is receiving mortgage insurance and subsidies under Section 221(d)(3) of the National Housing Act. All of the Project Partnerships will therefore be required to rent units only to persons of low and moderate income.

Applicants represent that the Partnership is organized as a limited partnership because a limited partnership is the only form of organization which provides investors with both the ability to claim on their individual tax returns the tax benefits arising from the Partnership's investment in the Project Partnerships and liability limited to their capital investment. Applicants further represent that the Partnership's objectives are to preserve and protect its capital, provide capital appreciation, provide tax benefits for investors, and provide potential for some future annual cash distributions.

Applicants state that the Partnership is offering 100 units of limited partnership interests ("Units") at $74,400 per unit, pursuant to Section 4(2) of the Securities Act of 1933 and Regulation D thereunder, to investors meeting certain suitability standards. According to the application, each subscriber must represent, among other things, either (a) that he is an "Accredited Investor" within the meaning of Regulation D or (b) that he has a net worth of at least $200,000 exclusive of home, furnishings, automobiles, and the amount to be invested in the Partnership. Each must also represent that he reasonably believes that at least a portion of his 1984 income will be subject to a federal income tax rate of 42%, and that he has knowledge and experience in business and financial matters. The Investment Group Capital Corp., the Partnership's investor services agent, must approve all subscriptions for Units, which approval will be conditioned upon receipt of representations concerning suitability of the investment for each subscriber.

According to the application, the cash submitted by subscribers will be held in a non-interest bearing escrow until December 31, 1984 and will be returned without interest or deduction if the offering is terminated. If the offering is consummated, it will immediately be invested in accordance with the terms of the offering. The application states that purchasers of Units will become limited partners ("Limited Partners") of the Partnership, representing an aggregate 98% interest in the Partnership. Upon admission of the Limited Partners, Equity Resyndication, Inc., a Texas corporation will be admitted as a General Partner and, together with the Managing General Partner, will have a 1.01% interest in the Partnership.

Applicants anticipate that the Partnership will have $6,483,000 available for investment from the proceeds of its offering after the payment of selling commissions and offering expenses. Applicants state that the Partnership will pay $4,136,430 (55.6% of the gross proceeds) as capital contributions to the Project Partnerships.

Applicants maintain that the General Partners will manage the Partnership's business pursuant to the Agreement and First Amended and Restated Certificate of Limited Partnerships of the Partnership (the "Partnership Agreement"), and the Limited Partners will not be entitled to participate in the control of the Partnership's business. The application states, however, that a majority in interest of the Limited Partners will have the right to remove a General Partner, sell or dispose of the Partnership's interest in the Project Partnerships, take action requiring the consent of the Partnership under the Project Partnership Agreements, cause the Partnership to engage in any business other than that specified in the Partnership Agreement, or amend the Partnership Agreement. The application further states that, under the Partnership Agreement, each Limited Partnership is entitled to review all books and records of the Partnership during reasonable business hours.

The application summarizes the compensation and fees to be paid by the Partnership to the Gerneral Partners and others. The application states that the Partnership believes such compensation meets all applicable guidelines necessary to permit Units to be offered and sold in the various states that prescribe such guidelines including, without limitation, the Statement of Policy adopted by the North American Securities Administrators Association, Inc., with respect to real estate programs.

Without conceding that the Partnership is an investment company as defined in the Act, Applicants request that the Partnership be exempted from all the provisions of the Act. In support of this request, Applicants assert that such exemption is both necessary and appropriate in the public interest and would be consistent with the protection of investors and the purposes and policies underlying the Act. Applicants assert that investment in low and moderate income housing in accordance with the national policy expressed in Title IX is not economically suitable for private investors without the tax and organizational advantages of the limited partnership structure. Applicants state that a limited partnership would be unable to function in the manner contemplated by the Partnership if it is deemed to be an investment company under the Act. In addition, it is maintained that application of the Act would discourage two-tier limited partnership arrangements and thus eliminate the best available means of attracting private equity capital into government-assisted housing and frustrate national policy.

Notice is further given that any interested person wishig to request a hearing on the application may, not later than December 26, 1984, at 5:30 p.m., do so by submitting a written request setting forth the nature of his interest, the reasons for his request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of the request should be served personally or by mail upon Applicants at the address stated above.

Proof of service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Mangement, pursuant to delegated authority.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84-32406 Filed 12-11-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-21544; File No. SR-AMEX-84-34]

Self-Regulatory Organizations; Proposed Rule Change by the American Stock Exchange, Inc.; Relating to Testing and Supervision Requirements Regarding Interest Rate Options Trading

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 19, 1984, the American Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The American Stock Exchange, Inc. (the "AMEX" or "Exchange") proposes to amend Rules 920 and 922 as set forth below. *Italics* indicates material proposed to be added; [brackets] indicate materials proposed to be deleted.

Rule 920. Registration and Examination of Options Personnel.

No change.

. . . Commentary

.01 Any member or associated person of a member organization who became registered and was approved by the Exchange as a Registered Representative or as an Options Principal prior to the date of implementation of trading in options on debt securities on the Exchange shall not be deemed to be qualified with regard to such options unless such Registered Representative or Registered Options Principal has successfully completed an examination prescribed by the Exchange for the purpose of demonstrating adequate knowledge of options on debt securities.

.02 Any sales personnel of a member organization who solicits or accepts customer orders with regard to options on debt securities shall be deemed qualified with regard to such options after such person has successfully completed an examination prescribed by the Exchange for the purpose of demonstrating adequate knowledge of options on debt securities.

* * * * *

Rule 922. Supervision of Accounts.

(a) No change.

(b) No change.

(c) Branch Offices.—The principal supervisor of every branch office of a member organization which transacts options business with the public must be qualified as a Registered Options Principal with regard to options on [both] equity [and debt] securities; provided that if no more than three Registered Representatives in a branch office engage in options transactions, the principal supervisor of such branch office need not qualify as a Registered Options Principal with regard to [either category of] equity options, [or if more than three Registered Representatives in a branch office engage in transactions involving options on equity securities but three or less engage in transactions involving options on debt securities, the principal supervisor of such branch office may qualify as a Registered Options Principal only with regard to options on equity securities], so long as any options activities of such branch office for which the principal supervisor is not qualified as a Registered Options Principal are supervised by an appropriately qualified Registered Options Principal of the member organization. *Debt options trading of a branch office may be supervised by any debt qualified Registered Options Principal of member organization.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Examination of Sales Personnel. Rule 920 currently requires all options sales personnel of a member organization to pass a general securities qualification examination before soliciting or accepting customer orders. The General Securities Registered Representatives Examination (Test Series 7), commonly referred to as the Registered Representatives ("RR") exam, tests a candidate's knowledge of a diverse range of subjects including: stocks, bonds, options, repurchase agreements, warrants, real estate investment trusts, mutual funds, investment companies, variable annuities and direct participation programs.

Currently, sales personnel who handle customer orders involving options on debt securities are required to successfully complete the RR exam. In addition, they are required to complete the Interest Rate Options ("IRO") Qualification Examination (Test Series 5), which comprehensively tests a candidate's knowledge of options of U.S. Treasury Bills, Bonds and Notes. However, sales personnel who conduct a customer business solely in the underlying Government securities are *not* required to take either the RR exam or the IRO exam.

The Exchange believes that sales personnel who conduct a customer business in U.S. Treasury securities are dissuaded from conducting a customer business in options on these Treasury securities, for hedging purposes or otherwise, because they are required to take both the IRO exam and the very comprehensive RR exam. Therefore, to encourage trading in interest rate options, while continuing to maintain appropriate testing standards, it is proposed that Rule 920 be amended to permit sales personnel to conduct a customer business in interest rate options after passing only the IRO exam. It should be noted that if an RR engages in any other SEC regulated business, he or she would be required to successfully complete the full RR exam.

The Philadelphia Stock Exchange ("PHLX") addressing a similar concern was granted Commission approval to permit persons seeking to conduct a customer business in foreign currency options to do so after completing only a foreign currency options exam, thus deleting the requirement that such market participants complete the full RR exam (approval of SR-PHLX-83-20 granted in Rel. No. 20545 on January 16, 1984). Thus, this filing merely proposes to adopt for interest rate options a testing scheme which parallels that of foreign currency options.

Supervision of Accounts. Rule 922 requires that the principal supervisor of every branch office of a member organization, where more than three RRs conduct a public debt options business, become qualified as a Debt Registered Options Principal ("DROP").

(Such qualification is accomplished by successful completion of the IRO exam.) However, the exchange believes that such requirement is unnecessary and burdensome, and has reduced the appeal of debt options trading. Instead, it is proposed that debt options trading be supervised by any qualified DROP within the member organization designated to supervise branch activity, although not necessarily the office manager at that particular branch. This proposal will continue to ensure proper supervision of all accounts.

Therefore, it is proposed that Rule 922 be amended to delete the requirement that all branch office managers who supervise more than three RRs handling debt options accounts must become debt options qualified. It should be noted that this proposal also conforms to the PHLX rule change (SR–PHLX–83–20), which provides for a member firm's foreign currency options accounts to be supervised by any person within the firm who is qualified with respect to foreign currency options.

The proposed changes are consistent with the requirements of the Securities Exchange Act of 1934 (the "1934 Act") and rules and regulations thereunder applicable to the Exchange by deleting unnecessary testing requirements. Therefore, the proposed rule changes are consistent with Section 6(b)(5) of the 1934 Act which provides in pertinent part, that the rules of the Exchange be designed to promote just and equitable principles of trade and to protect the investing public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The AMEX believes that the proposed rule changes will not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Options Committee, a committee of the AMEX Board of Governors comprised of members and representatives of member firms, endorsed the proposed rule change.

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or institute proceedings to determine whether the Proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted on or before January 3, 1985.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84–32401 Filed 12–11–84; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–21540; File No. SR–MSE–84–11]

Self-Regulatory Organizations; Proposed Rule Change by Midwest Stock Exchange, Inc. Relating to an Increase in the Maximum Execution Limit Size for Agency Orders Under Midwest's Guaranteed Execution System

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 9, 1984, the Midwest Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement on the Terms of Substance of the Proposed Rule Change

Rule 34 of Article II of the Rules of the Midwest Stock Exchange, Inc. is hereby amended as follows:

Additions italicized—[Deletions Bracketed].

GUARANTEED EXECUTION SYSTEM

Rule 34. The Midwest Stock Exchange Guaranteed Execution System (the BEST System) shall be available to Exchange member firms in all dually traded issues in the specialist system. System orders from 100 up to and including [399] *1099* shall be executed pursuant to the following requirements:

1. Specialists must accept and guarantee execution on all agency orders from 100 up to and including [399] *1099* shares in accordance with this rule.

No change in remainder of Rule 34.

II. Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B), and (C) below of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change will increase the maximum execution limit size for agency orders under Midwest's Guaranteed Execution System (BEST) from 399 to 1099 shares for all specialists. Some MSE specialists already have voluntarily increased their limits to 1099 shares or higher in some issues. The proposed rule change would increase the mandatory limit to 1099 for all dually traded issues in the specialist system.

The proposed increase is consistent with limits recently adopted by other exchanges for their automatic routing and/or execution systems and will make the Exchange more competitive in providing this service.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Midwest Stock Exchange, Inc. does not believe that the proposed rule change will place any burdens on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments have neither been solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th St., NW., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 5th St., NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted on or before January 3, 1985.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 5, 1984.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84-32404 Filed 12-11-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 23513 (70-6921)]

American Electric Power Co., Inc., et al.; Proposed Issuance and Sale of Short-Term Notes; Capital Contributions to Subsidiaries; Exception From Competitive Bidding

The American Electric Power Company, Inc. ("AEP"), 1 Riverside Plaza, Columbus, Ohio 43215, a registered holding company, and several of its electric utility subsidiaries, hereinafter cited, have filed a proposal with this Commission pursuant to sections 6, 7 and 12(b) of the Public Utility Holding Company Act of 1935 ("Act") and Rules 45, 50(a)(2) and 50(a)(5) under the Act.

During the period January 1, 1985 to December 31, 1986, AEP proposes to issue and sell short-term notes to banks and commercial paper to a dealer in two annual, aggregate amounts not to exceed $50 million outstanding at any one time, and make annual cash capital contributions to its subsidiary Columbus and Southern Ohio Electric Company ("C&SOE") not to exceed $40 million. During the same period, C&SOE requests authorization to issue and sell short-term commercial paper to dealers. C&SOE, Kingsport Power Company ("Kingsport"), Michigan Power Company ("Michigan"), Kentucky Power Company ("Kentucky"), and Wheeling Electric Company ("Wheeling) would also sell notes to banks. The companies propose to sell notes in two aggregate, annual amounts outstanding at any one time of up to: $160 million for C&COE, $40 million for Kentucky, $4 million for Kingsport, $6 million for Michigan, and $3 million for Wheeling.

All notes will mature not more than 270 days after the date of issuance or renewal. None will mature later than June 30, 1987. The notes to banks will be sold under various lines of credit with different terms, including rates at prime, generally, no maintenance of separate or additional compensating balances since the companies maintain deposit balances for operational and financial needs, although under certain conditions balances of up to 10% of the line of credit and 10% of the amount borrowed may be required; and fees in the amount of ⅜% of a line of credit or ¼% on the unused amount of a line of credit. Fees and balances for shared lines of credit are borne by the companies in proportion to their respective projected maximum need for such credit. With such fees and with balances maintained solely to fulfill borrowing requirements, no line of credit would result in an effective cost of borrowing exceeding 125% of the prime commercial rate in effect from time to time, or not more than 15% based on a prime rate of 12%.

The commercial paper notes will not be prepayable, will have varying maturities, and will be sold directly to a dealer at a discount not in excess of the discount rate per annum prevailing at the time of issuance for commercial paper of comparable quality and maturity. No commercial paper notes will be issued having a maturity of more than 90 days if such notes would have an effective interest cost which exceeds the effective interest cost at which such company could borrow from banks through the issuance of notes in an amount at least equal to the principal amount of such commercial paper at that time.

The proceeds from the borrowings will be used for general corporate purposes including business operations, construction, and retirement of short-term debt.

The proposal and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by December 27, 1984, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the applicant at the address specified above. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in this matter. After said date, the proposal, as filed or as amended, may be authorized.

For the Commission, by the Office of Public Utility Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84-32365 Filed 12-11-84; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 21541; File No. SR-PSE-84-22]

Self-Regulatory Organizations; Filing of Proposed Rule Change by Pacific Stock Exchange, Inc.

December 5, 1984.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 15, 1984, the Pacific Stock Exchange, Inc. ("PSE") filed with the Securities and Exchange Commission the proposed rule change as described herein. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

The PSE proposes to adopt a new Equity Floor Procedure Advice 2–C, Reporting of Transactions Executed at the Exchange (the "Advice"). PSE Rule I, Section 16 currently requires the seller to ensure that a transaction is properly reported. The Exchange has noted in its filing that this requirement is subject to two exceptions, due to the fact that the PSE maintains two equity trading floors, one in Los Angeles and the other in San Francisco: (1) Pursuant to PSE Rule I, Section 16(b), inter-floor "limit sell" orders are to be reported from the trading floor on which the order was placed and executed, and (2) in transactions in local issues, when the specialist is the buyer and the seller is located on the other trading floor, the specialist, rather than the seller, is responsible for ensuring that trade is reported on the tape. Under these circumstances the seller is required to submit a "goldenrod" ticket for clearing purposes only.

The Exchange has noted in its filing to the Commission that these reporting procedures occasionally result in transactions not being reported by the tape. The proposed Advice describes Rule I, Section 16(a) and the exceptions to the rule discussed above,[1] and in addition, establishes a fine schedule for repeated violations of this reporting requirement. The PSE states in its filing that the rule change is consistent with Section 6(b)(5) of the Act in that it is intended to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling and processing information with respect to transactions in securities and to protect investors and the public interest.

In order to assist the Commission in determining whether to approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved, interested persons are invited to submit written data, views and arguments concerning the submission within 21 days after the date of publication in the **Federal Register**. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549. Reference should be made to File No. SR–PSE—84–22.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, 450 5th Street, NW., Washington, D.C. Copies of the filing and of any subsequent amendments also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84–32342 Filed 12–11–84; 8:45 am]

BILLING CODE 8010–01–M

[1] The Exchange will impose a penalty of $25 for a second violation, $50 for a third, $75 for a fourth, and $100 for fifth and subsequent violations, based on the number of violations of a particular security calculated on a monthly basis. The schedule is intended to apply to inadvertent violations of the floor procedure advice which are not attributable to clerical errors by Exchange staff or other mitigating circumstances.

[Release No. 21542; (SR-NYSE-84-20)]

Self-Regulatory Organizations; New York Stock Exchange, Inc., Order Approving Proposed Rule Change

December 6, 1984.

The New York Stock Exchange, Inc. ("NYSE") 11 Wall Street, New York, New York, 10005, submitted on May 7, 1984, copies of a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b–4 thereunder, to amend the NYSE's arbitration rule (NYSE Rules 600 to 634) as follows: (1) "Simplified arbitration" procedures would apply to claims not exceeding $5,000, instead of claims not exceeding $2,500, as under the current rule; (2) the filing fee would be raised from $15 to $25 for claims over $1,000 but below $2,500, with fee increases for claims of higher amounts as provided in proposed Rule 630; (3) the six year limitation on arbitration submissions would be tolled for any arbitration claim that had been under court consideration for the period the court retained juridiction; (4) each party to an arbitration proceeding, including proceedings where multiple parties are involve, would have the right to a peremptory challenge as well as to unlimited challenges for cause; (5) a respondent who presents only a "general denial" as an answer could, at the discretion of the arbitrators, be barred from presenting facts or defenses at a subsequent hearing on the same matter under paragraph (b) of Rule 612; and (6) an NYSE member organization would be required to pay a nonfundable filing fee of $500 under New Rule 634, in addition to all other fees, when filing a claim against a non-member.

Notice of the proposed rule changes together with the terms of substance of the proposed rule changes was given by the issuance of a Commission release (Securities Exchange Act Release No. 20979, May 18, 1984) and by publication in the **Federal Register** (49 FR 25554, June 21, 1984). All written statements filed with the Commission and all written communications between the Commission and any person relating to the proposed rule change were considered and (with the exception of those statements or communications which may be withheld from the public in accordance with the provisions of 5 U.S.C 552) were made available to the public at the Commission's reference room.

The Commission received two comment letters from Alex. Brown & Sons, Inc. objecting to the proposed amendments to Rule 612(b) and proposed Rule 634.[1] With respect to the proposed amendments to Rule 612(b), Alex. Brown contends the amendments are inequitable because, although they provide arbitrators with discretion to bar the respondent's presentation at the hearing of any previously omitted facts or defenses, they do not apply to claimants. In addition, Alex. Brown believes that the provisions may operate to prevent a full presentation of all relevant and necessary facts and defenses, and may result in unnecessary delays and in inequitable and/or erroneous arbitration decisions. Alex.

[1] *See* letters from Joseph R. Hardiman, Managing Director, Alex. Brown & Sons, Inc. and from Clinton P. Stephens, Managing Director, Senior Registered and Options Principal, to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, dated, respectively, July 12, 1984 and August 30, 1984.

Brown recommends that Rule 612 be amended to impose an identical obligation upon the claimant to present all relevant facts and legal theories prior to the hearing.

With respect to proposed Rule 634, which requires an NYSE member organization to pay a non-refundable filing fee of $500, in addition to all other fees, when filing a claim against a non-member, Alex. Brown contends that such a fee will discourage member organizations from using the arbitration procedure, particularly in cases where relatively small amounts of money are involved. Moreover, because a non-member may demand that a member's claims against the non-member be arbitrated,[2] such non-member, according to Alex. Brown, can effectively force a member organization to discount a valid claim or to abandon a valid claim for $500 or less. Alex. Brown also notes that the proposed rule does not provide for the arbitrator's assessment of this fee to the non-member party as is the case with forum fees, and believes that the fee should be assessed at the discretion of the arbitrators. In addition, Alex. Brown contends that, because the arbitration rules of the National Association of Securities Dealers ("NASD") have no provision comparable to Rule 634, more claims will be filed with the NASD, resulting in additional delays in their resolution at the NASD.

The NYSE has indicated that Rule 634 is intended to recapture some of the costs of the administration of the Exchange's arbitration facility.[3] The rule is designed so that the more frequent users of the facility pay an equitable share of the arbitration costs without penalizing public customers. The NYSE states that most member organizations will have the option to pursue the non-member in court or in arbitration, and that the $500 fee is one factor such organizations will have to consider in making the decision to arbitrate.

Under section 6(b)(4) of the Act, the rules of an exchange must provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) provides, among other things, that exchange rules be designed to promote just and equitable priniciples of trade, and to protect investors and the public interest. In addition, under section 6(b)(8), exchange rules must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission views the proposed rule changes as consistent with these provisions of the Act for the reasons discussed below.

The Commission notes that the proposed amendments to NYSE Rule 612(b) are consistent with recent amendments to the Uniform Arbitration Code developed by the Securities Industry Conference on Arbitration and already adopted by several self-regulatory organizations.[4] Under the amendments, a responding party must specify in its answer all available facts as well as all relevant defenses that will be relied upon at the hearing. Currently, Rule 612(b) only requires that the respondent specify all available defenses. The amendments would provide that if a responding party pleads only a general denial as an answer, it may be barred from presenting any facts or defenses at the time of the hearing, and, if it fails to specify all available defenses and relevant facts, it may be barred from presenting these additional facts or defenses at the hearing.

The Commission believes the proposed amendments clarify and emphasize the authority that arbitrators currently possess under NYSE Rule 626 to bar amendments to pleadings after receipt of a responsive pleading. With respect to the commentator's assertion that the proposed amendments are inequitable because they do not apply to claimants, the Commission notes that under NYSE Rule 612(a), claimants must specify in their statement of claim the relevant factors and remedies sought. In addition, as noted above, arbitrators currently have the authority under Rule 626 to refuse to permit claimants or respondents to amend their pleadings after receipt of a responsive pleading. Thus, although the proposed amendments to Rule 612(b) only relate to the responsibilities of respondents, the Commission does not view the authority of the arbitration panel, or the NYSE's arbitration procedures as currently practiced, to be balanced in favor of claimants. The Commission therefore finds the proposed amendments to Rule 612(b) to be consistent with sections 6(b)(5) and 6(b)(8) of the Act in that the amendments are designed to promote just and equitable principles of trade without imposing any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission believes that these amendments would encourage parties to respond specifically and completely to claims and would ensure that all parties are fully informed of claims and defenses prior to the hearing.

The Commission views the NYSE's proposed $500 fee imposed on members filing a claim against a non-member as an appropriate method of assessing members who use the NYSE's arbitration facilities for costs incurred by the Exchange with respect to arbitration procedures. According to the NYSE, the proposed fee is intended to assist the NYSE in recouping a portion of its costs in conducting the arbitration hearing. The Commission notes that the fee is to be imposed without regard to the merit of the member's claim, the amount at issue, or to the member claimant's success before the arbitration panel. The fee is therefore user-based, with those members using the Exchange's arbitration facilities more often paying proportionately more than members using such facilities less frequently. The Commission believes it is appropriate that such fee not be imposed at the discretion of the arbitrators upon a non-member party, and that NYSE arbitrators not have discretion to impose no fee at all. Such discretion could transform what is essentially a user-based facilities fee into a sanction upon one party or the other, which is not the Exchange's intention in imposing the fee. The Commission finds the proposed fee to be consistent with section 6(b)(4) of the Act which provides for the equitable allocation of reasonable dues, fees and other charges among an exchange's members and issuers and other persons using its facilities. The proposed fee is equitable in that it is to be imposed upon all NYSE member claimants in connection with arbitration proceedings against non-members. In addition, the proposed fee appears to be reasonable in relation to the expenses incurred by

[2] NYSE Rule 600 provides that disputes, claims, or controversies between a customer or non-member and a member arising in connection with such member's business, be arbitrated under the NYSE Constitution and Rules as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

[3] *See* letter from James E. Buck, Secretary, NYSE, to Michael Cavalier, Branch Chief, Division of Market Regulation, SEC, dated September 28, 1984.

[4] The Commission has approved provisions similar to those contained in proposed Rule 612(b) for the National Association of Securities Dealers (SR-NASD-84-16; Securities Exchange Act Release No. 21295, September 7, 1984; 48 FR 36040, September 13, 1984); the Municipal Securities Rulemaking Board (SR-MSRB-84-5; Securities Exchange Act Release No. 21047, June 14, 1984; 49 FR 25332, June 20, 1984); the American Stock Exchange (SR-Amex-84-24; Securities Exchange Act Release No. 21442, October 31, 1984; 49 FR 44574, November 7, 1984); the Midwest Stock Exchange (SR-MSE-84-6; Securities Exchange Act Release No. 21506, November 20, 1984, 49 FR 46857, November 28, 1984) and the Chicago Board Options Exchange (SR-CBOE-84-26; Securities Exchange Act Release No. 21476, November 9, 1984; 49 FR 45687, November 19, 1984).

the NYSE with respect to arbitration proceedings.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6 and the rules and the regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above-mentioned proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84-32405 Filed 12-11-84; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[License No. 02/02-5484]

Capital Circulation Corp.; Application for a License To Operate as a Small Business Investment Company

An application for a license to operate as a small business investment company (SBIC) under the provisions of section 301(d) of the Small Business Investment Act of 1958, as amended, (the Act), (15 U.S.C. 661 *et seq*), has been filed by Capital Circulation Corporation, 208 Main Street, Fort Lee, New Jersey 10952, with the Small Business Administration (SBA) pursuant to 13 CFR 107.102 (1984).

The officers, directors and shareholders of the Applicant are as follows:

Name and address	Title of relationship	Percent of ownership
Allen P. Chiu, 66 Bellwood Drive, New Hyde Park, NY 11040.	President, Director	10
Wan Chi Woo, 232 Bellwood Drive, Fort Lee, New Jersey 07024.	Director	40
Judy Mei Kao 280 Forest Road, Fort Lee, New Jersey 07024.	Secretary, Director CEO.	20
Lucia L. Chiang, 1616 S. 6th Street, Philadelphia, PA 19148.	Treasurer, Director	30

The Applicant will begin operations with a capitalization of $1,000,000 and will conduct its operations principally in the State of New Jersey.

As an SBIC licensed to operate under section 301(d) of the Act, the Applicant will provide financial and management assistance solely to small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operation of the Applicant under their management, including adequate profitablity and financial soundness, in accordance with the Act and the SBA Rules and Regulations.

Notice is hereby given that any person may, not later than 30 days from the date of publication of this notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street, NW., Washington, D.C. 20416.

A copy of this notice shall be published in a newspaper of general circulation in Fort Lee, New Jersey.

Dated: December 6, 1984.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 84-32398 Filed 12-11-84 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF THE TREASURY

Fiscal Service

Bureau of the Public Debt; Information Systems Reorganization

AGENCY: Bureau of the Public Debt, Treasury.

ACTION: Notice of reorganization.

SUMMARY: The Bureau of the Public Debt combined three information systems management and data processing groups that reported to different office heads into a new Office of Automated Information Systems.

FOR FURTHER INFORMATION CONTACT: Michael Smiley, Management Analysis Officer, Bureau of the Public Debt, 1111 20th Street NW., Washington, D.C. 20239, 202-634-5257.

SUPPLEMENTARY INFORMATION: On October 15, the Commissioner of the Public Debt announced the establishment of a new Office of Automated Information Systems, and appointed Mr. Van Zeck as Assistant Commissioner to head it. The reorganization combined all three of the Bureau's information systems management and data processing groups that were organizationally located in separate offices.

Under the general authority vested in the Secretary of the Treasury in 5 U.S.C. 301 and 31 U.S.,C. 321, approval was granted in July by the Fiscal Assistant Secetary. Following approval, the acting Assistant Secretary (Electronic Information Systems and Information Technology) and the Assistant Secretary (Administration) concurred.

Dated: November 30, 1984.

W.M. Gregg,

Commissioner.

[FR Doc. 84-32343 Filed 12-11-84; 8:45 am]

BILLING CODE 4810-40-M

Sunshine Act Meetings

Federal Register
Vol. 49, No. 240
Wednesday, December 12, 1984

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, December 19, 1984.

PLACE: 2033 K Street, NW., Washington, DC., 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Judicial Matter.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 84–32478 Filed 12–10–84; 1:47 pm]

BILLING CODE 6351–01–M

2

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting.

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporations's Board of Directors will meet in open session at 2:00 p.m. on Monday, December 17, 1984, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous meetings.

Applications for Federal deposit insurance:

Rancho Santa Fe Thrift & Loan Associaton, an operating noninsured industrial bank located at 251 North El Camino Real, Encinitas, California.

Metropolitan Thrift and Loan Association, an operating noninsured industrial bank located at 416 Eighth Street, Oakland, California.

Reports of committees and officers:

Minutes of actions approved by the standing committees of the Corporation pursuant to authority delegated by the Board of Directors.

Reports of the Division of Bank Supervision with respect to applications, requests, or actions involving administrative enforcement proceedings approved by the Director or an Associate Director of the Division of Bank Supervision and the various Regional Directors pursuant to authority delegated by the Board of Directors.

Reports of the Director, Office of Corporate Audits and Internal Investigations:

Summary Audit Report re: Dominion Bank of Denver, Denver, Colorado, AP–362 (Memo dated November 14, 1984).

Summary Audit Report re: First National Bank of Browning, Browning, Montana, NR–448 (Memo dated November 14, 1984).

Summary Audit Report re: Banco Economias, San German, Puerto Rico, CP–259 (Memo dated November 14, 1984).

Summary Audit Report re: Union Trust Company, San Juan, Puerto Rico, AP–366 (Memo dated November 14, 1984).

Summary Audit Report re: Warren County Bank, McMinnville, Tennessee, AP–361 (Memo dated November 14, 1984).

Summary Audit Report re: Farmers Bank and Trust, Winchester, Tennessee, AP–369 (Memo dated November 14, 1984).

Summary Audit Report re: The First National Bank of Midland, Midland, Texas, AP–365 (Memo dated November 20, 1984).

Summary Audit Report re: The Peoples Bank of the Virgin Islands, Charlotte Amalie, Virgin Islands, SR–320 (Memo dated November 14, 1984).

Summary Audit Report re: Decimus Asset Management System, Northeast Regional Office Audit (Memo dated November 28, 1984).

Discussion Agenda:

Memorandum re: Budget of Administrative Expenses for Budget Year 1985.

Memorandum re: Budget Year 1985 Liquidation Expense Budget.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, D.C.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389–4425.

Dated: December 10, 1984.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Exeuctive Secretary.

[FR Doc. 84–32487 Filed 12–10–84; 3:13 pm]

BILLING CODE 6714–01–M

3

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting.

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:30 p.m. on Monday, December 17, 1984, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of Title 5, United States Code, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(6), (c)(8), and (c)(9)(A)(ii)).

Note—Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Discussion Agenda:

Application for consent to merge and establish fourteen branches:

Washington Mutual Savings Bank, Seattle, Washington, an insured stock savings bank, for consent to merge, under its charter and title, with Lincoln Mutual Savings Bank, Spokane, Washington, and to establish fourteen of the offices of Lincoln Mutual Savings Bank as branches of the resultant bank.

Recommendation regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver,

liquidator, or liquidating agent of those assets:

Memorandum and Resolution re: Abilene National Bank (now known as MBank Abilene, National Association) Abilene, Texas.

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(2) and (c)(6)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550–17th Street, NW., Washington, D.C. Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389–4425.

Dated: December 10, 1984.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 84–32488 Filed 12–10–84; 3:14 pm]

BILLING CODE 6714–10–M

4

FEDERAL RESERVE SYSTEM

TIME AND DATE: 12:00 Noon, Monday, December 17, 1984.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Studies of (1) futures and options markets, and (2) federal margin regulations (Public Docket No. R–0427). (This item previously announced for a closed meeting on December 5, 1984.)
2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 7, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84–32402 Filed 12–7–84; 4:56 pm]

BILLING CODE 62107–01–M

5

FEDERAL RESERVE SYSTEM

TIME AND DATE: 12:30 p.m., Friday, December 7, 1984. The business of the Board required that this meeting be held with less than one week's advance notice to the public, and no earlier announcement of the meeting was practicable.

PLACE: 20th Street and Constitution Avenue, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Federal Reserve Bank and Branch director appointments. (This matter was previously announced for a closed meeting on December 10, 1984.)

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: December 7, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84–32403 Filed 12–7–84; 4:56 pm]

BILLING CODE 6210–01–M

6

LEGAL SERVICES CORPORATION

Operations and Regulations Committee Meeting.

TIME AND DATE: The meeting will commence at 2:00 p.m. and continue until all official business is completed; Wednesday, December 19, 1984.

PLACE: Capitol Holiday Inn, Apollo Room, 550 C Street, SW., Washington, D.C. 20024.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Approval of Minutes
   September 29, 1984
3. Report from Office of General Counsel
   45 CFR 1601 (By-laws)
   45 CFR 1612 (Lobbying)
   45 CFR 1614 (Private Attorney Involvement)
   45 CFR 1620 (Priorities)
   45 CFR 1622 (Sunshine Act)
   Comments on other Regulations effective since April 27, 1984
4. Report from Office of Field Services
   Monitoring Schedules
   Private Attorney Involvement

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Opsut, Executive Office, (202) 272–4040.

Date Issued: December 10, 1984.

Donald P. Bogard,

President.

[FR Doc. 84–32517 Filed 12–10–84; 4:39 pm]

BILLING CODE 6820–35–M

7

LEGAL SERVICES CORPORATION

Provisions for the delivery of Legal Services.

TIME AND DATE: The meeting will commence at 8:00 a.m. and continue until all official business is completed; Wednesday, December 19, 1984.

PLACE: Capitol Holiday Inn, Apollo Room, 550 C Street, SW., Washington, D.C. 20024

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Approval of Minutes
   November 21, 1983
3. Report from Office of Field Services
   Private Law Firm Project
   Law School Clinic Project
   Urban Judicare
   Alternative Dispute Resolution
   Voucher Project
   Reginald Heber Smith Community Lawyer Fellowship Program
   NORC Report
   Private Attorney Involvement
4. Needs Study Update

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Opsut, Executive Office, (202) 272–4040.

Date Issued: December 10, 1984.

Donald P. Bogard,

President.

[FR Doc. 84–32518 Filed 12–10–84; 4:39 pm]

BILLING CODE 6820–35–M

8

LEGAL SERVICES CORPORATION

Audit and Appropriations Committee meeting.

TIME AND DATE: The meeting will commence at 10:30 a.m. and continue until all official business is completed; Wednesday, December 19, 1984.

PLACE: Capitol Holiday Inn, Apollo Room, 550 C Street, SW., Washington, D.C. 20024.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Approval of Minutes
   June 22, 1984
3. Report from Audit Division
   Audit and Accounting Guide for Recipients and Auditors
4. Report from Assistant to the President
   Funding Formulas
5. Report from the Office of Comptroller
   Presentation of Corporation Audit FY 1984
   Final FY 1984 Consolidated Operating Budget
   Proposed FY 1985 Consolidated Operating Budget with recommendations for allocation of FY 1984 carryover
   FY 1986 Budget Mark

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Opsut, Executive Office, (202) 272–4040.

Date Issued: December 10, 1984.

Donald P. Bogard,

President.

[FR Doc. 84–32519 Filed 12–10–84; 4:39 pm]

BILLING CODE 6820–35–M

9

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 10, 17, 24, and 31, 1984.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, D.C.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of December 10

Monday, December 10

1:30 p.m.
Discussion/Possible Vote on Hydrogen Rule (Public Meeting) (if needed)
3:00 p.m.
Discussion of Adjudication Matters Related to Catawba–1 (Closed—Ex. 10)

Tuesday, December 11

10:00 a.m.
Staff Follow-up to 11/15 DOE Briefing on High Level Waste Program (Public Meeting)
2:00 p.m.
Year End Budget Review (Public Meeting)

Thursday, December 13

10:00 a.m.
Affirmation/Discussion and Vote (Public Meeting) (a) Aamodt Motion for Investigation of Radioactive Releases During the TMI–2 Accident (Tentative)

Friday, December 14

10:00 a.m.
Discussion/Possible Vote on Full Power Operating License for Catawba–1 (Public Meeting)
2:00 p.m.
Briefing and Discussion on the Hearing Process (Public Meeting)

Week of December 17—Tentative

Monday, December 17

10:00 a.m.
Discussion of Material False Statements—Policy Options (Public Meeting)
2:00 p.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

Tuesday, December 18

10:00 a.m.
Discussion of 1985 Policy and Planning Guidance (Public Meeting)
2:00 p.m.
Discussion of Need for and Impact of Further TMI–1 Hearings (Public Meeting) (Tentative)

Wednesday, December 19

10:00 a.m.
Discussion/Affirmation of Indian Point Order (Public Meeting) (if needed)

Thursday, December 20

10:00 a.m.
Affirmation Meeting (Public Meeting) (if needed)

Week of December 24—Tentative

Friday, December 28

11:30 a.m.
Affirmation Meeting (Public Meeting) (if needed)

Week of December 31—Tentative

Thursday, January 3

2:00 p.m.
Affirmation Meeting (Public Meeting) (if needed)

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING) (202) 634–1498.

CONTACT PERSON FOR MORE INFORMATION: Julia Corrado (202) 634–1410.

George T. Mazuzan,

Office of the Secretary.

December 7, 1984.

[FR Doc. 84–32397 Filed 12–7–84; 4:50 pm]

BILLING CODE 7590–01–M

10

SECURITIES AND EXCHANGE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: (To be published).

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW., Washington, D.C.

DATE PREVIOUSLY ANNOUNCED: Tuesday, November 27, 1984.

CHANGE IN THE MEETING: Additional items.

The Following items were considered at a closed meeting held on Tuesday, December 4, 1984, at 10:00 a.m.

Close investigation.

Administrative proceeding of an enforcement nature.

Consideration of amicus participation.

Chairman Shad and Commissioners Treadway, Marinaccio and Peters determined that Commission business required the above changes and that no earlier notice thereof was possible.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Steve Molinari at (202) 272–2467.

Shirley E. Hollis,

Acting Secretary.

December 7, 1984.

[FR Doc. 84–32412 Filed 12–7–84; 5:14 pm]

BILLING CODE 8010–01–M

11

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of December 10, 1984, at 450 Fifth Street, NW., Washington, D.C.

A closed meeting will be held on Tuesday, December 11, 1984, at 10:00 a.m. An open meeting will be held on Thursday, December 13, 1984, at 10:00 a.m., in Room 1C30.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, the items to be considered at the closed meeting may be considered pursuant to one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10).

Chairman Shad and Commissioners Treadway, Marinaccio and Peters voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, December 11, 1984, at 10:00 a.m., will be:

Formal orders of investigation.
Institution of administrative proceedngs of an enforcement nature.
Institution of injunctive actions.
Settlement of administrative proceedings of an enforcement nature.
Settlement of injunctive action.

The subject matter of the open meeting schedules for Thursday, December 13, 1984, at 10:00 a.m., will be:

1. Consideration of whether to adopt Rule 3a-5 (proposed as a revision of Rule 6c-1) under the Investment Company Act of 1940 which would exempt finance subsidiaries of United States and foreign private issuers from the definition of investment company under certain conditions. Consideration will also be given to whether to rescind Rule 6c–1 under that Act. For further information, please contact William C. Gibbs at (202) 272–2048.
2. Consideration of whether to grant an exemption from section 15(b)(8) of the Securities Exchange Act of 1934, which requires that a registered broker-dealer purchasing and selling securities in the over-the-counter market become a member of the National Association of Securities Dealers, Inc. For further information, please contact Katherine A. England at (202) 272–2882.

At times changes in Commission priorities require alterations in the

scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: David Wescoe (202) 272-2092

December 7, 1984.

Shirley E. Hollis,

Acting Secretary.

[FR Doc. 84-32413 Filed 12-7-84; 5:14 pm]

BILLING CODE 8010-01-M

12

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of December 17, 1984, at 450 Fifth Street, NW., Washington, D.C.

An open meeting will be held on Tuesday, December 18, 1984, at 10:00 a.m., in Room 1C30, followed by a closed meeting.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, the items to be considered at the closed meeting may be considered pursuant to one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10).

Chairman Shad and Commissioners Treadway, Cox, Marinaccio and Peters voted to consider the items listed for the closed meeting in closed session.

The subject matter of the open meeting scheduled for Tuesday, December 18, 1984, at 10:00 a.m., will be.

Consideration of whether to issue a release adopting Securities Exchange Act Rule 11d1-2 to exempt from the credit restrictions of Section 11(d)(1) of the Securities Exchange Act of 1934 any security issued by an open-end management investment company of unit investment trusts registered under Section 8 of the Investment Company Act of 1940 which has been owned for more than thirty days by the person to whom credit would be extended. For further information, please contact Valerie Golden at (202) 272-2848.

The subject matter of the closed meeting scheduled for Tuesday, December 18, 1984, following the 10:00 a.m. open meeting.

Formal orders of investigation.
Institution of administrative proceedings of an enforcement nature.
Settlement of administrative proceedings of an enforcement nature.
Regulatory matter regarding financial institutions.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Marianne Keler at (202) 272-2648.

Shirley E. Hollis,

Acting Secretary.

December 7, 1984.

[FR Doc. 84-32477 Filed 12-10-84; 1:34 pm]

BILLING CODE 8010-01-M

federal register

Wednesday
December 12, 1984

Part II

Department of Commerce

Patent and Trademark Office

37 CFR Part 1

Patent Interference Proceedings; Final Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 40104-4151]

Patent Interference Proceedings

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Patent and Trademark Office is amending its rules of practice in patent interference cases. The Patent Law Amendments Act of 1984, Pub. L. 98-622, sections 201-202, abolished the Board of Appeals and Board of Patent Interferences and created in their place a Board of Patent Appeals and Interferences which will decide *ex parte* appeals from adverse decisions of patent examiners and interference cases. The Patent and Trademark Office, through this amendment of its rules, intends to provide guidance on the procedures the Office will be following in conducting interference cases before the Board of Patent Appeals and Interferences.

DATE: The effective date of these rules is: February 11, 1985.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey by telephone at (703) 557-4025 (if no answer, message may be left at 703-557-4103) or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, D.C. 20231.

SUPPLEMENTARY INFORMATION: The Patent and Trademark Office (PTO) conducts interference proceedings to determine who as between two or more applicants for patent or one or more applicants and one or more patentees is the first inventor of a patentable invention. Heretofore, the determination was made by a Board of Patent Interferences. The Patent Law Amendments Act of 1984, Pub. L. 98-622, sections 201-202 combines the Board of Appeals and the Board of Patent Interferences into a single Board of Patent Appeals and Interferences (Board) and authorizes the Board to consider priority and patentability in interference cases.

In view of the discretion given the Board under 35 U.S.C. 135(a), as amended by Pub. L. 98-622 ("The Board . . . may determine questions of patentability. . . ."), these new rules will apply to all interferences declared on or after February 11, 1985, except in special circumstances, such as: (1) Interferences which are declared as a result of a motion made in another interference which was pending before the Board before February 11, 1985 (e.g., an interference declared as a result of a motion under 37 CFR 1.231 to declare an additional interference); (2) an interference related to another interference declared prior to February 11, 1985 (e.g., an interference involving a method of using a compound where an interference involving the same parties and the compound was declared prior to February 11, 1985); and (3) an interference reinstituted after having been dissolved under the old rules (37 CFR 1.201-1.288) (e.g., an interference reinstituted after having been dissolved as a result of a motion under 37 CFR 1.231 to dissolve on the grounds of unpatentability where the applicant has obtained allowance of the claims held unpatentable in the decision on motions).

Through these new rules the PTO seeks to improve interference procedure so that the rights of parties in interferences are determined at an early date and the overall process of examining patent applications which become involved in interferences is simplified.

In order to obtain maximum input from the public prior to formally proposing revisions to the rules, on August 1, 1983, the PTO published in the **Federal Register** an advance notice of proposed rulemaking for interference rules. 48 FR 34836-34855. The advance notice was not published in the *Official Gazette*. Twenty-one written comments were received. All comments are available for public inspection in Room 10C01, Crystal Gateway II, 1225 Jefferson Davis Highway, Arlington, Virginia.

On January 30, 1984, the PTO published in the **Federal Register** a notice of proposed rulemaking. 49 FR 3768-3802. The notice was also published in the *Official Gazette* on February 14, 1984. 1039 O.G. 11; 1039 TMOG 11. The notice also appeared in the Bureau of National Affairs' Patent, Trademark & Copyright Journal, Vol. 27, pp. 312-346 (February 2, 1984), hereinafter "BNA." Eighteen written comments were received in response to the notice of proposed rulemaking. The comments are analyzed herein. A hearing was held on May 15, 1984. Three individuals appeared at the hearing. Oral comments made at the hearing are also analyzed herein. The eighteen comments and copy of the transcript of the hearing are available for public inspection in Room 10C01, Crystal Gateway II, 1225 Jefferson Davis Highway, Arlington, Virginia.

The new rules for interferences are set forth herein in §§ 1.601 through 1.688. The new rules replace entirely the present interference rules (37 CFR 1.201 through 1.288). A "six hundred" number series is used for the new rules. The use of a six hundred number series for the new rules will permit interested individuals to research published decisions (e.g., F.2d, USPQ) or computerized legal research services (e.g., LEXIS) citing the new rules.

An index of the headings of §§ 1.601-1.688 and a table correlating 37 CFR 1.201 through 1.288 (old rules) to §§ 1.601 through 1.688 (new rules) appears below.

Under the new rules, interferences are decided by the Board. The Board has jurisdiction to determine (1) priority of invention, (2) patentability of any claim corresponding to a count both as to applicants and patentees, (3) any issue of interference-in-fact as to any count, and (4) any other issue necessary to resolve the interference. The rules permit an interference to be declared on the basis of a single count defining one patentable invention in interferences involving patents as well as applications. The Board also has jurisdiction to determine whether counts are patentably distinct.

When an interference is declared, an examiner-in-chief is assigned to handle the interlocutory stages of the interference. An examiner having full signatory authority determines when one or more applications and a patent claim the same patentable invention. When the examiner makes such determination, the examiner will forward any involved applications or patents to the Board. The examiner will designate, at the time the involved applications or patents are sent to the Board, the claims of any application and patent which correspond to each count. The examiner-in-chief can subsequently designate additional claims to correspond to a count. The examiner-in-chief assigned to handle the interference will issue a notice to the parties declaring the interference.

The object of the interference will be to resolve all controversies as to all interfering subject matter defined by one or more counts. A final decision in the interference will determine who, if anyone, is entitled to claims which correspond to a count. Any decision adverse to an applicant by the Board will constitute a final refusal by the PTO to that applicant of the claims involved. Any decision adverse to a patentee constitutes cancellation from the patent of the claims involved.

Any decision by the Board on any issue is binding on the examiner and would govern further proceedings in the PTO.

The designation of a single examiner-in-chief to handle the interlocutory phases of an interference will permit better management of, and control over, interference proceedings. The rules provide that times be set and the examiner-in-chief exercise control over proceedings in the interference such that pendency of the interference before the Board from declaration to final decision will not normally exceed 24 months. The examiner-in-chief should be familiar with the history of the interference and will be accessible to counsel for the parties. For example, an examiner-in-chief, where appropriate, may conduct telephone conference calls to obtain agreement of the parties on the setting of schedules. The rules also permit the examiner-in-chief to hold hearings in the PTO or by conference telephone call in order to expedite or settle interlocutory issues in interferences. Any hearing can be transcribed by a court reporter under such conditions as an examiner-in-chief or the Board deems appropriate. The examiner-in-chief, where appropriate, will be available by phone to rule on the admissibility of evidence in the event parties encounter unusual problems during the taking of depositions. The examiner-in-chief will also be available to rule on requests for production of documents which take place during cross-examination. Oral orders given by phone will be followed by written orders.

At the time an interference is declared, the examiner-in-chief will set a time for filing preliminary motions. The preliminary motions can include:

(1) A motion for judgment on the ground that a claim corresponding to the count is not patentable to an opponent under 35 U.S.C. 102, 103, 112, or any other provision of law.

(2) A motion for judgment on the ground that there is no interference-in-fact between the claims of the opponents in the interference.

(3) A motion to add or to substitute new counts, to amend a claim corresponding to a count, to designate an application or patent claim to correspond to a count, to designate an application or patent claim as not corresponding to a count, or to require an applicant to present a claim to be designated to correspond to a count.

(4) A motion to substitute another application for the application involved in the interference or to add an application for reissue to the interference.

(5) A motion to declare another interference.

(6) A motion to be accorded the benefit of an earlier application or to attack the benefit of an earlier application which has been accorded to an opponent.

Other motions are permitted as necessary, such as a motion to amend the count and/or a claim corresponding to the count in response to a preliminary motion for judgment.

Oppositions to motions are permitted if filed within a time set by the examiner-in-chief. Replies are also authorized. Papers which are not authorized by the rules or requested by the examiner-in-chief can be returned unfiled.

A preliminary statement will be filed prior to or concurrently with the preliminary motions outlined above.

Motions will be decided by an examiner-in-chief, who may consult with an examiner on questions of patentability which have not previously been decided by the examiner. The examiner-in-chief may grant a motion, deny a motion, defer consideration on the merits of a motion to final hearing, or take such other action with respect to a motion as may be appropriate, e.g., dismiss an entirely inappropriate motion.

At the time preliminary motions are decided, the preliminary statements will be opened. If a decision on a motion or inspection of the preliminary statement results in entry of an order to show cause why a judgment should not be entered, the party against whom judgment might be entered can request a hearing before the examiner-in-chief and two additional examiners-in-chief. The decision will govern further proceedings. If adverse, the decision will constitute a final agency action. If favorable, the interference will proceed before the examiner-in-chief.

After preliminary motions are decided and assuming judgment does not result, a period may be set for the parties to file motions for additional discovery. The scope of the additional discovery would be the same as under current practice.

When a time period is set for filing discovery motions, or after discovery has closed, the examiner-in-chief will set a period for taking testimony. Any party wishing to take the testimony of a witness can elect to have the testimony of the witness taken by deposition or presented by affidavit. A transcript of an *ex parte* deposition can be used as an affidavit. If an affidavit is presented, the opposing party may then cross-examine on oral deposition. Any redirect will take place at the deposition. The party calling the witness is responsible for securing a court reporter and filing the transcript and record associated with cross-examination of its witness.

In the event a party needs testimony from a third-party who will not appear unless a subpoena is issued, including a hostile witness, direct and cross-examination testimony may be taken on oral deposition. The rules provide that prior authorization of an examiner-in-chief is required before a party can take testimony by issuance of a subpoena under 35 U.S.C. 24. The rule thus adopts the policy of *Sheehan* v. *Doyle*, 513 F.2d 895, 898, 185 USPQ 489, 492 (1st Cir.), *cert. denied*, 423 U.S. 874 (1975), and *Sheehan* v. *Doyle*, 529 F.2d 38, 40, 188 USPQ 545, 546 (1st Cir.), *cert. denied*, 429 U.S. 870 (1976), *rehearing denied*, 429 U.S. 987 (1976), and rejects the policy announced in *Brown* v. *Braddick*, 595 F.2d 961, 967, 203 USPQ 95, 101–102 (5th Cir. 1979). Testimony obtained in other proceedings, e.g., another interference or an infringement action, may be used if otherwise admissible.

Under the rules, the Federal Rules of Evidence are made applicable to interferences, except for those portions which relate to criminal actions, juries, and other matters not relevant to interferences. Those portions include:

(1) Rule 103(c).

(2) Rule 104 (c), (d), and (e).

(3) The language in Rule 105 which reads "and instruct the jury accordingly."

(4) Rule 201(g).

(5) The language in Rule 403 which reads "or misleading the jury."

(6) Rule 404(a) (1) and (2).

(7) The word "charge" in Rule 405(b).

(8) The language "or criminal" and proviso (ii) in Rule 410.

(9) Rule 412.

(10) Rule 606.

(11) The language "whether by an accused" and "other" in the last sentence of Rule 607.

(12) The provisions of the first sentence of Rule 611(c) relating to leading questions on direct examination do not apply to statements made in an affidavit authorized to be filed under the rules.

(13) The language "Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code" and "except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial" in Rule 612.

(14) Rule 614.

(15) Rule 706.

(16) The language "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel" and "and against the Government in criminal cases" in Rule 803(8).

(17) The language "but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the second" in Rule 803(22).

(18) The language "prosecution for homicide or in a" in Rule 804(b)(2).

(19) The language "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement" in Rule 804(b)(3).

(20) Rule 1101(a), (b), (d)(2), (d)(3), and (e).

The examiner-in-chief will set a period for filing the record and briefs. Oral hearings normally will be held before a panel consisting of the examiner-in-chief assigned to the interference and two other examiners-in-chief. The panel will render a final decision in the interference. Requests for reconsideration are permitted.

In rendering its decision, the Board will consider only that evidence which can be made available to the public under § 1.11(a). Accordingly, the Board will not consider evidence which is submitted under a protective order issued by a court if release of that evidence under § 1.11(a) would be inconsistent with the terms of the court's order.

A final decision of the Board is reviewable in the U.S. Court of Appeals for the Federal Circuit or an appropriate U.S. district court. Any reviewing court can review all aspects of the decision including patentability, priority, and all relevant interlocutory orders, such as denials of discovery.

Except as noted above, these new rules are applicable to all interferences declared on or after February 11, 1985. Interferences declared prior to February 11, 1985, continue to be governed by the prior rules (37 CFR 1.201–1.288 (July 1, 1984)) and will be decided by personnel of the Board of Patent Appeals and Interferences. Actions presently taken by a patent interference examiner or examiners of interferences will be taken by an examiner-in-chief.

An anticipated time schedule for a two-party interference follows.

Sections 1.601 through 1.688 would introduce new concepts in interference practice. Some of the more significant aspects of the rules, as well as some of the new concepts, include the following.

Section 1.1 codifies a practice announced in a Commissioner's Notice of November 28, 1983, "Mailing of Papers to the PTO in Patent Interference Proceedings," 1037 *Official Gazette* 25 (December 27, 1983) and authorizes a party in an interference to direct mail to the PTO intended for the interference to a special box in the Mail Room for interference papers. Amendments copying claims which are filed prior to the time an interference is declared would continue to be addressed in accordance with § 1.5(a).

Section 1.5 provides that when a paper filed in the PTO concerns an interference which has been declared, it should state the names of the parties (e.g., Smith v. Jones) and the number of the interference. The name of the examiner-in-chief assigned to the interference (§ 1.610) and the name of the party filing the paper should also appear conspicuously on the first page of the paper. Identification of the examiner-in-chief assigned to the interference and the name of the party filing the paper will greatly assist the Board in its administration of interference cases.

Section 1.8 excludes from the certificate of mailing practice any paper in an interference which an examiner-in-chief orders filed by hand or "Express Mail." Papers filed by "Express Mail" in an interference case would be addressed as set forth in § 1.1(e).

Section 1.11 sets forth when the interference file would become available to the public without a petition for access.

Section 1.48 provides that when a request is filed to correct inventorship of an application involved in an interference, the request shall comply with the requirements of § 1.48 and shall be accompanied by a motion under § 1.634. The request will be placed in the file of the application and the motion will be placed in the file of the interference. The request will be decided as part of the interference.

Section 1.138 permits an attorney or agent to sign and file a paper abandoning an application involved in an interference.

Section 1.196 more clearly sets forth the options open to an applicant when the Board makes a new ground of rejection under § 1.196(b). The last sentence of paragraph (b)(1) is intended to clarify practice in certain situations. One situation involves a case where (1) the Board affirms an examiner's rejection of a "first" claim and makes a new ground of rejection under § 1.196(b) of a "second" claim, (2) the applicant elects to have further proceedings before the examiner on the new ground of rejection on the second claim, and (3) those proceedings do not result in a further appeal (i.e., the second claim is allowed or is cancelled). The last sentence of § 1.196(b)(1) permits the Board to make its decision final on the first claim. By making its decision final on the first claim, the time period under § 1.304 for seeking judicial review begins. Another situation involves a case where (1) the Board affirms an examiner's rejection of a claim over reference A, (2) the Board also enters a new ground of rejection of the claim over reference B, (3) the applicant elects to have further proceedings before the examiner on the new ground of rejection, and (4) those proceedings result in applicant overcoming the new ground of rejection based on reference B. The last sentence of § 1.196(b)(1) permits the Board to make its decision final as to its affirmance of the rejection over reference A. Entry of an order making its decision final would start the period under § 1.304 for seeking judicial review. Thus, an applicant does not forego possible judicial review by electing further prosecution before the examiner when a new ground of rejection is made by the Board. Under paragraph (d), a recommendation by the Board that an allowed claim be rejected is binding on the examiner (rather than being a mere recommendation as was previously the case) in the absence of (1) an amendment, (2) showing of facts by affidavit or other appropriate evidence, or (3) both. The last sentence of paragraph (d) is intended to clarify that the Board may enter a final decision in certain circumstances. When the Board affirms an examiner's rejection of a "first" claim and makes a recommendation under paragraph (d) as to a "second" claim, the application is remanded to the examiner and the Board's decision affirming the rejection of the first claim is not a final decision. If proceedings before the examiner on remand do not result in a further appeal (i.e., the second claim is allowed or is cancelled), the Board may then make its decision final as to the first claim. By making its decision final as to the first claim, the time period under § 1.304 for seeking judicial review starts. Thus, an applicant does not forego judicial review on the first claim merely because of the remand proceedings with respect to the second claim.

Most of the current interference rules (§§1.201 through 1.247 and 1.251 through 1.288) are removed, but will continue to govern interferences declared prior to February 11, 1985. Section 1.248 is retained and governs service of papers in all patent cases except interference proceedings. Section 1.646 governs service of papers in interference proceedings.

Under § 1.292, it is intended to modify public use proceedings only to the extent that public use and on sale issues

which arise during an interference shall be raised by a preliminary motion under §1.633(a). There is no fee for filing the motion in the interference, but a fee would continue to be necessary when a petition is filed for institution of a public use proceeding apart from an interference. When a public use proceeding is instituted apart from an interference, the Commissioner will designate an appropriate official to conduct the proceeding including the setting of times for taking testimony under §§1.671 through 1.685. There will continue to be no "additional discovery" (see §§1.687 and 1.688) in public use proceedings.

Section 1.304 makes clear that the provisions of § 1.136 do not apply when judicial review is sought of a decision of the Board of Patent Appeals and Interferences in (1) a reexamination proceeding or (2) an interference. An extension of time to seek judicial review of a decision of the Board in a reexamination proceeding may be obtained under § 1.550(c). An extension of time to seek judicial review of a decision of the Board of an interference proceeding may be obtained under § 1.645. Section 1.304 also establishes an "excusable neglect" standard for seeking judicial review in interference cases when a notice of appeal is untimely filed or a civil action is not timely commenced. The excusable neglect standard is intended to be the same as the standard under Rule 4(a)(5) of the Federal Rule of Appellate Procedure.

Section 1.322 provide that when a request for a certificate of correction under 35 U.S.C. 254 (PTO mistake) is filed to make a correction of a patent involved in an interference, the request shall comply with the requirements of § 1.322 and shall be accompanied by a motion under § 1.635. The request will be placed in the file of the patent and the motion will be placed in the file of the interference. The request will be decided as part of the interference.

Section 1.323 provides that when a request for a certificate of correction under 35 U.S.C. 255 (patentee's mistake) is filed to make a correction of a patent involved in an interference, the request shall comply with the requirements of § 1.323 and shall be accompanied by a motion under §1.635. The request will be placed in the file of the patent and the motion will be placed in the file of the interference. The request will be decided as part of the interference.

Section 1.324 provides that when a request is filed to correct inventorship of a patent involved in an interference, the request shall comply with the requirements of § 1.324 and shall be accompanied by a motion under proposed § 1.634. The request will be placed in the file of the patent and the motion will be placed in the file of the interference. The request will be decided as part of the interference.

Section 1.565 provides that when a patent is involved in an interference proceeding and a reexamination proceeding, both the interference proceeding and the reexamination proceeding *will* continue unless one of the proceedings is stayed. A stay of a reexamination proceeding will be made by the Commissioner. A stay of an interference proceeding will be made by an examiner-in-chief, subject to review by the Commissioner. Section 1.565 continues the present practice of the Commissioner determining in every instance whether to stay a reexamination proceeding when the patent involved in the reexamination proceeding is sought to be reissued or becomes involved in litigation.

Under § 1.601, the rules shall be construed to secure the just, speedy, and inexpensive determination of interferences. Section 1.601 defined various terms used in Subpart E including "additional discovery," "affidavit," "case-in-chief," "case-in-rebuttal," "count," "effective filing date," "filing date," "interference," "interference-in-fact," "junior party," "lead" attorney, "party," "phantom count," "same patentable invention," "separate patentable invention," "senior party," "sworn," and "United States." "Affidavits" include declarations under 35 U.S.C. 25 and 37 CFR 1.68 as well as statutory declarations under 28 U.S.C. 1746. The definition of "United States" is the same as the definition of United States isn 35 U.S.C 100(c).

The definition of "interference" permits an interference between one or more applications and one of more patents. Thus, these new rules follow the policy of *Wilson* v. *Yokel*, 1876 Dec. Comm'r. Pat. 245 (Comm'r. Pat. 1876) and, to the extent inconsistent therewith, do not follow the policy announced in *Touval* v. *Newcombe*, 194 USPQ 509 (Comm'r. Pat. 1976). However, in view of the statutory requirement for the presence of at least one application in an interference, if an applicant were to concede priority or otherwise be terminated from an interference involving only one application and more than one patent, the interference would have to be terminated for lack of subject matter jurisdiction unless one or more of the patentees filed an application for reissue which could be added to the interference under § 1.633(h). A "count" defines interfering subject matter. An interference may have two counts only if the second count defines a "separate patentable invention" from the first count. The reason the second count must define a separate patentable invention is to permit the PTO to lawfully issue separate patents to different parties in an interference when a single party does not prevail as to all counts. A "separate patentable invention" is defined in § 1.601 (n):

> Invention (A) is a "separate patentable invention" with respect to invention (B) when invention (A) is new (35 U.S.C. 102) and non-obvious (35 U.S.C. 103) in view of invention (B) assuming invention (B) is prior art with respect to invention (A).

Section 1.602(a) continues the present PTO practice (37 CFR 1.201(c)) of not declaring or continuing an interference between (1) two or more applications owned by the same party or (2) an application and a patent owned by a single party unless good cause is shown. A corporation and its wholly-owned subsidiary are considered a "single party" within the meaning of § 1.602(a). Under prior rules, when a patent and an application involved in an interference became commonly owned, the interference was not "dissolved." Rather, the PTO required that the interference be terminated with a judgment. *Chillas* v. *Weisberg*, 1928 Dec. Comm'r. Pat. 24 (Comm'r. Pat. 1928); *Malone* v. *Toth*, 202 USPQ 397 (Comm'r. Pat. 1978); and *Morehouse* v. *Armbruster*, 209 USPQ 514 (Comm'r. Pat. 1980). Under these new rules, all interferences, including those involving only applications, will be terminated with a judgment. As noted in *Chillas* v. *Weisberg*, *supra* at 25 "the common owner can allow a judgment against the junior party to be rendered by default or it can file a concession of priority from one party to the other." Paragraphs (b) and (c) of § 1.602 continue the present PTO practice (37 CFR 1.201(c)) of requiring a party to notify the PTO of any real party in interest not apparent on the face of the notice declaring the interference (see § 1.611) or of any change in the real party in interest after the interference is declared. The PTO needs to know the identity of any real party in interest to properly enforce § 1.602(a) and to enable an examiner-in-chief to determine whether recusal is necessary or appropriate. A new requirement in paragraphs (b) and (c), not present in 37 CFR 1.201(c), is a 20-day time period for advising the PTO of the identity of, or any change in, the real party in interest.

Under §§ 1.601(f), 1.603, and 1.606, the interfering subject matter would be defined by one or more counts. All the claims in an application or a patent

which define the same patentable invention as a count would be designated to correspond to the count. An interference would have two counts only if one count defines a separate patentable invention from another count. Under § 1.606, at the time an interference is declared between a patent and an application, a count would not be narrower in scope than any patent claim which corresponds to the count. Thus, a patent claim would be presumed, subject to a motion under § 1.633(c), not to embrace "separate patentable inventions." Some examples illustrate how the PTO would formulate counts and designate patent and application claims to correspond to counts.

Example 1: Application A contains patentable claim 1 (engine). Application B contains patentable claim 8 (engine). If an interference is declared, there would be one count (engine). Claim 1 of application A and claim 8 of application B would be designated to correspond to the count.

Example 2: Application C contains patentable claims 1 (engine) and 2 (6-cylinder engine). Application D contains patentable claim 8 (engine). An engine and a 6-cylinder engine define the same patentable invention. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application C and claim 8 of application D would be designated to correspond to the count.

Example 3: Application E contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application F contains patentable claims 11 (engine) and 12 (8-cylinder engine). Claims 1 and 2 of application E and claims 11 and 12 of application F define the same patentable invention. Claim 3 of application E defines a separate patentable invention from claims 1 and 2 of application E and claims 11 and 12 of application F. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application E and claims 11 and 12 of application F would be designated to correspond to the count. Claim 3 of application E would not be designated to correspond to the count.

Example 4: Application G contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application H contains patentable claims 11 (engine) and 15 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H define the same patentable invention. Claim 3 of application G and claim 15 of application H define a separate patentable invention from claims 1 and 2 of application G and claim 11 of application H. If an interference is declared, there would be two counts: Count 1 (engine) and Count 2 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H would be designated to correspond to Count 1. Claim 3 of application G and claim 15 of application H would be designated to correspond to Count 2.

Example 5: Application J contains patentable claims 1 (engine), 2 (combination of an engine and a carburetor) and 3 (combination of an engine, a carburetor, and a catalytic converter). Application K contains patentable claims 31 (engine), 32 (combination of an engine and a carburetor), and 33 (combination of an engine, a carburetor, and an air filter). The engine, combination of an engine and carburetor, and combination of an engine, carburetor, and air filter define the same patentable invention. The combination of an engine, carburetor, and catalytic converter define a separate patentable invention from engine. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application J and claims 31, 32, and 33 of application K would be designated to correspond to the count. Claim 3 of application J would not be designated as corresponding to the count.

Example 6: The PTO will continue to follow *Waldeck* v. *Lewis*, 120 USPQ 88 (Comm'r.Pat. 1955). Application L contains patentable claims 1 (Markush group of benzene or toluene), 2 (benzene), and 3 (toluene). Application M contains patentable claim 11 (benzene). Benzene and toluene define the same patentable invention. If an interference is declared, there would be one count (Markush group of benzene or toluene). Claims 1, 2, and 3 of application L and claim 11 of application M would be designated to correspond to the count.

Example 7: Application N contains patentable claim 1 (benzene). Application P contains patentable claim 11 (xylene). Benzene and xylene define the same patentable invention. If an interference is declared, there would be one count (benzene or xylene). Claim 1 of application N and claim 11 of application P would be designated to correspond to the count.

Example 8: Application Q contains patentable claims 1 (Markush group of benzene or chloroform), 2 (benzene), and 3 (chloroform). Application R contains patentable claim 33 (benzene). If benzene and chloroform define the same patentable invention and an interference is declared, there would be one count (Markush group of benzene or chloroform). Claims 1, 2, and 3 of application Q and claim 33 of application R would be designated to correspond to the count. If chloroform defines a separate patentable invention from benzene and an interference is declared, there would be one count (benzene). Claims 1 and 2 of application Q and claim 33 of application R would be designated to correspond to the count. Claim 3 of application Q would not be designated to correspond to the count.

Example 9: Application S contains patentable claims 1 (Markush group of benzene or chloroform), 2 (benzene), and 3 (chloroform). Application T contains patentable claims 11 (Markush group of benzene or chloroform), 12 (benzene), and 13 (chloroform). If benzene and chloroform define the same patentable invention and an interference is declared, there would be one count (Markush group of benzene or chloroform). Claims 1, 2, and 3 of application S and claims 11, 12, and 13 of application T would be designated to correspond to the count. The PTO will continue to adhere to *Becker* v. *Patrick*, 47 USPQ 314 (Comm'r.Pat. 1939). An interference can have two counts only if one count defines a separate patentable invention from another count. If chloroform defines a separate patentable invention from benzene and an interference is declared, there would be two counts: Count 1 (benzene) and Count 2 (chloroform). Claims 1 and 2 of application S and claims 11 and 12 of application T would be designated to correspond to Count 1. Claims 1 and 3 of application S and claims 11 and 13 of application T would be designated to correspond to Count 2.

Example 10: Patent A contains claim 1 (engine). Application U contains patentable claim 11 (engine). If an interference is declared, there would be one count (engine). Claim 1 of patent A and claim 11 of application U would be designated to correspond to the count.

Example 11: Patent B contains claims 1 (engine) and 2 (6-cylinder engine). Application V contains patentable claim 8 (engine). An engine and a 6-cylinder engine define the same patentable invention. If an interference is declared, there would be one count (engine). Claims 1 and 2 of patent B and claim 8 of application V would be designated to correspond to the count.

Example 12: Patent C contains claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application W contains patentable claims 11 (engine) and 12 (8-cylinder engine). Claims 1 and 2 of patent C and claims 11 and 12 of application W define

the same patentable invention. Claim 3 of patent C defines a separate patentable invention from claims 1 and 2 of patent C and claims 11 and 12 of application W. If an interference is declared, there would be one count (engine). Claims 1 and 2 of patent C and claims 11 and 12 of application W would be designated to correspond to the count. Claim 3 of patent C would not be designated to correspond to the count.

Example 13: Patent D contains claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application X contains patentable claims 11 (engine) and 15 (engine with a platinum piston). Claims 1 and 2 of patent D and claim 11 of application X define the same patentable invention. Claim 3 of patent D and claim 15 of application X define a separate patentable invention from claims 1 and 2 of patent D and claim 11 of application X. If an interference is declared, there would be two counts: Count 1 (engine) and Count 2 (engine with a platinum piston). Claims 1 and 2 of patent D and claim 11 of application X would be designated to correspond to Count 1. Claim 3 of patent D and claim 15 of application X would be designated to correspond to Count 2.

Example 14: Patent E contains claims 1 (Markush group of benzene or toluene), 2 (benzene), and 3 (toluene). Application Y contains patentable claim 11 (benzene). Benzene and toluene define the same patentable invention. If an interference is declared, there would be one count (Markush group of benzene or toluene). Claims 1, 2, and 3 of patent E and claim 11 of application Y would be designated to correspond to the count.

Example 15: In this example, the claims of patent E and application Y in Example 14 are reversed. Patent E contains claim 1 (benzene). Application Y contains patentable claims 11 (Markush group of benzene or toluene), 12 (benzene), and 13 (toluene). If an interference is declared, the count would be the same as the count in Example 14—(Markush group of benzene or toluene). Claim 1 of patent E and claims 11, 12, and 13 of application Y would be designated to correspond to the count.

Example 16: The PTO will continue to follow cases such as *Case* v. *CPC International, Inc.*, 730 F.2d 745, 221 USPQ 196 (Fed. Cir. 1984); *cert. denied*, 105 S.Ct. 233 (1984); *Aelony* v. *Arni*, 547 F.2d 566, 192 USPQ 486 (CCPA 1977); and *Nitz* v. *Ehrenriech*, 537 F.2d 539, 190 USPQ 413 (CCPA 1976), and declare interferences where interfering patent and application claims are mutually exclusive provided the claims define the same patentable invention. Patent F contains claim 1 (benzene). Application Z contains patentable claim 11 (xylene). Benzene and xylene define the same patentable invention. If an interference is declared, there would be one count (benzene or xylene). Claim 1 of patent F and claim 11 of application Z would be designated to correspond to the count.

Example 17: It will be the practice of the PTO under § 1.606 to initially declare interferences with counts which are identical to or broader than patent claims which correspond to the counts. A single patent claim would be presumed, subject to a motion under § 1.633(c), not to define separate patentable inventions. Patent G contains claims 1 (Markush group of benzene or chloroform), 2 (benzene), and 3 (chloroform). Application AA contains patentable claim 33 (benzene). If an interference is declared, initially it would be presumed by the PTO, subject to a later motion under § 1.633(c), that benzene and chloroform define the same patentable invention. There would be one count (Markush group of benzene or chloroform). Claims 1, 2, and 3 of patent G and claim 33 of application AA would be designated to correspond to the count. If a party believes benzene and chloroform define separate patentable inventions, that party could file a motion under § 1.633(c) to redefine the count and the claims corresponding to the counts.

Example 18: Patent H contains claims 1 (Markush group of benzene or chloroform), 2 (benzene), and 3 (chloroform). Application AB contains patentable claims 11 (Markush group of benzene or chloroform), 12 (benzene), and 13 (chloroform). Benzene and chloroform initially would be presumed, subject to a motion under § 1.633(c), to define the same patentable invention, because they are recited as a Markush group in a single patent claim. If an interference is declared, there would be one count (Markush group of benzene or chloroform). Claims 1, 2, and 3 of patent H and claims 11, 12, and 13 of application AB would be designated to correspond to the count. If a party believes benzene and chloroform define separate patentable inventions, the party could move under § 1.633(c) to substitute a count (benzene) for (Markush group of benzene or chloroform) and to add a count (chloroform). See Example 36.

Example 19: Under § 1.606, the PTO will continue to follow the practice announced in *Ex parte Card and Card*, 1904 Dec.Comm'r.Pat. 383 (Comm'r.Pat. 1904). Patent J contains claim 1 (method of mixing, grinding, and heating). Application AC contains patentable claim 8 (method of mixing and heating) and does not disclose or claim a grinding step. In the context of the inventions disclosed in patent J and application AC, a method of mixing, grinding, and heating is the same patentable invention as a method of mixing and heating. Under current practice, it would be said that "grinding" is an "immaterial" limitation in claim 1 of patent J. Under § 1.606, the fact application AC does not disclose grinding would not preclude an interference. If an interference is declared, there would be one count (method of mixing and heating). Claim 1 of patent J and claim 8 of application AC would be designated to correspond to the count.

Under § 1.605, timely filing of an amendment presenting a claim suggested by the examiner for purposes of an interference would stay *ex parte* proceedings in the application in which the claim is presented pending a determination by the examiner of whether an interference will be declared. Also under § 1.605(a), when an examiner suggests a claim, the applicant will be required to copy verbatim the suggested claim. At the time the suggested claim is copied, however, the applicant may also (1) call the examiner's attention to other claims already in the application or which are presented with the copied claim and (2) explain why the other claims would be more appropriate to be included in any interference which may be declared.

Under § 1.607(b), when an applicant seeks an interference with a patent, e.g., by copying claims from the patent, examination of the application including any appeal would be handled with special dispatch within the PTO. "Special dispatch" would be construed to be the same as special dispatch in a reexamination proceeding. See 35 U.S.C. 305.

Under § 1.608, the PTO will continue current practice (37 CFR 1.204(c)) of requiring an applicant seeking to provoke an interference with a patent to submit evidence which demonstrates that the applicant is *prima facie* entitled to a judgment relative to the patentee. Evidence would be submitted only when the earlier of the filing date or effective filing date of the application is more than three months after the earlier of the filing date or effective filing date under 35 U.S.C. 120 of the patent. The evidence may relate to patentability and need not be restricted to priority. When the evidence (1) consists of prior printed publications and patents and (2) shows that the claims of the application are not

patentable, the claims in the application would be rejected and the applicant could file a request for reexamination of the patent.

Section 1.609 sets forth what an examiner shall forward to the Board when an interference is declared. For the most part, § 1.609 continues current practice. However, under § 1.609(b)(3), the examiner would identify all claims in an application which the examiner believes are patentable over the proposed counts. Thus, a claim in an application would either correspond to a count or would be indicated as being patentable over the count. For instance, in Example 3, *supra*, the examiner would indicate that (1) claims 1 and 2 of application E and claims 11 and 12 of application F correspond to the count and (2) claim 3 of application E defines a separate patentable invention from the count.

Under § 1.610, each interference will be declared by an examiner-in-chief. The examiner-in-chief enters all interlocutory orders in the interference. As necessary, another examiner-in-chief may act in place of the examiner-in-chief assigned to the interference. At the discretion of the examiner-in-chief assigned to the interference, a panel of two or more examiners-in-chief may enter an interlocutory order. The examiner-in-chief will set times and control proceedings such that pendency of the interference normally will not exceed 24 months. Under § 1.610(d), the examiner-in-chief is authorized to hold conferences. Any conference can be by a telephone conference call. Under § 1.610(e), an examiner-in-chief is authorized to determine a proper course of conduct for any situation not specifically covered by the rules.

Under § 1.611(a), the PTO will normally notify each party at its correspondence address (37 CFR 1.33(a)) that an interference is declared. This practice will save the PTO the administrative burden of sending multiple notices as is required by the present rules. Under § 1.611(a), the PTO could, in an appropriate circumstance, also send a notice to a patentee or an assignee. An appropriate circumstance for sending an additional notice would be a situation where a patent was issued on the basis of an application filed under 37 CFR 1.47. The matters to be specified in a notice declaring an interference are set out in § 1.611(c). One item to be set out is the "order of the parties," meaning the order in which the parties will take testimony. If Jones is the junior party and Smith is the senior party, the order of the parties is: Jones v. Smith. The order of the parties may change as a result of the granting of a motion under § 1.633 (d), (f), or (g). Under § 1.611(d), the notice declaring the interference may also set dates for filing preliminary statements, notices that preliminary statements have been filed, motions under § 1.633, oppositions to those motions, and replies to the oppositions. Alternatively, an examiner-in-chief may set those times in a separate order before or after consultation with counsel for the parties. Under § 1.611(e), the PTO may place a notice in the *Official Gazette* each time an interference is declared involving a patent. The notice would make it easier for patent practitioners throughout the country to determine whether a given patent is or has been involved in an interference.

Under § 1.612, except for affidavits under § 1.131 and any evidence and explanation under § 1.608(b) filed separate from an amendment, each party shall have access to the file of every other party after an interference is declared. The files of applications and patents involved in an interference will be maintained in the Service Branch of the Board of Patent Appeals and Interferences for inspection and copying. Any explanation which is filed as part of an amendment or an amendment which discusses details contained in an affidavit under § 1.131 would not be sealed under § 1.612(a). Thus, § 1.612(a) continues the practice discussed in *Moorman* v. *Martin*, 103 USPQ 273 (Comm'r.Pat. 1950) and Calvert, *An Overview of Interference Practice*, 62 J. Pat. Off. Soc'y. 290, 293 (1980). Under § 1.612(b), each party will have access to an opponent's affidavit under § 1.131 or an opponent's evidence and explanation under § 1.608(b) when a decision is rendered on motions under § 1.633. Under § 1.612(c), a party would be required to serve any evidence and explanation under § 1.608(b) if an order to show cause is issued under § 1.617(a) and the party responds to the order under § 1.617(b). Under § 1.612(d), the parties may agree to exchange copies of their respective files.

Under § 1.613(a), when a party has appointed more than one attorney or agent of record, the party may be required to designate a "lead" attorney or agent. A lead attorney or agent would be a registered attorney or agent of record who is primarily responsible for prosecuting an interference on behalf of a party and is the individual whom an examiner-in-chief can contact to set times and take other action in the interference. Section 1.613(b) continues the practice of not permitting the same attorney or agent to represent two or more parties in an interference except as permitted by Chapter 1, see e.g., § 1.344. Under § 1.613(c), an examiner-in-chief can make an appropriate inquiry to determine whether an attorney or agent should be disqualified from representing a party. A final decision to disqualify an attorney or agent is made by the Commissioner under 35 U.S.C. 32.

Section 1.614 specifies when the Board gains jurisdiction over an interference. The section also indicates when an interference becomes a contested case within the meaning of 35 U.S.C. 24. A remand to the examiner is authorized and may be useful in certain situations, such as, when a party moves under § 1.633(c) to add a proposed count which is broader than any count in an interference. Alternatively, an examiner-in-chief would be able to obtain informal opinions from examiners during the course of an interference. Nothing in the rules, however, is intended to authorize informal conferences between an examiner-in-chief and an examiner with respect to the merits of an application before the board in an *ex parte* appeal from an adverse decision of the examiner.

Section 1.616 permits an examiner-in-chief or the Board to impose appropriate sanctions against a party who fails to comply with the rules or with an order entered in the interference. Paragraphs (a) through (e) set forth some of the possible sanctions which can be entered. The particular sanction to be entered would depend on the facts of a given case and ordinarily would not be entered prior to giving the affected party an opportunity to present its views. An individual examiner-in-chief could not impose sanction granting judgment inasmuch as entry of a judgment requires action by the Board. See § 1.610(a). A party desiring sanctions imposed against an opponent could move under § 1.635 for entry of an order imposing sanctions.

Section 1.617 retains summary judgment proceedings in those cases where a junior party applicant is required to file evidence and an explanation under § 1.608(b). To avoid summary judgment, the junior party applicant must establish that it is *prima facie* entitled to judgment relative to the senior party patentee. For the most part, practice under § 1.617 will be the same as the current practice under 37 CFR 1.228. The major changes would be the following: (1) A *prima facie* case could be based on patentability as well as priority. (2) A stricter standard would be imposed for presenting additional evidence after entry of an order to show cause. Under current practice (37 CFR

1.228), additional evidence may be submitted with a response to an order to show cause "when a showing in excuse of . . . [its] omission from the original" showing is made. The "good cause" showing required by § 1.617(b) imposes a stricter standard than was required under the prior rules. The stricter standard is necessary to encourage applicants copying claims from a patent to better prepare their initial showings under proposed § 1.608(b). Under current practice, the Board of Patent Interferences has found that substantial time is lost in issuing orders to show cause based on an inadequate initial showing only to have an adequate showing made with the response to the order to show cause. Under the "good cause" standard, ignorance by a party or counsel of the provisions of the rules or the substantive requirements of the law would not constitute good cause. (3) When an interference involves more than two parties, all opponents would be permitted to participate in summary judgment proceedings. Thus, the new rules overrule *Chan* v. *Akiba* v. *Clayton*, 189 USPQ 621 (Comm'r. Pat. 1975). (4) Currently, and applicant must file two copies of its initial showing under 37 CFR 1.204(c). Under § 1.608(b), a party would file only one copy of the showing. However, any party responding to an order to show cause would be required to serve a copy of its initial showing under § 1.608(b) with any response to the order to show cause. (5) A single examiner-in-chief may order an interference to proceed after issuance of an order to show cause under § 1.608(b) and the filing of a response by an applicant under § 1.617(b). Only the Board, however, may enter a summary judgment. See § 1.617(b).

Under § 1.618, the PTO has authority to return to a party any paper presented in an interference which is not authorized by, or is not in compliance with the requirements of, Subpart E. When an improper paper is filed, a party may be given an opportunity to file a proper paper under such conditions as an examiner-in-chief may deem appropriate: Two examples of improper papers are: (1) Replies to replies which are not authorized by the rules and (2) papers presented which have attached thereto a paper previously filed in the interference.

Sections 1.621 through 1.629 govern preliminary statements which continue to be required in interference cases.

Under § 1.621, a preliminary statement can be signed by any individual having knowledge of the facts (e.g., the inventor) or by an attorney or agent of record. Permitting an attorney or agent of record to sign a preliminary statement eliminates unnecessary mailing of papers between parties and their attorney or agent.

Under § 1.622, the preliminary statement would identify the inventor who made the invention defined by each count. If the inventor identified in the preliminary statement is not an inventor named in the application or patent involved in the interference, a motion under § 1.634 must be diligently filed to correct inventorship.

Sections 1.623, 1.624, and 1.625 respectively set out the allegations which should be made in, and the attachments which should accompany, a preliminary statement when (1) the invention was made in the United States, (2) the invention was made abroad and was introduced into the United States, and (3) derivation by an opponent from a party is to be an issue.

Section 1.626 permits a party to file a preliminary statement which states that the party only intends to rely on the filing date of an earlier United States or foreign application. Ordinarily, a junior party who fails to file a preliminary statement is not entitled to access to any other preliminary statement filed (see § 1.631(b)). Section 1.626 would permit a junior party who only intends to rely on an earlier application to have access to any opponent's preliminary statement.

Section 1.628 sets out how an error in a preliminary statement may be corrected.

Section 1.629 sets out the effect of a preliminary statement. A party who fails to file a preliminary statement will not be permitted to prove (1) that the party made the invention defined by a count prior to the party's filing date or (2) that an opponent derived the invention from the party.

Under § 1.631, preliminary statements normally will be opened for inspection when an examiner-in-chief decides preliminary motions filed under § 1.633. A junior party who does not file a preliminary statement is not entitled to access to a preliminary statement of any other party. When an interference is terminated before preliminary statements are opened, any preliminary statement which has been filed will be returned unopened to the party who submitted the statement.

Under § 1.632, a notice must be filed by a party who intends to argue that an opponent abandoned, suppressed, or concealed an actual reduction to practice. 35 U.S.C. 102(g). A party will not be permitted to brief (§ 1.656) or argue at final hearing (§ 1.654) that an opponent abandoned, suppressed, or concealed an actual reduction to practice unless the notice is timely filed. A notice is timely if filed within ten (10) days of the close of the testimony-in-chief period of an opponent. while a party has the burden of proving that an opponent abandoned, suppressed, or concealed, the burden may be discharged on the basis of the opponent's evidence alone. *Shindelar* v. *Holdeman*, 628 F.2d 1337, 207 USPQ 112 (CCPA 1980). See also *Correge* v. *Murphy*, 705 F.2d 1326, 217 USPQ 753 (Fed. Cir. 1983); *Horwath* v. *Lee*, 564 F.2d 948, 195 USPQ 701 (CCPA 1977); and *Peeler* v. *Miller*, 535 F.2d 647, 190 USPQ 117 (CCPA 1976). Under current practice where notice is not required, it is possible that a party may learn for the first time that abandonment, suppression, or concealment is an issue when the party receives an opponent's brief at final hearing. See *Klug* v. *Wood*, 212 USPQ 767, 771 n. 2 (Bd.Pat.Int. 1981). At that point, it is often too late to reopen proceedings in the interference. The purpose of requiring the notice under § 1.632 is to make the parties and the Board aware during the interlocutory stage of an interference that abandonment, suppression, or concealment may be an issue in the interference. Early notice will permit the parties to ask for and the examiner-in-chief to set appropriate testimony periods for a party to present evidence related to abandonment, suppression, and concealment, particularly in those cases where long unexplained delays tend to prove the allegation of suppression or concealment. Early notice will also eliminate the need for the party moving to reopen the testimony period. *Klug* v. *Wood*, *supra*.

Under § 1.633, a party may file preliminary motions for judgment, to redefine the interference, to substitute a different application in the interference, to declare an additional interference, to be accorded the benefit of an earlier application, to attack benefit previously accorded an opponent, or to add a reissue application to the interference. The motions are called "preliminary motions" in order to distinguish the motions from other motions which might be filed during the course of an interference. The preliminary motions would replace motions currently authorized by 37 CFR 1.231.

Under § 1.633(a), a motion to dissolve would be replaced with a motion for judgment. A party can file a motion for judgment on the ground that an opponent's *claim* corresponding to a count is unpatentable to the opponent. With two exceptions, unpatentability can be based on prior art (35 U.S.C. 102,

103), insufficiency of disclosure (35 U.S.C. 112, first paragraph), indefiniteness of claims (35 U.S.C. 112, second paragraph), double patenting, estoppel, or any other ground which would support a holding that claims corresponding to a count are not patentable. The two exceptions are (1) priority of invention of the subject matter of a count by the moving party as against any opponent and (2) derivation of the subject matter of a count by the opponent from the moving party. The two exceptions are directed to issues which are traditional "priority" issues, e.g., which inventor made the invention defined by a count first or, when derivation is an issue, who made the invention. Resolution of those "priority" issues almost always requires the taking of testimony. A motion for judgment, however, would be proper when a party believed an individual not involved in the interference made the invention defined by the count prior to an opponent in the interference, but subsequent to the moving party. Thus, a patentability issue, such as that raised under 35 U.S.C. 102(g) in *Sutter Products Co.* v. *Pettibone Mulliken Corp.*, 428 F.2d 639, 166 USPQ 100 (7th Cir. 1970). properly could be raised with a motion for judgment under § 1.633(a). Derivation by an opponent from an individual not involved in the interference could also be raised under § 1.633(a).

Under § 1.633(b), a party could move for a judgment when the party believes there is no interference-in-fact. A motion for judgment on the ground of no interference-in-fact is only proper under one of three conditions: (1) When an interference involves designs, (2) when the interference involves plant applications or a plant application and plant patent, or (3) when no claim of a party which corresponds to a count is identical to any claim of an opponent which corresponds to that count. An example illustrates when a motion under § 1.636(b) is proper.

Example 20. Application AD contains patentable claim 1 (6-cylinder engine). Application AE contains patentable claim 3 (8-cylinder engine). An interference is declared with a single count (6 or 8-cylinder engine). Claim 1 of application AD and claim 3 of application AE are designated to correspond to the count. Applicant AD believes that a 6-cylinder engine is a "separate patentable invention" (see § 1.601(n)) from an 8-cylinder engine. Applicant AD would file a motion under § 1.633(b) for a judgment on the ground of no interference-in-fact stating why a 6-cylinder engine is patentably distinct from an 8-cylinder engine. If the Board ultimately agrees with applicant AD, a patent could issue to AD containing claim 1 of application AD and a second patent could issue to AE containing claim 3 of application AE.

Under §1.633(c), a party may move to redefine interfering subject matter. One way to redefine interfering subject matter would be to add or substitute a count. When a party seeks to add a count, the party is required to demonstrate that the proposed count to be added is directed to a "separate patentable invention" from every other count in the interference.

A motion may be filed to amend an application claim which has already been designated to correspond to a count. See § 1.633(c)(2). Such a motion might be filed when a party believes an application claim designated to correspond to a count is unpatentable and the amended claim is believed to be patentable.

An applicant may move to add a claim to the applicant's application and to designate the claim to be added to correspond to a count. See § 1.633(c)(2). Such a motion may be filed when the applicant discloses specific subject matter which is not claimed, would like to claim the subject matter, and wants the subject matter involved in the interference.

Another way to redefine interfering subject matter would be to designate a claim as corresponding or not corresponding to a count. See §1.633 (c)(3) and (c)(4). Examples 21 and 22 illustrate this latter point.

Example 21. Application AF contains patentable claim 1 (engine). Patent K contains claims 3 (engine) and 5 (6-cylinder engine). Claim 1 of application AF and claim 3 of patent K are designated to correspond to the count. Applicant AF believes a 6-cylinder engine is the "same patentable invention" (see § 1.601(n)) as engine. Applicant AF would file a motion under § 1.633(c)(3) to designate claim 5 of patent K as corresponding to the count. If the motion is granted and applicant AF prevails in the interference, judgment would be entered against patentee K and both claims 3 and 5 of patent K would be cancelled under 35 U.S.C. 135(a).

Example 22. Application AG contains patentable claim 1 (engine). Patent L contains claims 3 (engine) and 5 (8-cylinder engine). An interference is declared with one count (engine). Claim 1 of application AG and claims 3 and 5 of patent L are designated to correspond to the count. Patentee L believes that an 8-cylinder engine defines a "separate patentable invention" (see § 1.601(n)) from engine. Patentee L should file a motion under § 1.633(c)(4) to designate claim 5 of patent L as "not corresponding" to the count. If the motion is granted and an adverse judgment is entered against patentee L, only claim 3 would be cancelled from the patent pursuant to 35 U.S.C. 135(a).

A motion to redefine the interfering subject matter may also request that an opponent who is an applicant be required to add a claim to the opponent's application and to designate the claim to correspond to a count. See § 1.633(c)(5). Such a motion might be filed when a party sees that the opponent discloses, but does not claim, subject matter which the party believes should be involved in the interference.

Section 1.633(i) would continue present practice (37 CFR 1.231) of allowing a party to move to redefine the subject matter of the interference or substitute a different application when an opponent moves for judgment (see § 1.633(a) and (b)) or to attack benefit (see § 1.633(g)).

Paragraph (j) of § 1.633 will permit an opponent to move for benefit when a party moves to add or substitute a count. Thus, when a motion to add a count is filed by a party and an opponent wants benefit of an earlier application in the event the motion to add is granted, the opponent should file a motion under § 1.633(j) to be accorded benefit. The mere fact that the opponent had been accorded benefit of an earlier application when the interference was declared does not mean the opponent will be accorded benefit as to some other count which may be added on motion of some other party.

Section 1.634 authorizes a motion to correct inventorship in an application (see § 1.48) or a patent (see § 1.324) involved in an interference.

Section 1.635 authorizes the filing of motions other than those specified in §§ 1.633 or 1.634. Motions filed under § 1.635 would be referred to as "miscellaneous motions" to distinguish from "preliminary motions" under § 1.633. Instances where a miscellaneous motion would be filed include motions to correct an error in a preliminary statement, to extend time for taking action or to seek judicial review, to obtain permission to proceed under 35 U.S.C. 24, or to obtain additional discovery.

Section 1.636 sets out the times within which a motion would be filed.

Section 1.637 sets out the content of motions. In prior interference practice, parties and their counsel have had difficulty meeting all the "unwritten"

requirements for motions under 37 CFR 1.231. Section 1.637 is quite specific in setting out the requirements for each type of motion, particularly the preliminary motions. By setting out with specificity the requirements for each type of motion, it is intended to minimize disposition of motions on technicalities. A vast majority of the comments in response to the advanced notice published in the Federal Register on August 1, 1983, commenting on then proposed § 1.637 were in favor of the requirements for motions being specifically set out in the regulations.

Section 1.638 authorizes oppositions to motions. Any opposition would have to identify any material fact in dispute. A reply to an opposition would be authorized for all motions. A reply to a reply is not authorized.

Section 1.639 sets forth the evidence which may accompany a motion, opposition, or reply. Every material fact alleged in a motion, opposition, or a reply would have to be supported by proof. Section 1.639(b) authorizes affidavits to be used as proof for any motion. The affidavit may later be used by a party during the testimony period (see §§ 1.671(e) and 1.672(b)). When a party believes that testimony is necessary to decide a motion under § 1.633 or § 1.634, the party would have to describe the nature of the testimony needed. If an examiner-in-chief agrees that testimony is needed, appropriate interlocutory relief would be granted and testimony would be ordered.

Example 23. An interference is declared with one count between application AH and application AJ. Applicant AH files a preliminary motion under § 1.633(c)(1) to redefine the interference by adding a second count. In order to succeed, applicant AH must show that the proposed count to be added is directed to a "separate patentable invention" (see § 1.601(n)) from the count already in the interference. In the motion, applicant AH sets forth in detail the testimony which would be required to prove that the subject matter of the proposed count is to a separate patentable invention from the subject matter of the count in the interference. Applicant AJ opposes the motion on the ground that the proposed and present counts define the "same patentable invention" (see § 1.601(n)). An examiner-in-chief determines that a material fact is in dispute and that applicant AH has established testimony is needed to properly rule on the motion. Under the circumstances, the motion would be deferred to final hearing and a testimony period would be ordered. The questions of (1) whether the proposed and present counts define the same patentable invention and (2) priority would be decided at final hearing.

Under § 1.640, an examiner-in-chief would decide all motions. A hearing could be held on a motion in the discretion of an examiner-in-chief. Where appropriate, an examiner-in-chief could consult with an examiner on a question of patentability which arises in the first instance in the interference. Consulation would not be necessary where the examiner had already ruled on the patentability question which comes before the examiner-in-chief or the Board. Moreover, nothing in § 1.640 authorizes conferences between examiners-in-chief and examiners in *ex parte* appeals under 35 U.S.C. 134 from an adverse decision of an examiner. A party is entitled to request reconsideration of a decision on a motion by a single examiner-in-chief. An opposition to a request for reconsideration could not be filed unless ordered by an examiner-in-chief or the Board, but the decision by the single examiner-in-chief would not normally be modified unless an opposition has been requested. The request for reconsideration would be acted on by a panel of the Board consisting of at least three examiners-in-chief, one of whom would normally be the examiner-in-chief who decided the motion. Several comments were received in response to the advance notice questioning why the examiner-in-chief who decided the motion would form part of the panel deciding the request for reconsideration. The decision to propose, and now adopt, a regulation which would permit the examiner-in-chief who decided the motion to participate in the decision on reconsideration was made after careful balancing of all the factors involved. It could have been proposed to permit the examiner-in-chief to individually decide the request for reconsideration. However, it is believed that parties in interference cases would feel that their requests for reconsideration are being more fully considered if more than one person considers their request. The two additional examiners-in-chief would be able to consult with the examiner-in-chief most familiar with the case, but would be able to control the decision on reconsideration by a majority vote. Use of the examiner-in-chief who decided the motion and two additional examiners-in-chief would (1) minimize delay which would occur if three new examiners-in-chief were used who were unfamiliar with the record and (2) minimize the possibility that reversible error occurred if only the examiner-in-chief who decided the motion also individually decided the request for reconsideration.

Under § 1.644, petitions to the Commissioner are authorized in interference cases under certain restricted conditions. Petitions in interferences have been the source of substantial delay. Section 1.644 attempts to minimize those delays. Section 1.644 authorizes a petition to the Commissioner from a decision of an examiner-in-chief or a panel when the examiner-in-chief or the panel shall be of the opinion (1) that the decision involves a controlling question of procedure or an interpretation of a rule as to which there is a substantial ground for a difference of opinion and (2) that an immediate decision on petition would materially advance the ultimate termination of the interference. The standard is intended to be analogous to that of a district court certifying a question to a court of appeals under 28 U.S.C. 1292(b). A petition could be filed seeking to invoke the supervisory authority of the Commissioner. However, the petition could not be filed prior to entry of judgment and could not relate to the merits of priority or patentability or the admissibility of evidence under the Federal Rules of Evidence. A petition could also be filed seeking waiver of a rule. A fee of $120 would be charged for each petition and for each request for reconsideration of a decision on petition. Any petition would be decided on the record made before the examiner-in-chief or the Board and additional evidence could not be submitted with the petition. An opposition could not be filed unless ordered by the Commissioner. Where reasonably possible, service of a petition would have to be such that delivery is accomplished within one day. Service by hand or "Express Mail" would comply with this requirement.

Section 1.645 permits a party to file a motion to seek an extension of time to take action in an interference or to seek judicial review. The motion would have to be filed within sufficient time to actually reach an examiner-in-chief prior to expiration of the time for taking action. Under § 1.645, a moving party would not be able to assume that a motion for an extension of time would be granted. Under § 1.610(d)(6), a request for an extension of time could be made orally and an appropriate order would then be entered thus eliminating considerable paper work. The order would be the written record of the request and decision. See § 1.2. Extensions of time have caused numerous delays in interference cases.

Under present interference practice, some delays are caused because attorneys and agents on many occasions unexpectedly receive orders setting times. Under the new practice, attorneys and agents can expect times to be set for filing preliminary statements, preliminary motions, motions for additional discovery, testimony, and briefs after a conference call. It is expected that use of conference calls will permit an examiner-in-chief and attorneys or agents for parties to set a time schedule which is mutually satisfactory. A motion to extend time would not be granted unless a party shows good cause. The use of conference calls would allow schedules to be set before orders setting time are entered and therefore the press of other business which arises after the examiner-in-chief and attorneys and agents agree to times would not normally be considered good cause.

Under § 1.647, when a party relies on a document in a foreign language, an English language translation of the document and an affidavit attesting to the accuracy of the translation would be required. The rule would apply to any document, including evidence submitted with motions, foreign applications for which a party seeks benefit, testimony, and exhibits introduced in evidence during testimony.

Under § 1.651, after a decision is entered on preliminary motions, an examiner-in-chief would set times for filing motions for additional discovery and for taking testimony. Any motion for additional discovery would be to obtain answers to interrogatories, requests for admissions, and documents and things necssary for a party to prepare its case-in-chief.

Section 1.653 sets out what shall be in the record to be considered by the Board at final hearing. The record would continue to be printed or typed on paper 8½" by 11" in size. Accordingly, when a party files an affidavit, the party should use 8½" by 11" paper for the affidavit.

Section 1.654 continues the practice of holding a final hearing where oral argument may be presented by all parties. No fee would be charged for appearing at oral argument at final hearing in an interference.

Section 1.655 specfies the matters which can be considered in rendering a final decision. Patentability is an issue which may be raised. The Board can also consider whether any interlocutory order was manifestly erroneous or an abuse of discretion, although any interlocutory order would be presumed to be correct and burden of showing error shall be on the party attacking the order. This last procedural provision permits the Board to correct any manifest error before a party seeks judicial review of an interlocutory order along with judicial review of the Board's final decision.

Section 1.656 sets forth the requirements for briefs for final hearing. In large measure, § 1.656 follows the requirements of Rule 28 of the Federal Rules of Appellate Procedure. An original and three copies of a brief is required. Under § 1.656(h), if a party wants the Board in rendering its final decision to rule that any evidence is inadmissible, the party must file with its opening brief an original and three copies of a motion to suppress the evidence. Any previous objection to the admissibility of evidence is waived unless the motion to suppress is filed. This procedural provision makes clear that an objection to the admissibility of evidence must be renewed at final hearing and will be considered by the Board in rendering its final decision. When a junior party fails to file a brief, an order can be issued requiring the junior party to show cause why failure to file the brief should not be taken as a concession of priority.

Under § 1.658 the Board would enter a final decision. The decision can (1) enter judgment, in whole or in part, (2) remand the interference to an examiner-in-chief, or (3) take further action not inconsistent with law. A judgment as to a count shall state whether or not each party is entitled to a patent containing claims which correspond to the count. When judgment is entered as to all counts, the decision of the Board is considered final for the purpose of judicial review. Section 1.658(c) defines the doctrine of interference estoppel as it is to be applied in the PTO after an interference is terminated. The definition of interference estoppel is designed to encourage parties in interference cases to settle as many issues as possible in one proceeding. Section 1.658(c) creates an estoppel both as to senior and junior parties unlike the present practice (37 CFR 1.257) which limits estoppel in some instances to junior parties. An estoppel would *not* apply with respect to any claims which correspond, or which properly could have corresponded, to a count as to which the party was awarded a favorable judgment. A few examples illustrate how estoppel would be applied.

Example 24. Junior party applicant AL and senior party applicant AK both disclose separate patentable inventions "A" and "B" and claim only invention A in their respective applications. An interference is declared with a single count to invention A. Neither party files a preliminary motion (see § 1.633(c)(1)) to add a count to invention B. Judgment as to all of AL's claims corresponding to the sole count is awarded to junior party applicant AL. Senior party applicant AK would be estopped to thereafter obtain a patent containing claims to invention B, because applicant AK failed to move to add a count to invention B in the interference. Junior party applicant AL would not be estopped to obtain a patent containing claims to invention B.

Example 25. In this example, the facts are the same as in Example 24 except that judgment is awarded as to all AK's claims corresponding to the count to senior party applicant AK. Junior party applicant AL would be estopped to obtain a patent containing claims to invention B in the interference. Senior party applicant AK would not be estopped to obtain a patent containing claims to invention B.

Example 26. Junior party applicant AM and senior party applicant AP both disclose separate patentable inventions "C", "D", and "E" and claim inventions C and D in their respective applications. An interference is declared with two counts. Count 1 is to invention C and Count 2 is to invention D. Neither party files a preliminary motion to add a proposed Count 3 to invention E. Judgment as to all AM's claims corresponding to Counts 1 and 2 is awarded to junior party applicant AM. Senior party applicant AP would be estopped to thereafter obtain a patent containing claims to invention E, because applicant AP failed to move to add a count to invention E in the interference. Junior party applicant AM would not be estopped to obtain a patent containing claim to invention E.

Example 27. In this example, the facts are the same as in Example 26 except that judgment is awarded as to all AP's claims corresponding to Counts 1 and 2 to senior party applicant AP. Junior party applicant AM would be estopped to obtain a patent containing claims to invention E, because applicant AM failed to move to add a count to invention E in the interference. Senior party applicant AP would not be estopped to obtain a patent containing claims to invention E.

Example 28. In this example, the facts are the same as in Example 26 except that judgment is awarded on all of AM's claims corresponding to Count 1 to junior party applicant of AM and judgment is awarded on all AP's claims corresponding to Count 2 to senior party applicant AP. Both parties would be estopped to obtain a patent containing claims to invention E, because neither moved to add a count to invention E during the interference. Assume that junior party AM could have properly moved under § 1.633(f) to be accorded the benefit of an earlier application, but did not do so during the interference. Junior party AM would not be estopped in subsequent *ex parte* prosecution from asking for benefit of the earlier application as to the invention defined by Count 1. Accordingly, if the examiner were to reject junior party AM's claim corresponding to Count 1 on the basis of some newly discovered prior art, junior party AM could properly antedate the prior art by seeking the benefit under 35 U.S.C. 120 of the earlier application. Thus, even though junior party AM was a "losing party" as to Count 2 (an adverse judgment as to junior party AM's claims corresponding to Count 2 having been entered), junior party AM was awarded a favorable judgment (§ 1.658(c)) as to Count 1. Junior party AM would be estopped in subsequent *ex parte* prosecution from attempting to be accorded the benefit of the earlier application as to the invention of Count 2.

Example 29. Applicant AQ discloses and claims invention "F." Applicant AR discloses and claims separate patentable inventions "F" and "G." The assignee of applicant AQ also owns an application AS which discloses and claims invention "G." An interference is declared between applicant AQ and applicant AR. The sole count is directed to invention F. No motion is filed by applicant AQ or its assignee to declare an additional interference between applicant AR and applicant AS with a count to invention G. A judgment as to all of AR's claims corresponding to the sole count is awarded to applicant AR. Applicant AS and the assignee would be estopped to obtain a patent containing claims to invention G, because applicant AR and the assignee failed to move to declare an additional interference with a count to invention G.

Example 30. The facts in this example are the same as the facts in Example 29 except that judgment as to all of AQ's claims corresponding the sole count is awarded to applicant AQ. Applicant AS and the assignee would not be estopped, because applicant AQ was not a "losing party" (§ 1.658(c)).

Example 31. Applicant AT discloses a generic invention to "solvent" and a species to "benzene." Application AT contains a patentable claim 1 (solvent) and no other claims. Applicant AU discloses the generic invention to "solvent" and species to "benzene" and "toluene." Application AU contains patentable claim 3 (solvent) and no other claims. An interference is declared with a single count (solvent). Claims 1 of application AT and claim 3 of application AU are designated to correspond to the count. No preliminary motions are filed. A judgment is entered in favor of applicant AT on the claim corresponding to the sole count. Applicant AU would be estopped to obtain a patent containing a claim to benzene, because applicant AU failed to file a preliminary motion under § 1.633(c)(1) seeking to add a count to benzene and benzene was disclosed in winning party AT's application. Applicant AU would also be estopped to obtain a patent containing a claim to toluene, unless "toluene" defines a "separate patentable invention" from "solvent." A basis for interference estopped (§ 1.658(c)) exists if "toluene" and "solvent" define the "same patentable invention," because a claim to "toluene" could properly have been added and designated to correspond to the count. See § 1.633(c)(2).

Under § 1.659, the Board would be able to make recommendations to examiners and the Commissioner, including recommendations that application claims not involved in the interference be rejected and that a patent be reexamined as to patent claims not involved in the interference.

Under § 1.660, a party would be required to notify the Board when the party's patent or application becomes involved in other PTO proceedings (reexamination, reissue, or protest) or litigation.

Section 1.661 sets forth when an interference is considered terminated after a judgment is entered in the interference. For the purpose of filing copies of settlement agreements, an interference is considered terminated when the time for all appeals has expired. *Tallent* v. *Lemoine*, 204 USPQ 1058 (Comm'r . Pat. 1979). See also *Nelson* v. *Bowler*, 212 USPQ 760 (Comm'r. Pat. 1981).

Section 1.662 provides that a party may request that an adverse judgment be entered. The section also provides that when a written disclaimer (not a statutory disclaimer), concession of priority or unpatentability, abandonment of the invention, abandonment of an application, or abandonment of the contest is filed, the disclaimer, concession, or abandonment would be treated as a request for entry of an adverse judgment. Section 1.662(b) provides that when a patentee files a reissue application and omits all claims of a patent corresponding to the counts of an interference for the purpose of avoiding the interference, judgment would be entered against the patentee. Under § 1.662(c), the filing of a statutory disclaimer would not be treated as a request for entry of an adverse judgment unless all patent claims corresponding to a count are disclaimed. Under § 1.662(d), if after entry of a judgment or after filing of a statutory disclaimer no interference exists, the interference would be terminated as to any party against whom judgment has not been entered and any further prosecution of any application involved in the interference would be *ex parte* before the examiner.

Section 1.666 sets out the procedure for filing settlement agreements in interference cases. The PTO is merely a repository for copies of agreements filed under 35 U.S.C. 135(c) and does not undertake to rule on whether the statute requires that a copy of any particular agreement be filed. *Nelson* v. *Bowler*, 212 USPQ 760 (Comm'r.Pat. 1981).

Section 1.671 sets out what would be considered evidence. The Federal Rules of Evidence, with certain exceptions, are made applicable to interference cases. Under § 1.671(e), a party cannot rely on a previously filed affidavit unless the affidavit is served and notice is given that the party intends to rely on the affidavit. The purpose for the notice is to permit an opponent to determine whether a deposition for cross-examination is necessary (see §§ 1.672(b) and 1.673(e)).

Section 1.671(e) is intended to overrule prior construction of PTO rules in *Holmes* v. *Kelly*, 586 F.2d 234, 237 n. 7, 199 USPQ 778, 782 n. 7 (CCPA 1978) and *Brecker* v. *Jennings*, 204 USPQ 663 (Bd.Pat. Int. 1978), which considered a Rule 132 affidavit in the file of an involved application to be part of the "record" in an interference. Under § 1.671(e), a party intending to rely on such an affidavit must give notice and serve a copy of the affidavit on the opponent.

Under § 1.671(f), the significance of documentary and other exhibits must be discussed with particularity by a witness during oral deposition or in an affidavit. Section 1.671(f) sets out in the regulations an evidentiary requirement imposed by precedent. See *Popoff* v.

Orchin, 144 USPQ 762 (Bd.Pat. Int. 1963) (unexplained experimental data should not be considered); *Chandler* v. *Mock*, 150 F.2d 563, 66 USPQ 209 (CCPA 1945) (records standing alone were held to be meaningless), and *Smith* v. *Bousquet*, 111 F.2d 157, 45 USPQ 347 (CCPA 1940) (unexplained tests in stipulated testimony are entitled to little weight). See also *In re Borkowski*, 505 F.2d 713, 184 USPQ 29 (CCPA 1974) and *Triplett* v. *Steinmayer*, 129 F.2d 869, 54 USPQ 409 (CCPA 1942). Under § 1.671(g), a party is required to obtain permission from an examiner-in-chief prior to proceeding under 35 U.S.C. 24. This requirement insures that a subpoena is necessary (e.g., a subpoena ordinarily should not be necessary where testimony of an opponent is sought) and that testimony sought through a section 24 subpoena is relevant before a subpoena is issued. The motion seeking permission to proceed under section 24, any opposition thereto, and the order of an examiner-in-chief authorizing the moving party to proceed under section 24 will be of assistance to a federal court in the event a party is required to resort to a court to enforce the subpoena or to compel answers to questions propounded at any deposition where a witness is appearing pursuant to a subpoena. See *Sheehan* v. *Doyle*, 529 F.2d 38, 188 USPQ 545 (1st Cir.), *cert. denied*, 429 U.S. 870 (1976), *rehearing denied*, 429 U.S. 987 (1976).

Under § 1.671(h), any evidence which is not taken or sought and filed in accordance with the regulations will not be admissible.

Section 1.672 sets forth the manner in which testimony shall be taken. Testimony can be taken by deposition or affidavit at the election of the party presenting the testimony. A party presenting testimony by affidavit must file and serve the affidavit. If the party presents testimony by affidavit and an opponent elects to cross-examine the affiant, the party is required to notice a deposition for the purpose of cross-examination. Re-direct and re-cross will take place at the deposition. Where the parties agree, testimony can be presented by affidavit without opportunity for cross-examination (see § 1.672(e)) or by an agreed statement of facts (see § 1.672(f)).

Section 1.673 sets out how a deposition must be noticed. A deposition can be noticed for any reasonable place in the United States. The extent to which parties, witnesses, and attorneys or agents have to travel may be considered in determining whether a place is reasonable. Prior to serving a notice for a deposition, a party is required to take two procedural steps. Under § 1.673(b), a party would be required to serve a copy of the documents and a list of the things in its possession, custody, and control upon which it intended to rely. Under § 1.673(g), the party is required to have an oral conference (in person or by telephone) with all opponents to attempt to agree on a mutually acceptable time and place for taking the deposition. An examiner-in-chief may set the time and place if agreement is not reached. A single notice listing all the witnesses and the general nature of their expected testimony is then served. Under § 1.673(c) and except as provided, a party can not rely on any witness not mentioned in the notice, any document not served, or any thing not listed. Under § 1.673(h), a copy of any notice must be attached to the certified transcript of each deposition filed.

Section 1.674 sets out the persons before whom depositions can be taken.

Section 1.675 sets out how a deposition is to be taken.

Section 1.676 sets out how a court reporter should prepare and file a certified transcript of a deposition. Section 1.676(d) sets out how exhibits are to be marked for identification, used at depositions, and filed. Provisions similar to those of Rule 30(f)(1)(A) and (B) of the Federal Rules of Civil Procedure are applicable to interferences.

Section 1.677 sets out the form of a transcript of a deposition.

Under § 1.678, a transcript of a deposition must be filed in the PTO within 45 days of the date of the deposition.

Section 1.682 sets out how a party may introduce in evidence, if otherwise admissible, official records or printed publications. When a notice is served, a party is also required to serve (but not file) copies of the official records and printed publications. Any objection to the notice or to the admissibility of any official record or publication must be filed within 15 days of the date of service of the notice.

Section 1.683 sets out how a party may use testimony from another interference or proceeding.

Section 1.684 sets out how a party may take testimony in a foreign country.

Section 1.685 sets out how objections during the taking of depositions must be raised. Under § 1.685(a), an error in a notice of deposition is waived unless a motion to quash the notice is filed as soon as the error is, or could have been, discovered. Under § 1.685(b), any objection to the qualifications of an officer is waived unless (1) the objection is noted on the record of the deposition before a witness begins to testify or (2) if discovered after the deposition, a motion to suppress is filed as soon as the objection is, or could have been, discovered. Under § 1.685(c), any error in the manner in which testimony is transcribed, the transcript is signed by a witness, or the transcript is prepared or otherwise handled by the court reporter is waived unless a motion to suppress is filed as soon as the error is, or could have been, discovered. Under § 1.685(d), any objection on the merits to the admissibility of evidence (e.g., under the Federal Rules of Evidence) is waived unless an objection is made on the record at the deposition stating the specific ground of objection. Often objections are cured by subsequent testimony. Accordingly, any objection which a party wants the Board to consider at final hearing must also be made the subject of a motion under § 1.656(h).

Section 1.687 sets out how a party could seek and obtain additional discovery. "Additional discovery" is defined in § 1.601(a). Section 1.687 does not change the standard ("interest of justice") for obtaining discovery.

Section 1.688 sets out how a party can introduce into evidence admissions and answers to interrogatories obtained as a result of additional discovery.

Changes in Text

Several changes have been made to the text of the proposed rules published in the **Federal Register** on January 30, 1984. The changes are discussed below. Additional rationale for the changes are further discussed under the heading "Analysis of Comments."

All references to the "Board of Appeals and Interferences" have been changed to "Board of Patent Appeals and Interferences" in view of Pub. L. 98-622.

In § 1.11(a) the language "or after termination of an interference without an award of judgment" has been deleted. This change has been made in view of changes made in paragraphs (c) and (d) of § 1.662.

In response to comment, the fee required for a petition in an interference under § 1.644(e) and a request for reconsideration of a decision on petition in an interference under § 1.644(f) have been set out as separate items.

Section 1.136 was changed to refer to § 1.611 rather than § 1.610(a).

The following sentence was inadvertently omitted as the third sentence of § 1.138 in the notice of proposed rulemaking: "A registered attorney or agent acting under the

provision of § 1.34(a), or of record, may also expressly abandon a prior application as of the filing date granted to a continuing application when filing such a continuing application." This sentence presently appears in § 1.138.

In 1.196(d), second sentence, "thirty days" has been changed to "one month".

In 1.197(b), "thirty days" has been changed to "one month".

In the last sentence of § 1.304, "The Commissioner" has been changed to "An examiner-in-chief" and "of a decision of the Board of Patent Appeals and Interferences in an interference case" has been inserted after "time for seeking judicial review." This change is made to limit the "excusable neglect" standard to interference cases only.

In § 1.601(j), the language "all the claims of a party which correspond" has been changed to read "at least one claim of a party which corresponds". The language "all the claims of an opponent which correspond" has been changed to read "at least one claim of an opponent which corresponds".

Section 1.605(a) has been changed by deleting from the third sentence the language "a claim which is the same or substantially the same as" and by adding the following sentence as the fourth sentence: "At the time the suggested claim is presented, the applicant may also (1) call the examiner's attention to other claims already in the application or which are presented with the suggested claim and (2) explain why the other claims would be more appropriate to be included in any interference which may be declared." In the second sentence, "30 days" has been changed to "one month".

In the last sentence of § 1.606, the language "to define one patentable invention" has been changed to read: "not to contain separate patentable inventions."

The word "and" has been inserted in § 1.607(a) before "(3)". The word "must" in the first sentence of §1.607(c) has been changed to "shall" in response to a suggestion in a comment.

Pursuant to two separate suggestions, the following is being added after the first sentence in § 1.608(b): "Where the basis upon which an applicant is entitled to judgment relative to a patentee is priority of invention, the evidence shall include affidavits by the applicant, if possible, and one or more corroborating witnesses, supported by documentary evidence, if available, each setting out a factual description of acts and circumstances performed or observed by the affiant, which collectively would *prima facie* entitle the applicant to judgment on priority with respect to the earlier of the filing date or effective filing date of the patent. To facilitate preparation of a record (§ 1.653 (g) and (h) for final hearing, an applicant should file affidavits on paper which is 8½ by 11 inches (21.8 by 27.9 cm.)."

In § 1.609(b) (1), the language "count or counts" has been changed to "proposed count or counts". In § 1.609(b) (2), each occurrence of "the count" has been changed to "each count".

In § 1.613(a), "§ 1.344" has been changed to "this Chapter." This change is being made to obviate the need to again amend § 1.613 in the event new rules relating to practice before the PTO are issued. See the notice of proposed rulemaking published in the **Federal Register** on August 24, 1984, 49 FR 33790, proposed §§ 10.62 and 10.66. The language "or members of the same firm of attorneys or agents" has been added after "agent" in § 1.613(b).

In § 1.615(a), second sentence, "which are" has been deleted and "in the interference" has been added after "will not be entered or considered".

Several changes have been made in § 1.617. In § 1.617(a), the language "the interference shall proceed before the examiner-in-chief" has been changed to read: "the interference shall proceed in the normal manner under the regulations of this part". The second sentence of § 1.617(b) ("A response may include a request by the applicant for a hearing before the Board.") has been changed to read: "Any request by the applicant for a hearing before the Board shall be made in the response." This change was made to clarify when and how a hearing must be requested by the applicant. The second sentence of § 1.617(d) has been changed to read: "The statement may set forth views as to why summary judgment should be granted against the applicant, but the statement shall be limited to discussing why all the evidence presented by the applicant does not overcome the reasons given by the examiner-in-chief for issuing the order to show cause." Section 1.617(e) has been re-written as follows: "Within a time authorized by the examiner-in-chief, an applicant may file a reply to any statement filed by any opponent." The language "examiner-in-chief or the" has been added after "by the applicant is timely filed, the" in the first sentence of § 1.617(g). The language "Board decides that" has been deleted from the second sentence of § 1.617(g). The language "If the Board decides otherwise" has been replaced with "Otherwise" in the third sentence of § 1.617(g). The language "before the examiner-in-chief" in the third sentence of § 1.617(g) has been changed to read: "in the normal manner under the regulations of this part." These changes will authorize either an examiner-in-chief or a Board to authorize an interference to proceed under § 1.617(g). It will continue to be necessary for the Board to enter an order *granting* summary judgment. In the last sentence of § 1.617(h), "patentee" has been changed to "any opponent".

The language "the name of" has been deleted from the first sentence of § 1.622(a). The second sentence of § 1.622(a) in the notice of proposed rulemaking ("When an inventor identified in the preliminary statement is not identical to the inventor named in the party's application or patent, the party shall file a motion . . . .") has been changed to read: "When an inventor identified in the preliminary statement is not an inventor named in the party's application or patent, the party shall file a motion . . . ." This change is being made in view of section 105(a) of Pub. L. 98–622 which amended 35 U.S.C. 116 to permit joint inventors to be named "even though . . . (3) each did not make a contribution to the subject matter of every claim . . . ."

The following changes have been made in § 1.623(c). In the first sentence, "copy of the drawing" has been changed to "copy of the first drawing". In the second sentence, "copy of the written description" has been changed to "copy of the first written description". In the third sentence, "when a drawing or written description" has been changed to "when a copy of the first drawing or first written description".

Several changes have been made to § 1.624. The following has been added as a second sentence in § 1.624(a)(5): "If an actual reduction to practice of the invention was not introduced into the United States, the preliminary statement shall so state." The following changes have been made in § 1.624(c). Each occurrence of "was made" has been changed to "was introduced into the United States." In the first sentence, "copy of the drawing" has been changed to "copy of that drawing". In the second sentence, "copy of the written description" has been changed to "copy of that written description". In the third sentence, "a drawing or written description" has been changed to "a copy of the first drawing or first written description introduced in the United States".

The following changes have been made in § 1.625(c). In the first sentence, "copy of the drawing" has been changed to "copy of the first drawing". In the second sentence, "copy of the written

description" has been changed to "copy of the first written description". In the third sentence, "a drawing or written description" has been changed to "a first drawing or first written description".

The language of § 1.628(b) which read: "because the drawing or written description is not in the party's possession, custody, or control, the party may file a motion . . . to amend its preliminary statement promptly after it secures possession, custody, or control of a copy of the drawing or written description" has been changed to read as follows: "the party (1) shall show good cause and explain in the preliminary statement why a copy of the drawing or written description cannot be attached to the preliminary statement and (2) shall attach to the preliminary statement the earliest drawing or written description made in or introduced into the United States which is available. The party shall file a motion . . . to amend its preliminary statement promptly after the first drawing, first written description or drawing or written description first introduced into the United States becomes available."

The first sentence ("A preliminary statement should be carefully prepared.") has been deleted from § 1.629(a).

In § 1.629(b), the language "no earlier than" has been changed to "as early as".

In § 1.629(d), the following has been added after "allegation": "Unless the party complies with § 1.628(b)."

A new § 1.632 has been added to require a party to give timely notice of the party's intent to argue that an opponent has abandoned, suppressed, or concealed an actual reduction to practice. A companion change has been made to § 1.654.

Two changes have been made to § 1.633(c). Paragraph (c)(2) has been changed by adding thereto the following language: "Or adding a claim in the moving party's application to be designated to correspond to a count". In addition, in § 1.633(c), the "or" before "(4)" has been deleted and the following has been added to the end of the first sentence: ", or (5) requiring an opponent who is an applicant to add a claim and to designate the claim to correspond to a count."

Paragraph (j) has been added to § 1.633.

In § 1.636(b), "(i)" has been changed to "(i) or (j)" in view of the addition of paragraph (j) to § 1.633. The language "filed as soon as practical" in § 1.636(c) has been changed to "diligently filed" in order to conform § 1.636 to § 1.48. A party must exercise diligence in correcting inventorship. *Van Otteren* v. *Hafner*, 278 F.2d 738, 126 USPQ 151 (CCPA 1960).

Several changes have been made to § 1.637. The language "Where appropriate," has been deleted from the following paragraphs of § 1.637: (c)(1)(vi); (c)(2)(iv); (c)(3)(iii); (d)(4); (e)(1)(viii); (e)(2)(vii); and (h)(4). The following has been added in § 1.637(c)(2) before "shall": "or adding a claim to be designated to correspond to a count". The language "amended claim" in § 1.637(c)(2)(i) has been changed to read: "amended or added claim". The language "Apply the terms of each proposed claim to the disclosure of the application" in § 1.637(c)(2)(ii) has been changed to read: "Show that the proposed or added claim defines the same patentable invention as the count." The language "proposed amended claim" in § 1.637(c)(2)(iii) has been changed to read "amended or added claim." The language "adding the proposed claim" in § 1.637(c)(2)(iii) has been changed to read: "making the amended or added claim".

The word "interferences" in § 1.637(c)(4)(ii) has been corrected to read: "interference".

Subparagraph (c)(5) has been added to § 1.637.

The following has been added as the last sentence to § 1.637(f)(2): "If the earlier application filed abroad is not in English, the requirements of § 1.647 must also be met."

In paragraph § 1.637(f)(3), the language "discloses an embodiment with the scope" had been changed to read: "constitutes a constructive reduction to practice".

The first sentence, originally proposed in § 1.638(b) ("A reply to an opposition shall not be filed unless authorized by this subpart or an examiner-in-chief or the motion was filed under §§ 1.633 or 1.634"), has been deleted. The language "any authorized reply" in § 1.638(b) has been changed to "a reply".

The language "or a motion to correct inventorship under § 1.634" has been added to the first sentence of § 1.639(c) after "preliminary motion under § 1.633."

The following has been added after the first sentence of § 1.640(b)(1): "Failure or refusal of a party to timely present an amendment required by an examiner-in-chief shall be taken without further action as a disclaimer by that party of the invention involved." The fourth sentence of § 1.640(c) ("A request for reconsideration will ordinarily not be granted unless an opposition has been requested by an examiner-in-chief or the Board") has been changed to read: "A decision of a single examiner-in-chief will not ordinarily be modified unless an opposition has been requested by an examiner-in-chief or the Board." In the last sentence of § 1.640(c), the language "shall be decided by a panel" has been changed to read: "shall be acted on by a panel".

The word "application" in the paragraph heading and text of § 1.642 has been changed to read: "application or patent".

Three changes have been made in § 1.644. The following language has been added after "Commissioner" in § 1.644(a)(2): "and is not filed prior to the decision of the Board awarding judgment and does not relate to (i) the merits of priority of invention or patentability or (ii) the admissibility of evidence under the Federal Rules of Evidence". The following language has been deleted from the second sentence of § 1.644(b): "and shall not relate to (1) the merits of priority of invention or patentability or (2) the admissibility of evidence under the Federal Rules of Evidence". The language "A request for reconsideration will ordinarily not be granted unless" in the second sentence of § 1.644(f) has been changed to read: "The decision will not ordinarily be modified unless such".

Two changes have been made in § 1.645. The word "to" has been added before "file a notice of appeal" and "commence a civil action" in the first sentence of paragraph (a). The language, "accompanied by an affidavit," has been deleted from paragraph (b).

Three changes have been made to § 1.646. The word "service" has been added after "additional" in the third sentence of paragraph (b). The language "or except as otherwise provided by this part," has been added after "otherwise ordered by an examiner-in-chief," in paragraph (c). The language in paragraph (c) "paper may be made" has been changed to "paper shall be made". The word "time" has been changed to "date" in the last sentence of paragraph (e).

A new paragraph (c) has been added to § 1.654 to require that a party give timely notice of the party's intent to argue that an opponent has abandoned, suppressed, or concealed an actual reduction to practice. Section 1.632 specifies the time within which the notice shall be filed.

Three changes have been made in § 1.658. The language "paragraph (a) of the section" in the last sentence of § 1.658(b) has been changed to "paragraph (a) of this section". The "(i)" in the first sentence of § 1.658(c) has been changed to "(j)" in view of the addition of § 1.633(j). In the notice of

proposed rulemaking, the second sentence of § 1.658(c) reads: "A party, other than a party awarded a favorable judgment as to all counts, who could have properly moved, but failed to move, under §§ 1.633 or 1.634, shall be estopped to take *ex parte* or *enter partes* action in the Patent and Trademark Office after the interference which is inconsistent with the party's failure to properly move." This sentence has been changed to read: "A losing party who could have properly moved, but failed to move, under § 1.633 or 1.634, shall be estopped to take *ex parte* or *inter partes* action in the Patent and Trademark Office after the interference which is inconsistent with that party's failure to properly move, except that a losing party shall not be estopped with respect to any claims which correspond, or properly could have corresponded, to a count as to which that party was awarded a favorable judgment."

Several changes have been made in § 1.662. In § 1.662(a), the word "construed" has been changed to "treated." The first sentence of § 1.662(c) in the notice of proposed rulemaking read: "The filing of a statutory disclaimer under 35 U.S.C. 253 by a patentee will not be treated as a request for entry of an adverse judgment against the patentee, but will delete any statutorily disclaimed claims from being involved in the interference." That first sentence has been changed to read: "The filing of a statutory disclaimer under 35 U.S.C. 253 by a patentee will delete any statutorily disclaimed claims from being involved in the interference." The second sentence of § 1.662(c) in the notice of proposed rulemaking read: "A statutory disclaimer of any claim involved in an interference shall in subsequent proceedings have the same effect with respect to the patentee as an adverse judgment." That second sentence has been changed to read: "A statutory disclaimer will not be treated as a request for entry of an adverse judgment against the patentee unless it results in the deletion of all patent claims corresponding to a count." In view of this change, proposed § 1.662(d) has been deleted as unnecessary, and a change has also been made in § 1.11(a) to delete any reference to a termination of an interference by any means other than judgment.

The last sentence of § 1.671(g) has been changed from "The motion shall describe the general nature and show the admissibility in the interference of the testimony, document, or thing" to: "The motion shall describe the general nature and the relevance of the testimony, document, or thing."

Three changes have been made to § 1.672(b). In the second sentence after "witness by affidavit shall" the following has been added: ", prior to the close of the party's relevant testimony period." The language "file an affidavit" has been changed to "file and serve an affidavit." The following has been added after the third sentence: "A party shall not be entitled to rely on any document referred to in the affidavit unless a copy of the document is filed with the affidavit. A party shall not be entitled to rely on anything mentioned in the affidavit unless the opponent is given reasonable access to the thing. A thing is something other than a document."

Several changes have been made in § 1.673(b). The introductory sentence of paragraph (b) ("Unless the parties agree otherwise, at least three days prior to the conference required by paragraph (g) of this section, a party shall serve, but not file, the following:") has been changed to read: "Unless the parties agree otherwise, a party shall serve, but not file, at least three days prior to the conference required by paragraph (g) of this section, if service is made by hand or "Express Mail," or at least ten days prior to the conference if service is made by any other means, the following:" In § 1.673(b)(1) the word "copy" has been changed to "list and copy."

In the last sentence of § 1.675(d), the language "signed by the witness in the presence of any notary" has been changed to read "signed by the witness in the form of (1) an affidavit in the presence of any notary or (2) a declaration." This change conforms § 1.675(d) to § 1.68.

In § 1.682(a)(4), ", where appropriate," has been added prior to "be accompanied" and "(§ 1.671(d))" has been added after "printed publication."

The word "admissible" in § 1.684(a)(4) has been changed to "revelant."

The following sentence has been deleted from § 1.687(b): "If the witness refuses to produce a requested document or thing, the party may file a motion (§ 1.635) for additional discovery under paragraph (c) of this section."

Section 1.688 has been revised to more clearly describe how a party may introduce in evidence an answer to a request for admission or an answer to a written interrogatory.

Analysis of Comments

Eighteen written comments were received. Three individuals testified at a hearing held on May 15, 1984. The following is an analysis of the written comments and the oral comments made at the hearing.

One comment suggested that § 1.8 not be amended to exclude from the certificate of mailing practice a paper in an interference which an examiner-in-chief orders to be filed by hand or "Express Mail." The comment argues that "[s]ome parties might not have an attorney in the Washington area or they may live in an area not serviced by Express Mail." The suggestion is not being adopted. Experience has shown that there are situations in interferences where it is desirable to have and the parties need a prompt ruling on a written motion. It is difficult for an examiner-in-chief to render a prompt ruling if the motion and any opposition are not promptly served and filed. In those situations where a party has no Washington, D.C. metropolitan area attorney or where a party resides in an area not served by "Express Mail," it may not be possible to hand-file or use "Express Mail." The examiner-in-chief would then exercise discretion by not invoking the exception of new subparagraph (xii) of § 1.8(a).

One comment suggested that it would be clearer if the fee for a petition in an interference and the fee for a request for reconsideration of a decision on petition in an interference were set out in § 1.17(h) as separate items. This suggestion has been adopted and the two fees have been set out in § 1.17(h) as separate items.

A suggestion was made that a reference be made in § 1.136 to § 1.611 rather than § 1.610(a). The suggestion is being adopted, because a reference to § 1.611 is believed to be more appropriate. Once an interference is declared involving an application, *ex parte* prosecution of the application is suspended and the applicant need not respond to any PTO action outstanding as of the date the interference is declared.

One comment made the following remark concerning § 1.196: "I do not understand the need or desire of the PTO to start the time to appeal to a Court from a PTO *final* decision on one claim, while PTO action is continuing on a second claim." As explained in the notice of proposed rulemaking (49 FR 3770, columns 2–3; 1039 O.G. 20–21; 1039 TMOG 20–21), when there are further proceedings before the examiner following a decision by the Board of Patent Appeals and Interferences, judicial review is not appropriate. Hence, under § 1.196, the PTO will not start a time for seeking judicial review of a PTO decision on one claim while PTO action is continuing on another claim. The last sentences of § 1.196(b)(1) and § 1.196(d) authorize the Board to enter an order making its decision final as to one claim when remand

proceedings as to another claim result in a favorable decision for the applicant. Section 1.196 is intended to eliminate piecemeal appeals.

With respect to § 1.292(c), one commentator said: "[a] party should be able to raise public use and [on] sale issues at any stage [of an interference proceeding] provided the issue is raised in a timely manner after learning of the use of sale." Public use and on sale issues are to be raised in interferences by way of a preliminary motion under § 1.633(a). If a motion under § 1.633(a) cannot be timely filed, a belated motion may be filed provided the moving party complies with the provisions of § 1.645(b). Whether or not a belated motion will be accepted where a public use or sale is discovered after the time for filing § 1.633(a) motions which has passed will manifestly depend on the facts of a given case.

One comment suggested that the language "speedy, and inexpensive" be deleted from the second sentence of the preamble of § 1.601. This suggestion is not being adopted. The second sentence of the preamble of § 1.601 provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every interference." The provision is modeled in part after the second sentence of Rule 1 of the Federal Rules of Civil Procedure which states that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The "just, speedy, and inexpensive determination" provision of § 1.601 will prove useful in construing other provisions in the rules.

Two comments received which suggested a change in language in § 1.601(j). One comment correctly noted that "[i]f even one claim of each party defines the same patentable invention, there is an interference-in-fact." The comment went on to correctly note that "[t]he remaining claims can be disposed of by a motion under § 1.633(c)(4)." A second comment noted that under the definition proposed, all the claims of both parties corresponding to a count must define the same patentable invention. The comment went on to correctly note the intent of the PTO is, however, that an interference-in-fact exists if at least one of the claims of a party corresponding to a count defines the same patentable invention as one of the corresponding claims of an opponent. In view of the suggestions made in the two comments, § 1.601(j) has been changed to state that an interference-in-fact exists when at least one claim of a party which corresponds to a count and at least one claim of an opponent which corresponds to the count defines the same patentable invention.

Two comments were received which suggested that the language "earliest filing date" in § 1.601(m) be changd to read "earliest effective filing date." The suggestion is not being adopted. Section 1.601(m) defines "senior party." The definition of "senior party" in § 1.601(m) is consistent with current practice and is intended to codify current practice. In an interference where there are no benefit applications, the "senior party" is the party with the earliest "filing date." There are interferences where a party may be "senior" with respect to a first count based on the filing dates of the applications involved in the interference and "junior" with respect to a second count because the opponent is entitled to benefit of an earlier application as to the second count only. Under these circumstances in the past, the PTO has designated the party who is "senior" based on the filing dates of the applications involved as the "senior party." The designation of the party as "senior party" is for procedural purposes only, i.e., setting who takes testimony first, and does not affect which party has the burden of proof. Section 1.601(m) preserves this past practice.

Comments were received regarding § 1.601(n) which defines "same patentable invention" and "separate patentable invention." One written comment suggested that § 1.601(n) be deleted. The commentator appeared at the hearing and also urged orally that § 1.601(n) be deleted. The suggestion is not being adopted. In view of the nature of the comment and the importance of the definitions in § 1.601(n), the written comment is reproduced in its entirety:

Comment: The paragraph to be deleted contains an explicit definition of both "same patentable invention" and "separate patentable invention". It requires application of a two-prong test for determining "sameness" or "separateness". Two inventions are considered to be the "same patentable invention" when they are the same under 35 U.S.C. 102 or obvious variants under 35 U.S.C. 103 when one is considered as "prior art" with respect to the other. Application of this standard may lead to results which are anomalous or in conflict with statutory requirements if, as the proposed rules apparently assume, the award of priority as to counts embodying "separate patentable inventions" will inherently and finally resolve the question of entitlement to a patent as between the parties on involved claims corresponding to those counts. Three specific problems with the definition of Rule 601(n) have been identified as follows:

(1) If the standard of separate patentability as between two counts is applied on a mutual basis (i.e., Invention A must be separately patentable from Invention B considered as prior art and Invention B must be separately patentable from Invention A considered as prior art), then the conduct of interferences with separate counts directed to both a generic invention and an included specific embodiment thereof (i.e., a species) are frustrated. If, however, such mutuality is not applied (i.e., if Invention A is the existing count, then a count directed to Invention B is proper so long as Invention B would be considered patentable over Invention A as prior art), then a number of irreconcilable anomalies in count modification through preliminary motions practice will be manifest.

(2) "Separate patentability" as a non-obviousness issue is in every context *except* interference practice before the PTO determined with finality only when an *affirmative* determination has been reached or the applicant *elects* to discontinue further prosecution of any applications embodying the invention or to admit obviousness. Because in the ex parte context an applicant may continue to marshal additional evidence supportive of non-obviousness until separate patentability over a prior art invention has been established, "separate patentability" is always a fluid concept where ultimate resolution can neither be predicted nor foreclosed. On certain cases interference proceedings under the proposed rules will be conducted and judgment rendered on the assumption of a lack of "separate patentability", which would ordinarily be subject to change or rebuttal as additional argument, evidence or other supportive activity of non-obviousness were marshalled. Thus, simply determining a proposed count is not yet "separately patentable" for the purposes of count formation ought not to foreclose post-interference reconsideration of separate patentabilty questions when the party proposing the count would not have been foreclosed on priority grounds.

(3) The underlying assumption that "separate patentability" is to be established under the proposed rules for one invention when a second invention is considered as "prior art" does not have any necessary correspondence to the *effect* of an adverse judgment in an interference on the question of priority. While a lost count in interference is not patentable to the loser, the lost count will be considered as "prior art" against the losing party only if the status of prior art for the purposes of 35 U.S.C. 103 is established by the record in the interference, (i.e., by representing a prior invention of another made in the United States, not abandoned, suppressed or concealed under 35 U.S.C. 102). A party entitled to priority for a count under the benefit provisions of 35 U.S.C. 119 creates no "prior art" under 35 U.S.C. 102(g)/103 against his opponent. Separate counts ought not to be created or denied in an interference on the basis of a rule which fails to account for whether the interference record will confirm the assumption in the definition that a lost count will become "prior art".

The following examples are provided as indicative of perceived difficulties in the application of the definition embodied in Rule 601(n):

Example A: Rule 601(n) is applied in a mutuality sense to an interference where the existing count (Invention A) is a broad genus over organic compounds. Both parties disclose a species (Invention B) which one of the parties alleges represents a "selection invention", i.e., is neither anticipated by the genus nor obvious therefrom. The party proposing to add a species count to Invention B must demonstrate that the genus was neither the same as nor obvious in view of the species, an impossibility since *disclosure of the species anticipates the genus under 35 U.S.C. 102.* In effect, no party could ever propose sub-generic or species counts included within broader generic counts. Since all potential patentability and priority questions with respect to possible sub-generic and species claims are intended to be resolved in the unified patentability/priority proceedings, loss of such a broad generic count might be construed as estopping the losing party from arguing entitlement to a patent for species and sub-genera within the lost count. Since proof of a single species is dispositive of the question of priority as to a genus, no matter how large, this is a more severe result than would appear to be proper or intended.

Example B: Under the facts of Example A, if the standard under which the propriety for including a second sub-generic or species count is merely that the *proposed* count must be non-obvious over the *existing* count considered as prior art, then, an interference could conceivably proceed with both the generic and the species count in the interference. The usual criteria for "selection inventions" could be employed. However, when an interference is declared with a species count embodying Invention A, then utilization of a test requiring that a proposed count be non-obvious over the existing count as prior art leads literally to the conclusion that a proposed count to a generic Invention B is *anticipated* by the existing species count and therefore may not be added to the interference. This artificial distinction can certainly not have been intended, and yet the rules provide no clear indication of which result is the "correct" one or whether another test will be employed, e.g., the narrower count need only be non-obvious over the broader count.

Example C: A party moves to substitute two sub-generic counts to allegedly separately patentable inventions, Inventions A and Invention B, in place of a broad generic count to the "Markush" group of Invention A *and* Invention B. The party alleges Invention B has surprising and unexpected properties over Invention A and is separately patentable thereover. Because, however, a consideration of Invention B as "prior art" suggests Invention A would not be non-obvious thereover, the motion is denied. The moving party establishes priority as to Invention B, but loses the sole count of the interference to an opponent who filed a foreign application disclosing a single species from Invention A. The result is that the moving party with clear evidence of priority apparently loses the right to patent an invention on the technicality of "count formation" in interference. The result is substantially more severe than had he been simply faced with a statutory bar!

Example D: The senior party, a foreign applicant, relies on a priority application disclosing Embodiment A. Subsequently the junior party files a United States application directed to an Embodiment B. Thereafter both parties file applications in the United States disclosing a generic invention including both Embodiments A and B. An interference is declared on the generic invention and the junior party moves to substitute two counts, one count to Embodiment A and a second count to Embodiment B on the ground that they represent separate patentable inventions. Since the junior party's invention date for Embodiment B is after the senior party's priority date, the junior party will be obliged to concede priority on the sole count in the interference unless his motion to substitute counts is granted.

Accordingly, the junior party undertakes laboratory tests which indicate that both Embodiments A and B achieve substantially the same result in substantially the same manner without any significant differences in effectiveness. Without evidence of separate patentability to support the motion to substitute, the junior party is unsuccessful and priority is awarded to the senior party.

The junior party abandons his claim to the generic invention of the lost count, but persists in his assertion he is entitled to a patent on Embodiment B since the interference record indicates no actual priority for this embodiment in favor of the senior party. Ultimately, the junior party obtains evidence that Embodiment B is unexpectedly more useful than anticipated in a commercial setting, while Embodiment A is substantially unsuitable for practical use in a commercial setting.

Is the junior party entitled to a patent notwithstanding the disposition of the issue of its separate patentability in an *inter partes* proceeding? If indeed, the junior party would be entitled to such a patent, must a second interference now be declared with the senior party to again litigate the issue of priority? Had the junior party failed to have made the motion to substitute counts in view of his utter lack of supporting evidence of separate patentability, would the estoppel under 37 CFR 1.658(c) have applied? Finally, would the ends of justice be better served by a standard for count formation which could be finally determined contemporaneously with the filing of the preliminary motions themselves? All of these questions suggest that the utilization of a fluid concept such as non-obviousness as the basis for count formation will give unintended and unsupportable results in situations where the lack of separate patentability is prematurely assumed.

Example E: In the scenario of Example D, the non-entitlement to contest Embodiment B as a separate count was premised on a failure to demonstrate that Embodiment B was non-obvious over Embodiment A considered as prior art. However, an award of priority to the senior party based on the disclosure of Embodiment A in a foreign priority application does not render Embodiment A as available prior art (35 U.S.C. 102(g)/103) inasmuch as Embodiment A would not have been a prior invention of another made in the United States which had not been abandoned, suppressed or concealed. The junior party's entitlement to a patent on Embodiment B should depend, therefore, solely on his entitlement to priority with respect to Embodiment B. Priority is a necessary condition for entitlement to a patent since both parties disclose the embodiment and a sufficient condition since regardless of the party entitled to priority on Embodiment A, it should not become obviousness-generating prior art. Therefore, any standard or count formation which fails to reach the result of the junior party is entitled to contest priority and a patent on Embodiment B is contrary to current statutory requirements for entitlement to a patent.

The proposed rules attempt to rationally define counts in an interference so that the judgment in the interference settles all questions of entitlement to a patent. This not only cannot be done *prospectively*, but should not be done at all. Judgment should be made on *claims*, not counts and unpatentability determinations made against a party subject to the normal *ex parte* standard that additional evidence of non-obviousness, or other evidence or patentability wholly independent of priority itself, could compel a reconsideration of the judgment of unpatentability.

With respect to paragraph (1) of the comment, the standard of patentability will *not* be applied "on a mutual basis." Thus, if a species is patentable over a genus, the species is a "separate patentable invention" from the genus. Compare *In re Taub*, 348 F.2d 556, 146 USPQ 384 (CCPA 1965) (fluorine species might be patentable over genus of Markush group of hydrogen and halogen). A first count to a genus and a second count to a species which is patentable over the genus may properly appear in an interference. See e.g., Example 4. The comment suggests that if "such mutuality is not applied * * * then a number of irreconcilable anomalies * * * will be manifest." The urged "irreconcilable anomalies" are not readily apparent to the PTO.

The PTO disagrees with the concept expressed in paragraph (2) of the comment that there should be "post-interference reconsideration of separate patentability." One of the principal objects of Pub. L. 98–622 and these new rules is to encourage complete determination of all rights between parties in an interference and to avoid post-interference reconsideration in an *ex parte* environment of issues which were or could have been raised *inter partes* in an interference.

The commentator remarks in paragraph (3) of the comment that "[a] party entitled to priority for a count under the benefit of 35 U.S.C. 119 creates no 'prior art' under 35 U.S.C. 102(g)/103 against his opponent. *In re*

McKellin, 529 F.2d 1324, 188 USPQ 428 (CCPA 1976), arguable provides support for the commentator's remark. It should be noted, however, that in defining "same patentable invention" and "separate patentable invention" in § 1.601(n), the PTO is not establishing a new definition of "prior art." Rather, the PTO is providing defintions which will determine—both initially and ultimately in an interference—how *claims* in an application or patent will be designated to correspond to counts. See §§ 1.603 and 1.606. Examples 1–19 illustrate how the PTO proposes to initially designate claims to correspond to counts. The designation of claims to correspond (or not correspond) to a count is significant because, as noted by the plurality opinion in *McKellin*, 529 F.2d at 1327, 188 USPQ at 432: "[a]n applicant [or patentee] who has lost an interference is not entitled to claims which correspond to the subject matter of the counts, of the interference." Section 1.658(c) estops a party from obtaining a claim which could have been added and which would have been designated to correspond to the lost count. The definitions of "same patentable invention" and "separate patentable invention" in § 1.601(n), the availability of motions to designate or not designate claims as corresponding to a count under § 1.633(c), and the estoppel provisions of § 1.658(c) provide the basis for accomplishing the PTO's objective of resolving *inter partes* in a single proceeding all issues which are or could have been raised between parties in an interference.

Examples illustrate how §§ 1.601(n), 1.633(c) and 1.658(c) accomplish the PTO's objective.

Example 32. Application AV discloses engines in general and in particular a 6-cylinder engine. Application AV contains only claim 1 (engine). Application AW discloses engines in general, but does not specifically disclose a 6-cylinder engine. Application AW contains only a single claim 3 (engine). The U.S. "filing date" (§ 1.601(h)) of the AV application is prior to the U.S. filing date of the AW application, but the AW application claims a foreign priority date under 35 U.S.C. 119 based on an application filed in a foreign country prior to the filing date of the AV application. An interference is declared. The sole count of the interference is to "an engine." Claim 1 of the AV application and claim 3 of the AW application are designated to correspond to the count. During the interference, applicant AV does not move under § 1.633(c)(2) to add a claim to a 6-cylinder engine and to designate the claim to correspond to the count. Applicant AW is awarded a judgment in the interference based on the earlier filing date of the foreign patent application. After the interference, applicant AV adds claim 2 (6-cylinder engine) to the AV application. Whether AV would be entitled to a patent containing a claim to a 6-cylinder engine will depend solely on whether a 6-cylinder engine is a "separate patentable invention" from "engine"—the subject matter of the count. If a 6-cylinder engine is a "separate patentable invention" within the meaning of § 1.601(n), applicant AV could not have successfully moved under § 1.633(c)(2) to add claim 2 and to designate it to correspond to the count. Therefore applicant AV could obtain a patent containing claim 2. If, on the other hand, a 6-cylinder engine is not a "separate patentable invention," claim 2 of the AV application would be rejected on the basis of interference estoppel because claim 2 could have been added by a motion under § 1.633(c)(2). See § 1.658(c). See also Example 37.

Example 33. This example is basically the same as Example 32, except that application AV initially contains claim 1 (engine) and claim 2 (6-cylinder engine). When the interference is declared, both claims 1 and 2 of application AV are designated to correspond to the count. During the interference, applicant AV does not move under § 1.633(c)(4) to designate claim 2 as not corresponding to the count. A judgment in the interference is entered for applicant AW based on the earlier filing date of the foreign patent application. After the interference, applicant AV would not be able to obtain a patent containing claim 2, because that claim was designated to correspond to a count and entry of the judgment constitutes a final decision by the PTO refusing to grant applicant AV a patent containing claim 2.

In the written comment, Examples A through E were set out to illustrate what the commentator believed were "perceived difficulties." These examples are set out above and are analyzed below.

Analysis of Commentator's Example A. Example A does not describe any practice under these rules, because "same patentable invention" and "separate patentable invention" under § 1.601(n) are not intended to be "applied in a mutuality sense." Where a first count is to a genus and a second count is to a species within the scope of the genus, there may be two counts if the species is separately patentable from the genus. The species is "invention A" referred to in § 1.601(n); the genus is "invention B" referred to in § 1.601(n).

Analysis of Commentator's Example B. Commentator's Example B suggests—incorrectly—that if an interference is declared with a count to a species that no motion under § 1.633(c)(1) to add a count to a genus can ever be granted. If the species ("invention A" referred to in § 1.601(n)) is not anticipated by or obvious in view of the genus ("invention B" referred to in § 1.601(n)), a motion to add a separate count to the genus may be proper. The commentator uses the language "selection inventions" in both Examples A and B. Insofar as the PTO is aware, the language is not a term of art in the patent law. The PTO has not ascribed any particular meaning to the language in analyzing Examples A or B.

Analysis of Commentator's Example C. The result suggested in commentator's Example C can come to pass only if the moving party accepts as final the denial of the motion to substitute two "sub-generic counts" for the "broad generic count." Unlike practice under the rules which have been in effect, under these new rules a decision denying a motion to substitute a count is reviewable by the Board (see § 1.640(c) and § 1.655(a), second sentence). Additionally, the party could seek judicial review (35 U.S.C. 141, 146) of any final decision by the Board. However, if the party accepts as final the PTO's determination that inventions A and B are the "same patentable invention," the party would be precluded from obtaining a patent to invention B. After the interference is terminated, the only conceivable way that the moving party could seek to obtain a patent containing claims to invention B would be to first successfully move to reopen the interference for the purpose of presenting additional evidence. If the motion to reopen is granted (and it would be expected that such a motion will rarely be granted), the moving party would then have to successfully establish that invention A and invention B are not the same patentable invention. The PTO will continue to follow the general guidelines of 4 Rivise & Caesar, *Interference Law and Practice*, section 821 *et seq.* (Michie Co. 1948), in determining motions to reopen an interference after entry of judgment. It should be additionally noted that interferences in which a judgment has been entered by a district court in an action brought under 35 U.S.C. 146 or a mandate has been entered by the U.S. Court of Appeals for the Federal Circuit (35 U.S.C. 141 or 28 U.S.C. 1295(a)(4)(C)) will not be reopened until the district

court vacates its judgment and/or the Federal Circuit withdraws its mandate.

Analysis of Commentator's Example D. Several questions asked in the commentator's Example D can be answered as follows:

Question: Is the junior party entitled to a patent notwithstanding the disposition of the issue of its separate patentability in an *inter partes* proceeding? *Answer:* No. The junior party should have presented the "evidence that Embodiment B is unexpectedly more useful than anticipated in a commercial setting" during the interference. The PTO expects to resolve issues *inter partes* in the interference. If the PTO was to permit the evidence to be presented after the interference is terminated and after *ex parte* prosecution resumes, a principal purpose of the overall change to interference practice would be defeated. It may be unfortunate that the evidence was not known to the junior party. However, it may also be true that the winning party—had the evidence been presented in the interference—could have produced probative counter-evidence. Why should the winning party be put to the expense of a second interference?

Question: If indeed, the junior party would be entitled to such a patent, must a second interference now be declared with the senior party to again litigate the issue of priority? *Answer:* The premise in the question is not correct. The junior party is not entitled to a patent to Embodiment B and therefore there will not be a second interference.

Question: Had the junior party failed to have made the motion to substitute counts in view of his utter lack of supporting evidence of separate patentability, would the estoppel under 37 CFR 1.658(c) have applied? *Answer:* Yes, unless the junior party can successfully move to reopen the interference.

Question: Would the ends of justice be better served by a standard for count formation which could be finally determined contemporaneously with the filing of the preliminary motions themselves? *Answer:* While the question is not fully understood, it should be recognized that counts will initially be formed when an interference is declared and are subject to being changed by a motion (§ 1.633(c)) or by the Board (§ 1.640(c) and § 1.655, second sentence). The correctness of the PTO's ultimate decision on what counts should be is subject to judicial review (35 U.S.C. 141, 146).

Analysis of Commentator's Example E. The PTO, without agreeing or disagreeing with all of the commentator's statements in Example E, disagrees with any ultimate conclusion that the junior party is entitled to a patent on Embodiment B and that such a result "is contrary to current statutory requirements for entitlement to a patent." Interference estoppel precludes granting a patent claiming Embodiment B to the junior party even if Embodiment A is not prior art with respect to Embodiment B.

One comment asked whether "invention A" and "invention B" mentioned in § 1.601(n) "refer to the entire scope of subject matter recited in a claim or to the disclosed embodiment(s) supporting the claim (a la *In re Vogel*, [422 F.2d 438,] 164 USPQ 619 (CCPA 1970))?" The question is somewhat difficult, if not impossible, to answer in the abstract. Whether "invention A" refers to the entire scope or to the embodiments which support a claim is not controlling under these new rules. One fundamental change being made unde the new rules is that judgments will be in the form of whether an applicant or patentee is or is not entitled to a *claim*. In the past, the Board of Patent Interferences has entered an "award of priority." The use of an "award of priority" does not always accurately express the "judgment" entered in many interferences. See e.g., *Applegate* v. *Scherer*, 332 F.2d 571, 573 n. 1, 141 USPQ 796, 798 n. 1 (CCPA 1964). Whether an applicant or patentee is or is not entitled to a particular claim in any given interference will depend on many factors, some of which include the scope of the claim, the scope of the opponent's claim, and the prior art. An example illustrates the point.

Example 34. Applicant AX discloses an apparatus having fastening means. The specific means disclosed are rivets. Applicant AY discloses a similar apparatus having fastening means. The specific means disclosed are a nut and bolt. The prior art reveals that items have been fastened with numerous fastening means including both rivets and nuts and bolts. In determining whether AX's apparatus with rivet fastening means is the "same patentable invention" as AY's apparatus with nut and bolt fastening means, it would be proper to consider the specific apparatus disclosed by AX, the specific apparatus disclosed by AY, the fact that both AX and AY disclose the use of "fastening means" broadly, and the prior art which shows rivets and nuts and bolts to be known fastening means.

One comment suggested that the last sentence of § 1.604(b) and the last sentence of §1.607(c) be deleted in view of a proposed rule (§10.23(c)(7); 49 FR 10028; 49 FR 33809) which defines "misconduct" as including "[k]nowingly withholding from the Office information identifying a patent or application of another from which one or more claims have been copied." The proposed rule is still being considered. In any event, the last sentences of §§ 1.604(b) and 1.607(c) are instructions to examiners whereas proposed 37 CFR 10.23(c)(7) defines misconduct for those registered to practice before the PTO. Another comment suggested deletion of § 1.604(b) because "existing rules [37 CFR 1.56] already provide a duty of disclosure of subject matter *material* to examination." There is no inconsistency between the rule relating to the duty of disclosure and § 1.604. The comment also suggested that by identifying another application, an applicant "might be construed as having *admitted* that the claims" of the other application are directed to the same patentable invention as the claims in the applicant's application. The filing of such a paper is a statement by the applicant that the claims presented are "*known* to the applicant to define the same patentable invention" (emphasis added). If an applicant wishes to call another application to the attention of an examiner and the applicant believes that the other application does *not* claim the same patentable invention, but nevertheless may be relevant within the meaning of 37 CFR 1.56, the applicant may identify the other applications and at the same time state why the invention claimed in the other application is not the same patentable invention as the invention claimed in the applicant's application. For the reasons given, the suggestions made in the two comments are not being adopted.

Three comments relating to § 1.605 were received. One comment suggested that the language "or substantially the same as the suggested claim" be deleted from the third sentence of §1.605. The suggestion is being adopted to the extent that the language "a claim which is the same or substantially the same as" is being deleted. Under § 1.605, when the examiner requests an applicant to copy a suggested claim, the applicant will be required to copy verbatim the claim suggested by the examiner. A second comment suggested that the second and third sentences of § 1.605 be changed to read as follows:

> The applicant to whom the claim is suggested shall amend the application by presenting the suggested claim, or shall identify in the application one or more pending claims which the applicant regards as being directed to the same or substantially the same invention as the suggested claim, within a time specified by the Examiner, not

less than thirty days. Failure or refusal of an applicant to timely present a claim or to timely identify one or more claims which are directed to the same or substantially the same invention as the suggested claim shall be taken without further action as a disclaimer by the applicant of the invention defined by the suggested claim.

A third comment suggested that the second and third sentences of §1.605 fail to take into account the case where an applicant is already claiming the invention. The third comment suggested addition of the following at the end of the third sentence of § 1.605(a): ", unless the application already contains claims to the same patentable invention." The suggestions made in the second and third comments are not being adopted as such. However, the following sentence is being added as the fourth sentence of §1.605: "At the time the suggested claim is presented, the applicant may also: (1) Call the examiner's attention to other claims already in the application or which are presented with the suggested claim and (2) explain why the other claims would be more appropriate to be included in any interference which may be declared." A major deficiency of the suggestions made in the second and third comments was the inability of the PTO to efficiently and effectively handle situations where the applicant: (1) Presents a claim which is "substantially the same as" the suggested claim or (2) points to a claim already in the application *and* the examiner is of the opinion that the claim is not to the same patentable invention. Under those circumstances, the examiner could not properly declare an interference. Accordingly, the applicant will be required to present verbatim the suggested claim. The applicant may, however, also present any other claim which the applicant believes is more appropriate. Alternatively, the applicant, in addition to presenting verbatim the suggested claim, may also call the examiner's attention to a claim already in the application which the applicant believes is more appropriate for interference purposes. In either case, the applicant must explain to the examiner why a claim other than the suggested claim is more appropriate for inclusion in the interference. Upon consideration of the suggested claim and the applicant's alternative claims and any explanation, the examiner is in a position to forward the application to the Board for declaration of an interference. If the applicant is dissatisfied with the claims of the application designated to correspond to the count, the applicant may file an appropriate motion under §1.633(c).

Two comments were received which suggested that the last sentence of § 1.606 is not entirely clear. One comment suggested that the language in the last sentence which reads: "to define one patentable invention" be changed to read: "not to contain separate patentable invention." This suggestion is being adopted. The use of the language "*one* patentable invention" was unfortunate and rendered the actual intent of the rule unclear. Under § 1.606, at the time an interference is declared a *rebuttable* presumption will exist that any patent claim designated to correspond to a count does not embrace separate patentable inventions. Moreover, at the time the interference is declared, no count will be narrower in scope than the broadest patent claim designated to correspond to that count. The presumption is *rebuttable* and may be challenged and overcome by a motion under § 1.633(c). Examples 17 and 18 illustrate practice under § 1.606.

Two comments were received discussing § 1.607. A first comment suggested that the word "must" in the first sentence of § 1.607(c) be changed to "shall". The suggestion is being adopted. Use of "shall" makes § 1.607(c) consistent with § 1.604(b). A second comment asked the following question:

> If the examiner determines that the applicant's claim is patentable but that there is no interfering subject matter, and the examiner accordingly allows the claim but refuses to declare an interference, is that determination appealable [to the Board of Appeals and Interferences under 35 U.S.C. 1.134]?

The commentator suggests that "such a determination" is appealable and rationale in support of the commentator's position appears in Gholz, *Board of Appeals Jurisdiction Over Appeals from Decisions by Primary Examiners Refusing to Institute Interferences on Modified or Phantom Counts*, 64 J. Pat. Off. Soc'y 651 (1982). At the hearing, the commentator orally urged that the rules be amended to permit an appeal to the Board when an examiner allows a claim, but refuses to declare an interference involving the allowed claim. The suggestion is not being adopted. A decision by an examiner to allow a claim, but not to declare an interference involving the allowed claim, is petitionable and not appealable. See Gholz, *supra*, at 652 n.13. The rule being suggested would enlarge the jurisdiction of the Board. Action by Congress would be necessary to accomplish what is embodied in the suggestion.

Several written comments and one oral presentation at the hearing were made concerning § 1.608. One comment suggested that § 1.608 be expanded to provide for summary judgment in interferences involving applications where the earlier of the filing date or effective filing date of one application was three months earlier than the date of the other application. This suggestion is not being adopted. Ordinarily, interferences are not declared between applications having effective dates more than three months apart. Moreover, expanding summary judgment proceedings to application-application interferences would result in delay in resolving interferences. Currently in application-patent summary judgment proceedings under 37 CFR 1.204(c), very few summary judgments are entered against applicants who are junior to a patentee by more than three months. There is no reason to expect that a significant number of summary judgments would be entered in application-application interferences. As noted in the notice of proposed rulemaking, the PTO has already declined to expand summary judgment proceedings to cases where a patentee is junior to an applicant by more than three months. See 49 FR 3775 (paragraph bridging columns 1 and 2); 1039 O.G. 34; 1039 TMOG 34; 27 BNA 319.

Two written comments were received which suggested that § 1.608(b) should be more specific in indicating the kind of evidence which should be submitted when an applicant attempts to make out a *prima facie* case based on priority of invention. The suggestions in the comments are being adopted. The following sentence has been added to § 1.608(b):

> Where the basis upon which an applicant is entitled to judgment relative to a patentee is priority of invention, the evidence shall include affidavits by the applicant, if possible, and one or more corroborating witnesses, supported by documentary evidence, if available, each setting out a factual description of acts and circumstances performed or observed by the affiant, which collectively would *prima facie* entitle the applicant to judgment on priority with respect to the earlier of the filing date or effective filing date of the patent.

Similar language appears in the current rule: 37 CFR 1.204(c). The PTO agrees entirely with the following discussion made by one commentator:

> The material added to Rule 608(b) currently appears in existing 37 CFR 1.204(c). A comparison of the existing language of 37 CFR 1.204(c) with the proposed rule might be construed as suggesting that the allegations which are now expressly required where priority is an issue will be changed, specifically relaxed in some manner. Since under proposed Rule 617 this clearly is *not*

the case, the proposed addition to Rule 608(b) should assist the practitioner in understanding the intent of the PTO.

The commentator has accurately pointed out that the PTO intends to apply a stricter standard for filing additional evidence in summary judgment proceedings after an order to show cause has been issued. See the notice of proposed rulemaking, 49 FR 3775 (column 1); 1039 O.G. 34; 1039 TMOG 1039; 27 BNA 319 (column 1).

At the hearing, it was suggested that § 1.608 should encourage the use of 8½ by 11 inch paper for affidavits. This suggestion is being adopted and the following sentence has been added to § 1.608(b): "To facilitate preparation of a record (§ 1.653 (g) and (h)) for final hearing, an applicant should file affidavits on paper which is 8½ × 11 inches (21.8 by 27.9 cm.)." The commentator at the hearing suggested that "many people submitting a Rule 608(b) showing are going to want to rely upon that showing under Rule 672(b)" in those cases where an interference is allowed to proceed. Use of 8½ by 11 inch paper will facilitate preparation of the ultimate record.

Two comments were received with respect to § 1.609. The first comment suggested that the language "count or counts" in § 1.609(b)(1) be changed to "proposed count or counts" and that each occurrence of "the count" in § 1.609(b)(2) be changed to "each count". The suggestion is being adopted. These changes are editorial in nature and are designed to enhance the clarity of the rule. A second comment indicated that it was not clear to the commentator why it was necessary under § 1.609(b)(3) for the examiner to identify the claims in an application or patent which are deemed to be patentable over any count. The commentator went on to say that the examiner "could probably readily identify claims which would clearly be unpatentable over a count and perhaps this would be all that is needed. If the examiner simply said all claims are considered unpatentable over the count, what recourse does the applicant have if he disagrees?" The purpose of having the examiner identify all claims which are patentable over the count or counts is to place the parties on notice that those claims are allowable notwithstanding any decision in the interference. Thus, in an interference between Jones and Smith if the examiner indicates that claim 8 of Jones is patentable over the proposed count or counts, Smith will know that Jones may receive a patent containing claim 8 even if Smith wins the interference. This will permit Smith to move under § 1.633(c) to add claim 8 as corresponding to a count if Smith believes claim 8 defines the same patentable invention as one of the counts. Contrary to the suggestion in the comment, an examiner will not indicate that a claim is unpatentable over a count; rather, the examiner will designate the claim to correspond to a count. Each claim in a patent or application which is directed to the same patentable invention as a count will be designated to correspond to the count. Under the new practice, an examiner will no longer have occasion to indicate that a claim will be rejected over a lost count. To fully answer the commentator's question, if a claim is designated to correspond to a count and the applicant believes the claim does not define the same patentable invention as the count, the applicant may move under § 1.633(c) to designate the claim as *not* corresponding to the count. If the motion is granted, the examiner would be authorized to issue the applicant a patent containing the claim even if the applicant loses the interference.

Several comments were received which discuss § 1.611. One comment suggested addition of a paragraph (f) to permit expanded summary judgment proceedings in application-application interferences. Since expanded summary judgment proceedings are not contemplated, the suggestion is not being adopted. See the discussion above under analysis of comments of § 1.608(b). Two comments suggested that § 1.611(c)(8), which provides that a notice declaring the interference shall specify among other things the "order of the parties," fails to take into account the fact one party may be "senior" as to one count and "junior" as to another count. As explained above in connection with the analysis of the comments concerning §1.601(m), the "order of the parties" is a procedural tool. It indicates the "style" of the case—which practitioners are encouraged to use. It there are two counts and one party is "senior" as to one count and "junior" as to another count, the party has the burden of proof as to that count to which the party is "junior." See § 1.657. Appropriate testimony periods will be set (§ 1.651(b)) to accommodate differing burdens of proof in cases where a party is "senior" on one count and "junior" on another count. The suggestions to change the meaning of "order of the parties" are not being adopted. Another comment suggested that §1.611(e) be changed to indicate that notice "shall" (as opposed to "may") be given in the *Official Gazette* when an interference has been declared involving a patent. No useful purpose would be served by changing "may" to "shall" inasmuch as the rights of parties involved in an interference are not affected by publication or non-publication of the fact that a patent is involved in the interference. By § 1.611 the PTO intends to exercise discretion to publish in the *Official Gazette* an identification of patents which become involved in interferences; however, the PTO does not intend to undertake an absolute obligation to do so. The use of "may" better expresses the PTO's intent behind § 1.611(e).

No written comments were received relating to § 1.612. However, at the hearing two suggestions were made orally. The first suggestion was that where a "party" has obtained a copy of his "opponent's affidavit under § 1.131 or § 1.608(b) (see § 1.612(b)), the party should be required to notify the opponent. According to the suggestion, if the opponent then intends to rely on the affidavit (§ 1.671(e)), the opponent would have to "re-serve" the affidavit on the party. This suggestion is not being adopted. When the party gains access to the affidavit under § 1.612(b), the party may or may not make an accurate copy. On the other hand, the opponent knows exactly those portions of the affidavit upon which the opponent intends to rely. After careful consideration, the PTO believes on balance that it is better for the opponent to serve a copy of the evidence upon which the opponent intends to rely. Service avoids issues as to whether the party obtained under § 1.612(b) a complete and/or accurate copy of the evidence upon which the opponent intends to rely.

The second suggestion concerning § 1.612 made orally at the hearing was that a party should have access to an opponent's "predecessor application, even though the application may not be relied upon for 35 U.S.C. 120 benefit." According to the suggestion, access to a "predecessor application" may be needed to uncover relevant evidence, including violations of 37 CFR 1.56. Specifically, the commentator called attention to *Driscoll* v. *Cebalo*, 731 F.2d 878, 221 USPQ 745 (Fed. Cir. 1984), *rehearing denied mem.* (Fed. Cir. July 25, 1984). The suggestion is not being adopted. The Patent Statute (35 U.S.C. 122) provides that applications for patent will be preserved in secrecy by the PTO unless special circumstances are shown. Section 1.687(c) provides for "additional discovery" when required in the interest of justice. Additional discovery is believed to provide the necessary procedural vehicle for

obtaining access to an opponent's "predecessor application."

One comment was received which suggessted that the language "or members of the same firm of attorneys and agents" be added after "agent" in §1.613(b). The suggestion is being adopted because it is believed to make the rule clearer.

One comment was received which said the following with respect to § 1.616: "Sanctions should not be left to the Examiner-in-Chief (EIC) or BAI [Board of Patent Appeals and Interferences]—This Rule is *unnecessary* and should be deleted. An alternative would be to give sanction power only to the BAI." The suggestion to delete § 1.616 is not being adopted. There are cases where sanctions are warranted. See e.g., *Woods* v. *Tsuchiya*, 207 USPQ 228 (Comm'r. Pat. 1979) and *Tezel* v. *Bellantoni*, 188 USPQ 688 (Bd.Pat.Int. 1975). The PTO continues to believe that imposition of a sanction (except judgment) by a single examiner-in-chief is appropriate. In any event, a party may ask a 3-member panel of the Board to reconsider any sanction which may be imposed by a single examiner-in-chief. See § 1.640(c).

Several written and oral comments were received regarding § 1.617.

One oral comment made at the hearing suggested that "it should be explicitly stated in Rule 617(a) that the decision of the examiner-in-chief to permit the interference to proceed is without prejudice to the right of any other party to attack the sufficiency of the Rule 608(b) showing when offered as Rule 672 testimony." The suggestion is not being adopted. While no explicit statement to that effect will be placed in § 1.617(a), it necessarily follows that any opponent may attack the sufficiency of an applicant's showing under § 1.608(b) when that showing is presented as evidence under § 1.672. In summary judgment proceedings, all an applicant need do is make out a *prima facie* case. If the interference is allowed to proceed in the normal manner, the applicant must prove priority by a preponderance of evidence (when the application and the patent are copending) or beyond a reasonable doubt (when the application was filed after the patent issued). Manifestly, the burden in summary judgment proceedings is not as strict as the burden in proceedings following summary judgment. *Breuer* v. *DeMarinis*, 558 F.2d 22, 28, 194 USPQ 308, 313 (CCPA 1977) and *Schwab* v. *Pittman*, 451 F.2d 637, 640, 172 USPQ 69, 71 (CCPA 1971).

Several comments suggested that an applicant should be permitted as a matter of right to file a reply to any statement filed by any opponent under § 1.617(d). The suggestion that a reply be permitted is being adopted. Accordingly, § 1.617(e) has been changed to read: "[w]ithin a time authorized by the examiner-in-chief, an applicant may file a reply to any statement filed by any opponent." Some of the comments indicated that the applicant should be able to reply to a statement by a patentee or another opponent. The language "any opponent" in § 1.617(e) is intended to include both the patentee and any other opponent. The change in the last sentence of § 1.617(h) of "patentee" to "any opponent" is intended to make clear that all parties may appear at a hearing if the applicant requests a hearing.

One comment suggested that the patentee (and presumably any other opponent) should be allowed to present "evidence" during summary judgment proceedings. This suggestion is not being adopted. A change in the second sentence of § 1.617(d) is intended to make clear that opponents may file statements in response to an applicant's "response," but the statement "shall be limited to discussing why all the evidence presented by the applicant does not overcome the reasons given by the examiner-in-chief for issuing the order to show cause." The PTO does not intend to expand summary judgment proceedings into a "mini-interference." An applicant presents evidence under § 1.608(b). If the examiner-in-chief finds that evidence insufficient, an order to show cause stating reasons for the insufficiency is issued. An applicant may respond and, if appropriate, file "additional evidence." The PTO intends to be rather strict in permitting the filing of new evidence. After the applicant responds (with or without additional evidence), any opponent may file a statement. In the statement, the opponent should be free to comment on all the evidence (original and additional) which the applicant presents. Compare *In re Plockinger*, 481 F.2d 1327, 179 USPQ 103 (CCPA 1973). Under § 1.617(d) the opponent may not urge a rationale for summary judgment which does not appear in the order to show cause issued by the examiner-in-chief. However, it is not the PTO's intent to interpret § 1.617(d) in the narrow manner the Court of Customs and Patent Appeals interpreted 37 CFR 1.204(c) in *Kahl* v. *Scoville*, 609 F.2d 991, 995–996, 203 USPQ 652, 656 [headnote 6] (CCPA 1979). An example will illustrate how the PTO intends to interpret § 1.617(d).

Example 35. An applicant copies claims from a patent and is required to submit a showing under § 1.608(b). Upon review of the showing under § 1.608(b), the examiner-in-chief concludes that the showing fails to make out a *prima facie* case of priority, because applicant has failed to show an actual reduction to practice. Applicant files a response and includes additional evidence which purports to show an actual reduction to practice. The patentee then files a statement in which two arguments are made. *First*, patentee argues that the additional evidence has not been properly authenticated. *Second*, patentee argues that even if applicant has shown an actual reduction to practice, summary judgment is nevertheless appropriate because applicant suppressed and concealed after the actual reduction to practice. The first argument is proper, but the second argument is not. A patentee may comment on the sufficiency of the applicant's evidence. Fairness, however, dictates that summary judgment be granted only after fair notice in the order to show cause. Accordingly, summary judgment will not be based on a rationale raised by a patentee in a statement which does not correspond to the rationale used by the examiner-in-chief in the order to show cause.

A change has been made in § 1.617(a) and § 1.617(g) to make clear that once summary judgment proceedings have concluded, an interference will proceed "in the normal manner." The change is intended to codify the decisions in *Walsh* v. *Sakai*, 167 USPQ 465 (Comm'r. Pat. 1967) and *Ing* v. *Chiou*, 207 USPQ 321 (Comm'r. Pat. 1979). This change is further discussed in the discussion of the comments received with respect to § 1.635.

One comment was received which indicated that § 1.618:

> needs qualification. It may be appropriate to resubmit certain papers (See also 1.644(d) last sentence).

The precise "qualification" needed was not set forth in the comment. Likewise, no example of "certain papers" was set forth. Under the circumstances, the PTO declines to make any change in § 1.618.

Several comments were received which discussed the rules relating to preliminary statements.

Three comments were received which suggested that § 1.622(a) be amended to "take into account several court decisions holding that joint inventors need not be joint inventors of [the subject matter of] all claims." Changes have been made in § 1.622(a) consistent with the amendment to 35 U.S.C. 116 made by Pub. L. 98–622.

One comment was critical of §§ 1.623(c); 1.624(c); and 1.625(c), because § 1.628(b) does not cover the

possibility that a drawing might not be available, e.g., a drawing destroyed in "a fire." Section 1.628(b) has been amended to permit a party to allege a date when a first drawing or first written description was made in those circumstances where the first drawing or first written description is not available. The party will be required: (1) To show good cause and explain in the preliminary statement why a copy of the drawing or written description cannot be attached to the preliminary statement and (2) attach to the preliminary statement the earliest drawing or written description made in or introduced into the United States which is available. The party would also be required to file a motion to amend its preliminary statement promptly after the drawing or written description becomes available. It is the PTO's intent by the amendment § 1.628(b) to overrule the holding of headnote [1] of *Reddy* v. *Davis*, 187 USPQ 386, 388 (Comm'r.Pat. 1975).

Another comment was critical of the language "conceived" in § 1.623(a)(4). The current rules do not require a party to allege a conception; rather, they require one to allege the date of the certain acts which, if proved, would establish conception. See 37 CFR 1.216(a)(4). According to the commentator, an allegation of conception is "unprovable and meaningless." The use of "conception" in § 1.623(a)(4) is intentional and is designed to permit a party to "plead" the earliest date on which it believes conception occurred. Contrary to the suggestion in the comment, "conception" is not meaningless and may be proved during the testimony period. See *Gould* v. *Schawlow*, 363 F.2d 908, 150 USPQ 634 (CCPA 1966); *Meitzner* v. *Corte*, 410 F.2d 433, 161 USPQ 599 (CCPA 1969); and *Mergenthaler* v. *Scudder*, 11 App.D.C. 264, 1897 C.D. 724 (D.C.Cir. 1897). There is no need to prove "conception" in the preliminary statement.

A preliminary statement serves several useful purposes in an interference: (1) It serves to limit a party's proofs as to time, (2) it serves as a vehicle for permitting the examiner-in-chief or the Board to issue orders to show cause in those cases where it would be futile to take testimony, and (3) it serves as notice to an opponent of the case which is alleged by a party. Under the rules being announced herein, the issues which will be raised and decided by the Board at final hearing are made known during the interlocutory stage through: (a) The preliminary statement, (b) motions under § 1.633 and decisions thereon, and (c) notices under § 1.632 of a party's intent to argue abandonment, suppression, or concealment. Section 1.632(a)(4) requires a party to allege a date of conception—it does not require proof of conception. The allegation puts the opponent on notice that the party intends to prove conception as of a date no earlier than the date alleged in the preliminary statement.

One comment suggested that the rules relating to preliminary statements are deficient because they do not permit one to allege allegations concerning tapes. Specifically, the commentator said: "What about a taped transcript of an invention, a practice being followed in a number of research departments of corporations?" If making a tape is the last act of conception, a party may allege the date the tape was made as the conception date under § 1.623(a)(4).

Several comments were received which suggested that a party should not have to allege derivation in a preliminary statement because the party may not know derivation occurred until the testimony period. Section 1.625 requires a party to file a preliminary statement when derivation is an issue. If derivation is not known or discovered prior to the date the preliminary statement is due, a party may move to amend the preliminary statement and allege derivation promptly after existence of derivation is discovered.

Several comments discussing § 1.624 were received. One comment suggested that § 1.624.(a)(5) should require a party to state, where appropriate, that no actual reduction to practice of an invention made in a foreign country was introduced into the United States. This suggestion is being adopted and a second sentence has been added to § 1.624(a)(5) which provides: "If an actual reduction to practice of the invention was not introduced into the United States, the preliminary statement shall so state." This sentence conforms § 1.624(a)(5) to the allegation required in the second sentence of § 1.623(a)(5). Another comment suggested that the language "in the United States" be inserted after "reasonable diligence" in § 1.624(a)(6) and that all occurrences of the language "was made" in § 1.624(c) be changed to "was introduced into the United States". This suggestion is being adopted. As noted in the comment, "[t]he changes . . . are necessary to clarify that for an invention made abroad the only relevant activities are those which occur in the United States." See 35 U.S.C. 104.

One comment asked "how does one introduce 'an actual reduction to practice of the invention' in the United States?" *Breuer* v. *DeMarinis*, 558 F2d 22, 194 USPQ 308 (CCPA 1971), illustrates a case where an actual reduction to practice abroad was introduced into the United States.

One comment suggested that § 1.627(a) be changed to require preliminary statements "be enclosed in an outer envelope addressed to the Commissioner of Patents and Trademarks and be additionally marked Box Interference—Preliminary Statement." According to the comment, the confidentiality of preliminary statements "envisioned under the proposed rules would be further enhanced. . . . " The suggestion is not being adopted. The PTO believes it is sufficient if preliminary statements are enclosed in a sealed envelope as specified in § 1.627(a). The Board will not permit access to preliminary statements which have not been ordered opened by an examiner-in-chief.

Several comments discussing § 1.629 were received. One comment suggested that the first sentence ("A preliminary statement should be carefully prepared.") should not appear in § 1.629(a). This suggestion is being adopted. The PTO agrees with the commentator that the sentence:

> no longer appears necessary or appropriate in the context of rulemaking. The remainder of the paragraph makes the admonition redundant at best.

Two comments were received which suggested that the word "normally" be deleted from the last sentence of § 1.629(d). The suggestions are not being adopted. A preliminary statement is a pleading. The Board does not evaluate or consider the content of a drawing or written description prior to final hearing. At final hearing, in fact, the Board will only consider the drawing or written description if a party places the drawing or written description in evidence. The word "normally" first appeared in 37 CFR 1.223(c), last sentence, in 1978 (see e.g., 973 TMOG 19 (August 1, 1978)). The last sentence of 37 CFR 1.223(c) was intended to codify headnote [2] of *Reddy* v. *Davis*, 187 USPQ 386 (Comm'r. Pat. 1975). The word "normally" appears in the rule to permit the Board to exercise discretion to evaluate or consider the content of a drawing or written description in some unusual and presently unforeseen circumstance.

One comment suggested that "no earlier than" in § 1.629(b) be changed to "as early as". The suggestion is being adopted inasmuch as it is believed to more clearly state the intent of the rule.

One comment suggested that § 1.629(d) "is improper because it fails to

take into account testimony which can show that a drawing and/or written description were actually made even though the drawing and/or written description are not now available." A change to § 1.628(d) and addition of "unless the party complies with § 1.628(b)" to the first sentence of § 1.629(d) eliminates the problem raised by the commentator.

One comment discussing § 1.631(a) was received which expressed the view that a junior party should be required to send a copy of its preliminary statement to the senior party even if the senior party does not file a preliminary statement. According to the commentator, the senior party is *prima facie* the first inventor and at some time it will have to know the earliest dates alleged by the junior party. The rules require all parties to file a preliminary statement. If a junior party does not file a preliminary statement, it will be denied access to any other preliminary statement which is filed. A senior party, however, is always entitled to access to any preliminary statement filed by a junior party. See e.g., § 1.631(b). However, a junior party will only be required to serve a senior party who files a statement.

Numerous comments were received discussing § 1.633.

One commentator asked: "What sort of a judgment is in order if a count is not patentable over the prior art to an opponent?" Section 1.633(a) authorizes a party to bring a motion for judgment on the ground that the opponent's *claim* corresponding to a count is not patentable. It is important to note that the motion raises the patentability of the opponent's *claim* not the count. Accordingly, by a motion under § 1.633(a), a party seeks entry of a judgment that the opponent is not entitled to a patent containing a claim corresponding to a count.

Two comments questioned the nature of the judgment when a motion under § 1.633(b) is granted. Section 1.633(b) authorizes the filing of a motion for judgment on the ground that there is no interference-in-fact. If a motion under § 1.633(b) is granted, the judgment would provide that each party is entitled to a patent containing that party's claims corresponding to the count. Judgments in interferences under these rules will determine a party's entitlement or lack of entitlement to *claims* corresponding to a count.

One comment expressed the hope that "third party inventorship" would not be made an issue in interferences. Contrary to the hope expressed by the commentator, "third party inventorship" can be made the subject of a motion under § 1.633(a). Any ground of unpatentability may be made the subject of a motion under § 1.633(a) except: (1) Priority of invention of the subject matter of a count by the moving party as against any opponent or (2) derivation of the subject matter of a count by an opponent from the moving party. It should be noted that under past practice, third party inventorship has not been considered "ancillary" to priority. *Sheffner* v. *Gallo*, 515 F.2d 1169, 185 USPQ 726 (CCPA 1975). However, under these rules, the question of whether an issue is "ancillary" no longer arises. See 130 Cong. Rec. H10528 (daily ed. Oct. 1, 1984) (statement by Rep. Kastenmeier). Pub. L. 98–622 gives the Board authority to consider priority and *patentability*. Third party inventorship involves a question of patentability. 35 U.S.C. 102(f).

One comment pointed out that § 1.633(e) adopts the estoppel rule approved by the Court of Customs and Patent Appeals in *Avery* v. *Chase*, 101 F.2d 205, 40 USPQ 343 (CCPA 1939), *cert. denied*, 307 U.S. 638 (1939), while rejecting the rule announced by the U.S. Court of Appeals for the District of Columbia Circuit in *International Cellucotton Products Co.* v. *Coe*, 35 F.2d 869, 30 USPQ 366 (D.C. Cir. 1936). See also *American Cyanamid Co.* v. *Coe*, 106 F.2d 851, 42 USPQ 302 (D.C. Cir. 1939). The commentator is correct in noting that the rules adopt the estoppel rule approved in *Avery* v. *Chase*. The following comment by the CCPA in its opinion in *In re Shimer*, 69 F.2d 556, 558, 21 USPQ 161, 163 (CCPA 1934), accurately expresses the intent of the PTO in promulgating §§ 1.633(e) and 1.658(c):

> It may be stated that this rule works no hardship to him who is diligent in pursuit of his rights. When an interference is declared, the files of his contestants are open to him. He has full cognizance of their disclosures and claims. So advised, it becomes his duty to put forward every claim he has. [Rule 1.633(e)] . . . affords him this opportunity. If the rule be not enforced or enforceable, then delays and litigation are greatly increased. It is quite obvious that the doctrine of estoppel, as applied in these cases, results in the better conduct of the business of the Patent [and Trademark] Office and in the public good.

One comment suggested that the following be added to the end of § 1.633(c):

> A motion to add or substitute a count shall be construed as an automatic request for the benefit of any earlier application [filing] dates accorded the existing count, and also as encompassed by a contemporaneous motion under § 1.633 (f) or (g), unless indicated otherwise. Any opposition thereto must be raised in a motion opposition pursuant to § 1.638.

The suggestion is not being adopted. A specific reference to § 1.637(c) appears in § 1.633(c). The provisions of § 1.637(c) spell out in detail the steps which a moving party must take in filing a motion under § 1.633(c). One of those steps requires the moving party to request benefit of any earlier application. The mere fact that benefit has been accorded for a "first" count does not establish that benefit should be accorded for a "second" count. The PTO believes the burden should be on the moving party to point out where an earlier application supports a count rather than placing the burden on an opponent in the first instance to point out where an earlier application fails to support particular subject matter. There is no compelling reason to force the opponent "to prove a negative." It should be noted that the language "Where appropriate," has been deleted in every instance from §1.637 to make clear that the burden lies on the moving party to request benefit when that party files a motion under § 1.633.

At the hearing, one individual commented that § 1.633(a) is not clear as to whether a motion for judgment based on "fraudulent appropriation of the moving party's invention by his opponent" excluded. The "fraudulent appropriation of the moving party's invention by his opponent" is derivation. Section 1.633(a)(2) excludes both "innocent" derivation (e.g., through a third party and unknown to either party in an interference) or "fraudulent" derivation (e.g., where one party knowingly takes the invention from an opponent). In either event if derivation by an opponent of a party's invention is proved, the party will be awarded judgment.

One comment made the following statement:

> An opponent faced with a motion for judgment on the ground that a count is unpatentable may not be able to prove patentability in the short time periods. Provision should be made for extensions of time in such cases.

Provisions for extensions of time are made in § 1.645.

One comment addressed Example 23 which appeared in the notice of proposed rulemaking. Example 23 also appears in a slightly modified form herein and, as modified, takes into account discussion in the comment. The commentator believed that the motion mentioned in Example 23 should be denied and that a testimony period should be set. Accordingly to the commentator, the granting of the motion would shift the burden to the opponent of the motion. The commentator's point

is well taken. Actually, the motion should be deferred to final hearing and a testimony period would be set. In ruling on motions under § 1.633, it will not always be possible for the examiner-in-chief to grant or deny outright a motion. When testimony is needed to rule on a motion, the proper course of action is to defer a decision on the motion to final hearing and permit testimony. See § 1.639(c). The moving party retains the burden. If testimony is taken on patentability, the parties would also have to take testimony on priority. With all testimony at its disposal, the Board would then be in a position to rule on all issues and award a judgment.

One comment asked how the claims of the parties would be designated to correspond to the counts if in Example 18 a motion to substitute Count 2 (benzene) and add Count 3 (chloroform) was granted. The following Example 36 answers the commentator's question.

Example 36. The facts in this example are the same as Example 18. Assume that applicant AB believes that benzene and chloroform define separate patentable inventions. Applicant AB would file a motion under § 1.633(c)(1) to substitute Count 2 (benzene) for Count 1 (Markush group of benzene or chloroform) and add Count 3 (chloroform). If the examiner-in-chief grants the motion, the interference would be redeclared by deleting Count 1 and substituting in its place Counts 2 and 3. Claims 1 and 2 of the patent H and claims 11 and 12 of application AB would be designated to correspond to Count 2. Claims 1 and 3 of patent H and claims 11 and 13 of application AB would be designated to correspond to Count 3. If one party proves priority with respect to both benzene and chloroform, that party would be entitled to all claims in its application or patent corresponding to Counts 2 and 3. The other party would not be entitled to a patent containing any claim corresponding to Counts 2 and 3. If patentee H proves priority with respect to benzene and applicant AB proves priority with respect to chloroform (assuming there was no issue raised at final hearing with respect to the patentable distinctness of benzene and chloroform), the judgment would provide that patentee H is not entitled to a patent with claims 1 and 3, but is entitled to a patent with claim 2 and that applicant AB is not entitled to a patent with claims 11 and 12, but is entitled to a patent with claim 13. If an issue is properly raised at final hearing as to whether benzene and chloroform are the same patentable invention and the Board holds that they are the same patentable invention, the party proving the earliest priority as to either benzene or chloroform would prevail as to all claims. Thus, if patentee H invented benzene before applicant AB invented benzene or chloroform, patentee H would be entitled to a patent containing claims 1 through 3 even if applicant AB invented chloroform before patentee H invented chloroform. Applicant AB would not be entitled to a patent with claims 11 through 13.

An oral comment was received by telephone which raised the question of whether a party is, or could be, required to present in the party's application every claim which the party may ever seek to obtain in a patent based on the party's application. According to the commentator, such a requirement would prevent the party from proceeding *ex parte* after the interference on any claim on which a favorable judgment was not entered. It is not the PTO's intent to require a party who is an applicant to present at the outset all claims which the party may ever seek to obtain in a patent based on his application. Parties in interference cases should recognize, however, that the interference estoppel provisions of § 1.658(c) have been expanded with the view to eliminating much of the *ex parte* maneuvering which has taken place in the past after an interference is terminated. Accordingly, a party who fails to move to place a matter in issue runs a considerable risk that the party will not be able to raise the issue *ex parte* after an interference is terminated. Nevertheless, the PTO has determined that it will not, at this time, adopt the requirement suggested by the commentator. The commentator also suggested, contingent on his earlier suggestion being rejected, that the rules provide that a party be authorized to file a motion to require an opponent who is an applicant to add a claim to the opponent's application and to designate the claim as corresponding to a count. This suggestion is being adopted by addition of § 1.633(c)(5). Paragraph (c)(5) authorizes the filing of a motion to redefine the interfering subject matter by requiring an opponent who is an applicant to add a claim and to designate the claim to correspond to a count. A companion addition of paragraph (c)(5) to § 1.637 sets out the requirements of a motion under § 1.633(c)(5). Those requirements are: the moving party must: (1) Propose a claim to be added to the opponent's application, (2) show the patentability of the claim to the opponent and apply the terms of the claim to the disclosure of the opponent's application, (3) identify the count to which the proposed claim shall be designated to correspond, and (4) show that the proposed claim defines the same patentable invention as the count to which it will be designated to correspond. The following example illustrates how practice under §§ 1.633(c)(5) and 1.637(c)(5) is expected to occur.

Example 37. In this example, some of the facts set out in Example 32 will be used. Application AV discloses engines and in particular a 6-cylinder engine. Application AV contains only claim 1 (engine). Application AW discloses engines in general, but does not specifically disclose a 6-cylinder engine. Application AW contains only a single claim 3 (engine). Seeing that application AV specifically discloses a 6-cylinder engine and believing that a 6-cylinder engine is the same patentable invention as "engine," AW could move under § 1.633(c)(5) to require applicant AV to add a claim (6-cylinder engine) and to have the claim designated to correspond to the count (engine). Applicant AV could oppose on the ground that a 6-cylinder engine is not the "same patentable invention" as "engine." If the motion is granted, applicant AV would be required to add a claim to 6-cylinder engine and the claim would be designated to correspond to the count. If applicant AV loses the interference, the judgment would preclude applicant AV from obtaining a patent with claims to "engine" or "6-cylinder engine." If the motion is denied on the basis that a 6-cylinder engine is not the same patentable invention, applicant AV would not be required to present a claim to 6-cylinder engine and would be able to pursue such a claim *ex parte* even if applicant AV loses the interference.

If an applicant is ordered by an examiner-in-chief to file an amendment to present a claim and the applicant fails or refuses to timely present the amendment, the failure or refusal will be taken without further action as a disclaimer by the applicant of the subject matter of the claim. See the second sentence of § 1.640(b)(1).

At the hearing, one commentator indicated that it is not clear whether § 1.635 "would permit a motion for judgment in a situation where a junior party's case-in-chief fails as a matter of law to overcome a senior party's effective filing date." Under the rules, it is not the intent of the PTO to allow a senior party to test the sufficiency of the case-in-chief of a junior party prior to final hearing. Thus, a "motion for a directed verdict" (see Rule 50(a) of the Federal Rules of Civil Procedure) at the conclusion of the junior party's case-in-chief and prior to a senior party's case-

in-chief is not authorized under the rules. If a senior party believes the case-in-chief of the junior party is insufficient as a matter of law, the senior party may *elect* to proceed immediately to final hearing. If the senior party is incorrect, however, the senior party will have waived any right to present any case-in-chief or rebuttal. See e.g., *Comstock* v. *Kroekel*, 200 USPQ 548, 550 n. 4 (Comm'r.Pat. 1978); *Lorenian* v. *Winstead*, 127 USPQ 501, 508 (Bd.Pat.Int. 1959); and, more recently, *Burson* v. *Carmichael*, 731 F.2d 849, 221 USPQ 664 (Fed. Cir. 1984) ("There is no support in law for repeated bites at the apple"). This would be true even if the only evidence relied upon by the junior party is a showing under 1.608(b). In this respect, the rules codify the decision in *Walsh* v. *Sakai*, 167 USPQ 465 (Comm'r.Pat. 1970).

Two comments were received which suggested that the twenty-day period in § 1.636(b) is too short. It was suggested that a longer time period be set and one comment suggested thirty (30) days. The suggestions are not being adopted. The time period set for filing oppositions will normally be set during a telephone conference call between the examiner-in-chief and the attorneys for the parties. The twenty-day period appears in the rule in the event a specific time for filing oppositions is not set by an examiner-in-chief. The twenty-day period is deemed to be sufficient in most cases. Twenty days are currently allowed to respond to a motion. See 37 CFR 1.231(b). It should be noted that the twenty-day period is longer than the minimum period allowed by the Federal Rules of Civil Procedure for responding to motions. See Rule 6 (d) and (e).

Two comments were received which discussed § 1.637. Both comments suggested that a sentence be added to § 1.637(f)(2) to require a translation to be filed when a party moves for benefit of an earlier foreign application which is not in English. The suggestions are being adopted and the following has been added as the last sentence of § 1.637(f)(2): "If the earlier application filed abroad is not in English, the requirements of §1.647 must also be met." Section 1.647 requires a translation whenever a party relies on a document in a language other than English. One comment suggested that the language of § 1.637(f)(3) ("Show that the earlier application discloses an embodiment within the scope of each count.") may be "contrary to past decisions of the CCPA which have held a disclosure can be good without a specific embodiment." The critical issue in each benefit situation is whether the earlier application constitutes a constructive reduction to practice of the invention defined by the count. The issue is necessarily resolved on a case-by-case basis and the presence or absence of an embodiment is only one factor to be considered. Accordingly, the language of § 1.647(f)(2) has been changed to read: "Show that the earlier application constitutes a constructive reduction to practice of each count." The comment also criticized the use of the word "each" in § 1.647(f)(2). The term "each" is used to make clear that when there are two or more counts, the moving party must show that the earlier application constitutes a constructive reduction to practice for each count. There are cases where a disclosure in an earlier application would constitute a constructive reduction to practice for one count but not for another count.

Several changes have been made to § 1.637 which were not made as a result of a comment submitted from the public. Each occurrence of the language "Where appropriate," in § 1.637 has been deleted as being unnecessary and possibly confusing. Whenever a party wants or believes that it is entitled to benefit of an earlier application, the party must file a motion under § 1.633(f) for benefit. The language "Where appropriate" may have given parties the mistaken impression that a motion was not necessary where benefit of the earlier application had been accorded in the papers declaring the interference. See the discussion above of the suggested change to §1.633(c) which was rejected.

The language "or adding a claim to be designated to correspond to a count" has been added to § 1.637(c)(2). The change supplements a change made in § 1.633(c)(2). Section 1.637(c)(2) sets out the requirements for a preliminary motion to redefine the interfering subject matter by adding a claim in the moving party's application and to designate the claim to correspond to a count.

In § 1.637(c)(2)(ii), the language "Apply the terms of each proposed claim to the disclosure of the application" has been changed to "Show that the proposed or added claim defines the same patentable invention as the count". This change was made to add the requirement of showing that the new claim defines the same patentable invention as the count and to eliminate a requirement already contained in §1.637(c)(2)(iii).

Section 1.637(c)(2)(iii) was changed to refer to an "amended or added claim" and thereby conform the language of the section to the language of § 1.633(c)(2).

Paragraph (c)(5) was added to set out the requirements of a motion under § 1.633(c)(5) which permits a party to move to require an opponent who is an applicant to add a claim to the application and to designate the claim to correspond to a count. See Example 37.

Two comments were made concerning § 1.638. One comment suggested that the twenty-day periods of paragraphs (a) and (b) were too short. The PTO has evaluated the time periods of paragraphs (a) and (b) and has decided that no change will be made to those periods. Attention is directed to the discussion above of the comments concerning § 1.636(b) which also contains a twenty-day period.

Another comment made at the hearing suggested that a reply to an opposition to a motion should be permitted as a matter of course. Upon consideration of the comment, it has been decided to authorize the filing of replies to opposition to all motions. Presently, replies are permitting as a matter of course only for oppositions to motions under 37 CFR 1.231. Section 1.638(b), as changed, would permit the reply in every instance. The PTO over the years has received complaints concerning the inability of a party to file replies. The change being made in § 1.638(b) will be reviewed sometime in the future to determine whether authorizing replies is helpful to the Board and/or whether undue delay in resolving interference occurs because replies are filed. Moreover, the PTO will make a judgment on whether "new issues" are being raised as a matter of course in replies. It can thus be seen that the change in authorizing replies may be considered experimental and could be changed in the future if found to be counter-productive or inconsistent with the objective of resolving interferences in a relatively prompt manner.

One comment discussing § 1.639 was received. The comment states:

> The requirement that proofs of alleged material facts *must* be filed may be difficult or impossible to meet in view of the shortened times. [The] rule should make provisions for timely submission of proofs within reasonable times.

To the extent that the comment suggests setting specific times in the rules, the suggestion is not being adopted. It should be noted that if affidavits cannot be timely prepared to be filed with a motion, the moving party may wish to take advantage of paragraph (c) which requires a party to specify any testimony needed to resolve a motion.

One change was made in § 1.639(c) to make clear that a moving party or an opponent may describe any testimony

needed to resolve a motion under either § 1.633 or § 1.634. Often, testimony is needed to resolve inventorship disputes. Accordingly, a party may describe testimony needed to resolve motions to correct inventorship under § 1.634. It should be noted that if a party relies solely on affidavits in support of a motion (under § 1.633 or § 1.634) and the issue raised in the motion is to be considered at final hearing, the party must comply with § 1.671(e).

Several comments were received which discussed § 1.640. One comment asked: "When the final sentence speaks of a panel deciding the request for reconsideration, does this mean that the panel decides whether to reconsider or whether to modify the decision?" It was the PTO's intent that the panel make a decision on whether to modify the decision made by the single examiner-in-chief. Accordingly, the language "shall be decided by a panel" in the last sentence of § 1.640(c) has been changed to read: "shall be acted on by a panel". Another change in language to the fourth sentence of § 1.640(c) has been made to make clear that a decision of a single examiner-in-chief will not ordinarily be modified by a panel without an opportunity to file an opposition.

Another comment suggested that § 1.640(a) be changed to "allow, even encourage, the examiner-in-chief to travel to conferences where more convenient/practical for all concerned." This suggestion is not being adopted. The use of a telephone conference call eliminates the need to adopt the suggestion. The same comment suggested that the "speedy and inexpensive" language of the second sentence of § 1.640(b) be deleted. The suggestion is not being adopted. The comment fails to explain why the language should be deleted. It is obvious that a motion cannot always be granted or denied; other action is often appropriate, e.g., deferring consideration of a motion to final hearing. Section 1.640(b) gives the examiner-in-chief discretion to take appropriate action and the "just, speedy, and inexpensive determination" language provides some standard which an examiner-in-chief may follow in those cases where granting or denying a motion is not appropriate.

One comment was received which suggested that § 1.640 be changed to provide that an examiner-in-chief hold a hearing to determine whether an interference should proceed in those cases where a junior party fails to allege a date prior to the senior party and remains in an interference only because the junior party is alleging "fraud" by the senior party. The suggestion is not being adopted. If a party believes that an opponent has committed "fraud" or has engaged in "inequitable conduct," the party may file a motion under § 1.633(a) for judgment. Obviously, a motion for judgment on the basis of "fraud" or "inequitable conduct" must make out a case by clear and convincing evidence. The examiner-in-chief has sufficient authority under the rules to preclude a party from proceeding in an interference on a baseless charge of "fraud" or "inequitable conduct."

One oral comment was received which suggested that the examiner-in-chief be required to consult with an examiner prior to deciding a preliminary motion for judgment under § 1.633(a) based on patentability. The oral comment suggested alternate proposals:

(1) The examiner-in-chief will normally obtain a patentability report when deciding motions involving a question of patentability.

(2) The examiner-in-chief will consult with a primary examiner prior to deciding a motion raising an issue of patentability.

The suggestion of the oral comment is not being adopted. An examiner-in-chief is a person having "competent legal knowledge and scientific ability." 35 U.S.C. 7. Examiners-in-chief review decisions of examiners on questions of patentability. Accordingly, there is no reason to *require* an examiner-in-chief to consult with an examiner on a question of patentability. The PTO recognizes that many examiners possess special expertise in particular arts. It is for this reason that § 1.640(b) provides that "[a]n examiner-in-chief *may* consult with an examiner in deciding motions involving a question of patentability" (emphasis added). Thus, an examiner-in-chief is authorized to consult with an examiner on a question of patentability where the examiner-in-chief believes consultation will be beneficial.

One comment suggested that § 1.642 be changed to permit an examiner-in-chief to add a newly discovered patent, as well as newly discovered applications, to an interference. Inasmuch as 35 U.S.C. 135(a) authorizes interferences between applications and patents, the suggestion is being adopted. The language "application" in § 1.642 has been changed to read: "application or patent".

Several comments discussing § 1.644 were received. One commentator made four suggestions, none of which are being adopted. First, the commentator suggested that there should be no fee for a petition under § 1.644(a)(1). This suggestion is not being adopted. A decision on a petition is a service performed by the PTO on behalf of a petitioner. The Commissioner is authorized to charge fees for services performed. 35 U.S.C. 41(d). Second, the commentator suggested that the last sentence of § 1.644(d) be deleted. This suggestion is not being adopted. In the past when parties have filed petitions, copies of documents already in the interference file have been attached to the petition. The copies tend to increase unnecessarily the size of the file of an interference. Inasmuch as the document submitted with the petition is already in the interference, there is no need to file a "second" copy of the document. Parties can expect that petitions will be returned (§ 1.618) if the petition is accompanied by documents which are already in the interference file. Third, the commentator argued that the "requirement of service within one (1) day is too onerous and should be deleted" from § 1.644(g). No rationale was given in support of the argument. Petitions have caused considerable delay in interference cases in the past. To avoid unnecessary delay and surprise on the part of the opponent, the PTO has decided to require that service of a petition be such that delivery to the opponent is within one (1) working day. Service within one day should not ordinarily be difficult in view of "Express Mail" and numerous commercial one-day delivery services available. Lastly, the commentator suggested that § 1.644(i) be changed to provide that decision on a petition would not be delegated to the examiner-in-chief handling the interference. The suggestion to change § 1.644(i) is not being adopted. However, when a PTO employee is granted authority to decide a petition in an interference case, the employee would not be the examiner-in-chief handling the interference or an employee on a panel of the Board deciding the petition. It would be expected that an employee deciding a petition by delegation of authority would be one who could exercise independent judgment on the petition bearing in mind that a petition will be decided on the record made before the examiner-in-chief or the panel. In connection with this latter point, findings of fact by an examiner-in-chief or the Board will be presumed to be correct unless shown to be clearly erroneous. Discretionary action by an examiner-in-chief or the Board will not be overturned unless it is shown that an abuse of discretion occurred.

One commentator asked the following: "Is § 1.644(g) intended to

apply only to 'oppositions' to § 1.644 petitions, or is it also applicable to § 1.638 oppositions?" The provisions of § 1.644(g) apply only to petitions filed under § 1.644; those provisions do not apply to oppositions under § 1.638.

Two comments suggested that § 1.644(a)(2) be changed to include an express statement that a petition under paragraph (a)(2) could not be filed until after the Board has entered judgment and that the petition could not relate to the merits of priority of invention or patentability or a question of whether evidence is admissible under the Federal Rules of Evidence. The suggestions are being adopted and appropriate language has been added to § 1.644(a)(2) after the word "Commissioner". The change was suggested by the commentators so that no reasonable person could possibly overlook the fact that a petition to exercise supervisory authority can be filed *only after entry of judgment.* It should be noted that the language "and shall not relate to (1) the merits of priority of invention or patentability or (2) the admissibility of evidence under the Federal Rules of Evidence" has been deleted from § 1.644(b) in view of the change to § 1.644(a)(2).

One comment suggested that the last sentence of § 1.644(f) be changed to make clear that a decision would not ordinarily be modified until the Commissioner had requested an opposition to a request for reconsideration. This suggestion has been adopted and an appropriate change has been made to the last sentence of § 1.644(g).

One comment suggested that the word "shall" in the last sentence of § 1.644(b) precludes the filing of an opposition beyond the 15-day period specified in the rules. According to the commentator, the opposition should also be considered timely if filed within "any appropriate extension." A party may move to extend the time for filing an opposition. See § 1.645.

One comment argued that § 1.644(a)(1) cannot "be squared with the statute as interpreted in *Myers* [v. *Feigelman*, 455 F.2d 596, 172 USPQ 580 (CCPA 1972)]." The rationale in support of the comment is the following:

> I presume that the limitation in subparagraph (b) that a petition under subparagraph (a)(2) "shall not relate to . . . the merits of priority of invention or patentability or . . . the admissibility of evidence" is intended to avoid conflict with *Myers* v. *Feigelman*, 172 USPQ 580 (CCPA 1972), and its progeny. However, I read *Myers* as saying that, if the board has statutory authority to make a decision (including all the myriad of ancillary decisions that the panels and/or the single examiner-in-chief will be making under the new procedure), then the Commissioner does not have authority to review the board's or the single examiner-in-chief's decision. Or, to put it the other way around, if the Commissioner reviews an examiner-in-chief's decision, he is stepping into the shoes of the examiner-in-chief, and the Commissioner's decision is in turn reviewable by the panel (which is, of course, the only entity authorized to exercise the *statutory* jurisdiction of the board—see *Knickerbacker Toy Co.* v. *Faultless Starch Co.*, 175 USPQ 417 n.8 (CCPA 1972)). Thus, I don't see how proposed section 1.644(a)(1) can possibly be squared with the statute as interpreted in *Myers*.

It is true that the CCPA has stated that, "in performing his duties, the Commissioner cannot usurp the functions or impinge upon the jurisdiction of the Board . . . established by 35 U.S.C. 135." *In re Dickinson*, 299 F.2d 954, 958, 133 USPQ 39, 43 (CCPA 1962). See also *Myers* v. *Feigelman, supra*, 455 F.2d at 599 n. 8, 172 USPQ at 583 n. 8. However, it is also true that the Commissioner "shall superintend or perform all duties required by law respecting the granting and issuing of patents . . . ." 35 U.S.C. 6; *Kingsland* v. *Carter Carburetor Corp.*, 83 U.S. App. D.C. 266, 168 F.2d 565, 77 USPQ 499 (D.C.Cir. 1948); *In re Staeger*, 189 USPQ 284, 285 n. 2 (Comm'r.Pat. 1974). The Commissioner, subject to approval of the Secretary of Commerce, establishes the procedure by which the examiners-in-chief and the Board will consider interference cases. 35 U.S.C. 6. See also 35 U.S.C. 23 relating to affidavits and depositions.

Under the rules, the Commissioner will not determine on petition either "priority of invention" or "patentability." See § 1.644(b). Likewise, the Commissioner will not consider whether evidence should have been admitted or excluded under the Federal Rules of Evidence. The PTO believes that the federal courts, which routinely rule on admissibility under the Federal Rules, are in a better position to determine whether the Board properly interpreted the Federal Rules of Evidence.

While the Commissioner will not decide "priority of invention" or "patentability" under 35 U.S.C. 135(a), it does not follow that the Commissioner is precluded from interpreting PTO rules on procedural matters, including procedural matters related to the admissibility of evidence on some basis other than the Federal Rules of Evidence, e.g., whether a party has complied with a PTO rule such as § 1.671(e) (procedure for relying on affidavits) or § 1.671(g) (permission required for obtaining evidence by subpoena).

Full consideration has been given to the comment. The PTO nevertheless believes that § 1.644(a)(1) is not inconsistent with law.

Several comments concerning § 1.645 were received. One comment suggested that "to" be inserted in the first sentence of paragraph (a) before "file a notice of appeal" and "commence a civil action". According to the comment, "[t]he use of parallel infinitive verb forms provides greater clarity to the rule." The suggestion has been adopted.

Another commentator said the following:

> No good reason is seen to require a notarized oath from an attorney merely to explain why a paper was filed late, if there is no claim of substantive prejudice by other parties. Attorneys and examiners-in-chief should not be spending unnecessary time and effort on merely procedural formalities. That is contrary to the intent of the new rules.

The PTO agrees with the commentator and has deleted the language "accompanied by an affidavit" from § 1.645(b).

One comment suggested that a reference to § 1.610(d)(6) which provides for oral requests should be inserted into § 1.645 to reflect intent stated in the comments [of the notice of proposed rulemaking] on proposed § 1.645." This suggestion is not being adopted. As the commentator notes, § 1.610(d) authorizes an examiner-in-chief to hold a conference call to resolve issues and to enter an appropriate order following the conference call. A conference call may be used to obtain an extension of time. If the examiner-in-chief grants the request, an order may be entered—in which case a written motion is not necessary. The order provides the written record required by 37 CFR 1.2. However, it would unduly lengthen the rules to insert a reference to § 1.610(d) in each rule to which it may be applicable. Section 1.645(a) specifies the procedure to be used when a written motion is filed. It should be noted that an examiner-in-chief may require a written motion notwithstanding a conference call.

One comment stated that "[t]he 'other business' may be more pressing than the Interference. In order to serve the ends of justice, the PTO should be considerate in this matter." The PTO intends to evaluate each request for an extension of time on a case-by-case basis. However, extensions of time in interference cases have become "routine." A recent survey of a file in one interference revealed the following. The interference was declared on March

30, 1976. Preliminary statements were filed on May 5, 1979. A decision on motions was entered on June 28, 1982. Testimony was filed on January 3, 1984. During the period between declaration and filing of testimony, sixty-four (64) requests or stipulations for extension of time were filed.

When counsel and an examiner-in-chief agree to a schedule and times are set, the parties will be expected to adhere to the schedule unless there are unusual circumstances. Apart from work that counsel may have in an interference, an examiner-in-chief will have a docket and must manage not only the interference involving counsel, but numerous other interferences. The U.S. Court of Appeals for the Federal Circuit recently said the following in *Rosemount, Inc.* v. *Beckman Instruments, Inc.*, 727 F.2d 1540, 1549–1550, 221 USPQ 1, 10 (Fed. Cir. 1984):

> The conduct of a trial, granting of continuances and the like, is not, however, solely or entirely a matter of balancing conveniences of the parties. The Federal Rules of Civil Procedure recognize another consideration—the need for the exercise of discretion by the trial court in carrying out its duty of managing the judicial process, the business of the court, and the administration of justice.

Likewise, these rules also recognize the need for the exercise of discretion by an examiner-in-chief in carrying out his or her duty of managing the interference (§ 1.610), the business of the PTO (§ 1.610), and the administration of justice (§ 1.601).

Several comments were received which discussed § 1.646. One comment suggested that it would be clearer if "service" was inserted after "additional" in the last sentence of § 1.646(b). This suggestion has been adopted.

Another comment suggested that "or except as otherwise provided in these Rules" be added to § 1.646(c) after "otherwise ordered by an examiner-in-chief". The commentator pointed out that the change was needed because certain rules (§§ 1.644(g) and 1.658(b)) require service by "Express Mail" or by hand. The commentator accurately pointed out that adding the suggested phrase "will call attention to the fact that there are other rules which have their own requirements for service of papers." The suggestion has been adopted, except that "this part" has been used instead of "these Rules."

One comment suggested changing "time" to "date" in the last sentence of § 1.646(e). The suggestion has been adopted. The change is necessary to conform with the language of the rule to actual practice and other language in the rule.

Two comments suggested that § 1.646(d), which authorizes an examiner-in-chief to order service by hand or "Express Mail," be deleted. This suggestion is not being adopted. The use of "Express Mail" or delivery by hand is often desirable to expedite matters or to avoid unnecessary delay. One comment argued that delivery by hand may be prohibitive. Commercial couriers may be used to accomplish delivery by hand. The fee charged by most commercial couriers is not "prohibitive." The other comment argued that "there are circumstances when . . . [delivery by hand] is [not] possible." The use of § 1.646(d) is discretionary on the part of an examiner-in-chief. If delivery by hand, i.e., personal delivery or delivery by commercial courier, or by "Express Mail" is impossible, it would be expected that the examiner-in-chief would exercise discretion and permit service by first class mail.

One comment suggested that the language "present case," which was said to appear in § 1.651(b)(1) and § 1.651(c), be changed to "prepared case." The suggestion is not being adopted because the language "present case" does not appear in § 1.651. In any event, a testimony period is set for a party to present its testimony—either case-in-chief or case-in-rebuttal.

One comment was received which made two suggestions regarding § 1.652. First, the comment suggested that a period longer than 15 days be set for filing a response to a paper answering an order to show cause. This suggestion is not being adopted. The fifteen-day period is believed to be adequate in most cases. If more time is needed, a party may file a motion under § 1.645. Second, the comment suggested that the party placed under an order to show cause should be permitted as a matter of course to file a "reply" brief. This suggestion is not being adopted. In those instances where the Board believes a "reply" brief is desirable it may authorize the filing of a "reply."

One comment argued that § 1.653(i) "fails to make provision for exhibits which are too big to file or are too dangerous to file." If an "exhibit" cannot be filed, it will not be given consideration. A party will have to rely on testimony and/or pictures or sketches for "exhibits" (e.g., a large machine in a factory) which are too large or too dangerous to be filed in the PTO.

While no comments were received concerning § 1.654, it should be noted that a new paragraph (c) has been added and paragraph (c) as set out in the notice of proposed rulemaking has been redesignated as paragraph (d). New paragraph (c) provides that a party shall not be entitled to argue that an opponent abandoned, suppressed, or concealed an actual reduction to practice unless a notice under § 1.632 was timely filed.

Two comments discussing § 1.655 were received. The first comment made the following statement regarding § 1.655(a):

> Last sentence—interlocutory orders are reviewed only for 'manifest error' etc. It is not clear whether this includes show cause orders under § 1.640 resulting from unpatentability determined under § 1.633(a). However, if so, it precludes proper review of the patentability determination.

Patentability will initially be determined by a single examiner-in-chief. See §§ 1.610(a) and 1.640(b). If the examiner-in-chief determines that a claim of a party is unpatentable to that party, an order to show cause why judgment should not be entered as to that claim will be issued to that party. See § 1.640(d). If a response to the order to show cause is filed, a decision will be entered by the Board. See §§1.610(a) and 1.640(e). If the Board determines that the claim is not patentable to the party, a final decision and judgment will be entered holding the claim to be unpatentable. Review of the final decision and judgment is by judicial review under 35 U.S.C. 141 or 146. It should be noted, however, that if there are other claims in the party's application or patent which are deemed to be patentable, an interlocutory order would be entered holding only that certain claims are unpatentable. A final order holding those claims unpatentable would be entered after final hearing on other issues. Such a practice will avoid piecemeal judicial review.

Another comment suggested that § 1.655 be changed to preclude consideration of patentability at final hearing. Pub. L. 98–622 authorizes consideration of patentability assuming patentability is properly raised by a party during the interlocutory phase of an interference.

Two comments discussing § 1.656 were received. One comment suggested that "[b]riefs should be letter size for consistency." The PTO has no preference for the size of briefs. Briefs may be filed on letter or legal-size paper. Inasmush as the federal courts now require letter-size paper, parties who intend to use a PTO brief as an exhibit in a federal court should use letter-size paper.

Another comment suggested that § 1.656 be amended to preclude a single examiner-in-chief from ruling on admissibility of evidence. The introductory remarks to the notice of proposed rulemaking (and this notice) state that "[t]he examiner-in-chief, *where appropriate*, will be available by phone to rule on the admissibility of evidence in the event parties encounter *unusual* problems during the taking of depositions" (emphasis added). The commentator states:

> If an examiner-in-chief has ruled certain evidence inadmissible, that evidence would presumably not be before the Board at final hearing. Proposed Rule 1.656(h) provides a means for a party to obtain suppression of evidence to which he has made timely objection, but the Rule does not provide for any means for a party whose proffered evidence has been held inadmissible by the examiner-in-chief, to have that holding considered by the Board

The change suggested by the comment will not be adopted. However, a brief explanation of how practice is expected to work is in order. The introductory remarks indicate that a single examiner-in-chief may rule on admissibility of evidence "where appropriate" and in "unusual" circumstances. There are times during interferences where a motion *in limine* can be helpful. For example, a junior party during its case-in-chief may wish to examine a witness on a document which was *not* served as required by § 1.673(b)(1). The senior party objects and realizes that if the junior party is permitted to examine the witness on the document, extensive cross-examination using numerous documents would be necessary. In order to avoid wasting considerable time, the parties could contact the examiner-in-chief by phone for a determination *in limine* whether the junior party should be able to examine the witness on the document. Under the circumstances outlined the examiner-in-chief in his or her discretion could enter an order excluding the document from evidence. The order would be subject to a request for reconsideration. See § 1.640(c). Ordinarily, however, it would be expected that parties would present evidence subject to objection. See § 1.675(c), last sentence. It is not envisioned that single examiner-in-chief will routinely rule on the admissibility of evidence.

Several comments discussing § 1.658 were received. One comment suggested that the 14-day time period in § 1.658(b) is too short. Section 1.658(b) provides that a party may file a request for reconsideration within 14 days of a final decision by the Board. The 14-day time period is the same period authorized for filing requests for reconsideration by the U.S. Court of Appeals for the Federal Circuit. See Rule 40(a) of the Federal Rules of Appellate Procedure.

Several individuals suggested that a less restricted "interference estoppel" be set out in § 1.658(c). While full consideration has been given to the suggestion, it has been decided to retain in these rules the interference estoppel provisions of § 1.658(c) essentially as proposed. "Interference estoppel" under § 1.658(c) is designed to implement the PTO's intent to have as many issues resolved as possible in a single *inter partes* proceeding. Numerous examples in this notice illustrate how practice is expected to take place under § 1.658(c).

The language in the second sentence of § 1.658(c) has been changed to more clearly state the nature of the estoppel and the exception to estoppel. The word "counts" in the second sentence of § 1.658(c) means the counts as they exist at the time a final decision is entered.

One comment was received concerning § 1.658(c) which requires a specific answer. The commentator made the following statement:

> You state that an estoppel would not apply against a party awarded a favorable judgment as to *all* counts. However, it seems to me that there will be occasion when it would not be appropriate to have estoppel where there was a split decision. For instance, consider an interference between applicants A and B in which A was awarded priority as to count 1 and B was awarded priority as to count 2. If I understand you correctly, A would be estopped in post-interference *ex parte* practice to present an additional claim X which was patentably indistinct from his claim corresponding to count 1 if B had support for claim X. I think this result would be unfortunate, and that A should be permitted to further refine his claim structure after the interference—that is, after he has been assured that he is entitled to claims to the basic invention recited in count 1.

Under the circumstances described by the commentator, inventor A would *not* be estopped to present a claim to X because X is "patentably indistinct" (the proper terminology under the rules would be to say X is the "same patentable invention" as the subject matter of count 1) from the subject matter of count 1. Inventor A would be entitled to claim any disclosed invention which is directed to the "same patentable invention" as count 1. The change in the second sentence of § 1.658(c) more clearly reflects the PTO's intent in this regard. Inventor A would *not* be entitled to claim any invention which is the "same patentable invention" as the subject matter of lost count 2. See Examples 26, 27, and 28 for illustrations of interference estoppel practice when a "split" judgment is entered.

Two comments were received discussing § 1.659. One comment suggested that the first sentence of § 1.659(b) should "reflect" that a reexamination may be based only on patents and printed publications. The suggestion is not being adopted. The basis upon which a reexamination may be instituted are set out elsewhere in the statute and rules. 35 U.S.C. 301–306; 37 CFR 1.501–1.570. There is no further need to set that basis out again in § 1.659(b). Another comment suggested that the language "not involved in the judgment of the interference" be deleted from § 1.659(b). The rationale in support of the comment was as follows:

> Besides introducing a potential ambiguity as to what claims were 'involved in the judgment,' there does not appear to be any good reasons to draw this distinction, particularly unless it is made more specific. Why should the Board be prevented from recommending reexamination of some (less relevant) patent claims and not other patent claims which are potentially even more relevant to the public, unless *all* of the *same art* has already been fully evaluated against the *same claims* in the Board's decision? (emphasis in original).

When a patent is involved in an interference, each claim of the patent will be designated to (1) correspond to a count *or* (2) not correspond to a count. All claims which are *ultimately* determined to correspond to a count will be "involved in the judgment of the interference." Inasmuch as they are involved in the judgment of the interference, there is no need to recommend reexamination of those claims. The claims involved in the interference are either patentable or unpatentable based on the final decision of the Board. Section 1.659(b) merely authorizes the Board to recommend reexamination of patent claims which (1) are *not* involved in the judgment and (2) for one reason or another neither party saw fit to move to designate as corresponding to a count.

One comment was received which suggested that the requirements of § 1.660 are unnecessary. The PTO disagrees. The requirements of § 1.660 are designed to keep the PTO and a party's opponent informed of activity which is relevant to an interference. These rules attempt, to the extent possible, to eliminate procedural surprise. Inasmuch as mail delays occur and the PTO cannot react instantaneously to every paper filed in connection with every application or patent, the provisions of § 1.660 are believed helpful in preventing surprise

on the part of opponent's and unnecessary work by examiners-in-chief or the Board due to a lack of knowledge of relevant activity which may be taking place in the PTO.

One comment suggested that at the end of § 1.661 the following be added: "and the time for any such available appeal or review has expired." The suggestion is not being adopted. Section 1.661 already provides for finality when "no appeal . . . can be taken. . . ." The language finds antecedent basis in 35 U.S.C. 135(a).

Several comments discussing § 1.662 were received. Two comments suggested a change be made to provide that when a patentee files a statutory disclaimer under 35 U.S.C. 253 and deletes *all* claims corresponding to a count, the disclaimer will be treated as a request for judgment. As one of the comments pointed out, "[s]ince . . . [the filing of a statutory disclaimer disclaiming all claims corresponding to a count] by the patentee could have no other conceivable effect, the proposed rule should be changed to require judgment when all corresponding claims are disclaimed." The suggestion has been adopted and appropriate changes have been made to §1.662(c). In view of the changes, the following language in § 1.662(c), as proposed, is not necessary: "A statutory disclaimer of any claim involved in an interference shall in subsequent proceedings have the same effect with respect to the patentee as an adverse judgment." When a patentee disclaims less than all claims corresponding to a count, the claims which remain in the patent continue to be involved in the interference and any patentability or priority issues involving those remaining claims will be involved in the judgment on the merits in the interference.

Two comments suggested that the word "dissolved" in § 1.662(d) be changed to "terminated". This suggestion is being adopted, because § 1.662(d) has been deleted. However, all interferences will be terminated with a "judgment." A change has been made in the language of §1.11(a) to delete any reference to terminating an interference other than by judgment.

One comment suggested that the word "construed" in § 1.662(a) be changed to "treated". This suggestion has been adopted and more clearly states the intent of the PTO. The filing of the various papers mentioned paragraphs (a) and (c) of § 1.662 will result in certain action by the PTO. The word "treated" more appropriately describes the consequences of filing such papers.

One comment suggested that § 1.662(a) "is too sweeping." According to the commentator, a patentee may file a disclaimer because it has "become aware of a statutory bar or cannot afford the expense of an interference." If the patentee becomes aware of a statutory bar, the patentee should call the "bar" to the attention of the PTO or file an appropriate motion under §1.633(a) for judgment if the "bar" applies to the opponent. If a junior party patentee decides that an interference is too expensive and for that reason files a disclaimer, there is no reason why judgment should not be entered in favor of the opponent. The comment also suggested that § 1.662(c) "needs revision" because a patentee may disclaim one claim corresponding to a count, but not another. Section 1.662(c), as revised, takes into account the possibility that less than all claims corresponding to a count may be disclaimed. When some of the patent claims corresponding to a count are disclaimed, the interference proceeds on the basis of the remaining claims which correspond to the count. If all patent claims corresponding to a count are disclaimed, judgment will be entered.

One comment made the following statement regarding the third sentence of § 1.662(a):

> What of abandonment in favor of a CIP [continuation-in-part application]? Would this be construed as [a] request to enter [an] adverse judgment? Language should reflect procedural moves of substituting CIP for abandoned application and/or declaring new interference.

The third sentence of § 1662(a) does not apply to an application which is *not* involved in an interference. If an applicant files a continuation-in-part application and successfully moves (§ 1633(d)) to substitute the continuation-in-part for the application involved in the interference, abandonment of the application originally involved in the interference would have no bearing on the interference. Accordingly, no additional language is needed in § 1.662(a).

Two comments discussing § 1.663 were received. One comment suggested that an explanation of the status of patent claims involved in an adverse judgment should be stated in the rule. This suggestion is not being adopted. The status of patent claims involved in an adverse judgment is stated in 35 U.S.C. 135(a). Another comment suggested that the status of "claims which could have been counts . . . should be made of record." Unless a motion (§ 1.633(c)) to add claims to correspond to counts is filed, no reference will be made in a judgment as to claims "which could have been made counts."

One comment suggested that the language "then owned by either party but" be inserted after "application" in § 1.665. This suggestion is not being adopted. The language "same parties" in § 1.665 is intended to cover a party and any assignee. The suggested language "then owned" would narrow the scope of the rule in a manner not intended by the PTO.

An oral comment at the hearing suggested that § 1.671(e) be changed so that a party would not have to serve copies of affidavits relied upon under § 1.608(b) in those cases where an opponent had already obtained copies of the Rule 608(b) affidavits. This suggestion is not being adopted. See the discussion above answering comments related to § 1.612(b). Another comment made at the hearing noted that the PTO is "adopting" the Federal Rules of Evidence. The Federal Rules include a "shop book" rule—Rule 803(b)(6). The commentator expressed the view that adopting of a "shop book" rule might make an important change in evidence which is admissible in interferences and suggested that "it would be helpful if the Patent and Trademark Office would publicly comment on this extremely important evidentiary rule. . . ." The PTO believes that adoption of Rule 803(b)(6) of the Federal Rules of Evidence does not constitute a change in the admissibility of "shop book" evidence in interference cases. Rule 803(b)(6) is very similar to the former Federal Shop Book Rule (28 U.S.C. 1732) which it replaced. The courts have articulated a rule of law which the PTO will continue to apply in determining admissibility of laboratory note books under the "shop book" Rule 803(b)(6) of the Federal Rules of Evidence. See e.g., *Alpert* v. *Slatin*, 305 F.2d 891, 134 USPQ 296 (CCPA 1962) and *Elliott* v. *Barker*, 481 F.2d 1337, 179 USPQ 100 (CCPA 1973).

One comment suggested that § 1.671(f) be eliminated on the ground that a rule should not be used to train attorneys and agents. The suggestion is not being adopted. The problem addressed by § 1.671(f) is significant. By providing in the rules that documentary evidence must be explained, the PTO hopes to save both parties and the Board considerable difficulty in presenting and evaluating evidence.

One comment suggested that § 1.671(g) should be changed to require a party only to show the "relevancy" of expected testimony as opposed to the "admissibility" of the testimony. This suggestion is being adopted and an

appropriate change has been made to § 1.671(g) to require a moving party to "describe the general nature and the relevance of the testimony, document, or thing."

An oral comment was received which asked whether permission to issue a subpoena would be needed in the event a party seeks to call a witness under the control of an opponent. Ordinarily, the examiner-in-chief can order a party to produce an individual for a deposition as long as the individual is a party or is under the control of the party, e.g., an employee of an assignee. Where so-called "third parties" are concerned, however, issuance of a subpoena may be necessary, because the PTO has no authority to compel attendance of third parties.

Several comments concerning § 1.672 were received. One comment at the hearing pointed out that use of 8½ by 11 inch paper for affidavits appears to be optional. The commentator is correct in pointing out that the use is optional. By using 8½ by 11 inch paper, however, a party will save considerable time when filing a record (§ 1.653).

Two comments asked questions concerning § 1.672(b), and in particular, the meaning of the word "party" in the phrase "a party shall not be entitled to rely on any document or thing not mentioned in one or more of the affidavits. . . ." Specifically, one commentator stated:

> It is the scope of the words "the party" which leave doubt as to the meaning of the passage. If "the party" refers *only* to the party proffering the affidavit testimony, then the passage is fair since such party had the opportunity to use whatever documents it deemed favorable to its position. But if "the party" also encompasses the opponent, i.e., the cross-examining party not proffering the affidavit testimony, then the passage improperly restricts the scope of cross-examination. Surely, the proponent party cannot, simply by confining the affidavit to favorable documents, insulate the witness from cross-examination on unfavorable documents.

Section 1.672(b) refers to a "party" and an "opponent." The "party" is the party filing the affidavit and not an opponent of that party. Any "opponent" conducting cross-examination of an affiant may properly rely on documents and things not referred to in the affidavit.

One comment suggested that the language "a witness whose testimony will not be compelled under 35 U.S.C. 24" should be deleted or revised. According to the commentator:

> This is often not determinable in advance. Even a "voluntary" witness may develop cold feet and require a subpoena, or demand one for his own protection. Nor will all witnesses agreeable to affidavits be agreeable to depositions.

The suggestion is not being adopted. An affidavit may be used only when a witness agrees to sign the affidavit. If an individual refuses to sign an affidavit or voluntarily appear at a deposition, the party calling the witness will have to compel attendance at a deposition by a subpoena under 35 U.S.C. 24 after receiving permission from an examiner-in-chief.

One comment asked why there is "no express provision * * * [in the rules] for simply taking appropriate testimony of an adverse party by notice * * * rather than requiring a subpoena?" In many cases, notice will be sufficient inasmuch as an examiner-in-chief or the Board may generally order an adverse party to appear and give testimony. Thus, in many cases a subpoena is not needed to require attendance at a deposition of an adverse party.

Two comments suggested that a time be set out in the rules by which an affidavit should be filed. The suggestion is being adopted and the second sentence of § 1.672(b) has been changed to provide that affidavits shall be filed prior to the close of the party's relevant testimony period. The two comments also suggested that the rules specify that documents relied upon in an affidavit be filed with the affidavit. This suggestion is also being adopted by an appropriate change to § 1.672(b) which will provide that a party cannot rely on any document referred to in an affidavit unless a copy of the document is filed with the affidavit. Any document filed with an affidavit must also be served (§ 1.646). Section 1.672(b) will also provide that a party may not rely on any "thing" mentioned in an affidavit unless the opponent is given reasonable access to the "thing." A "thing" is something other than a document. The comments has suggested that the "things' be limited to those under the possession, custody, or control of the party submitting the affidavit. This suggestion is not being adopted. If a "thing" is not under the possession, custody, or control of a party, the party should resort the use of a deposition and compel production of the "thing" by a subpoena under 35 U.S.C. 24.

Four comments were received discussing § 1.673. It was suggested that the time for service under § 1.673(b) be three days if service is accomplished by hand or "Express Mail" and ten days if service is accomplished by any other means. This suggestion is being adopted. An appropriate change has been made in the introductory sentence of § 1.673(b). It was also suggested that the word "copy" in § 1.673(b) (1) be changed to read "list and copy". In support of the suggestion, one commentator states:

> In connection with the service of documents, the amendment to the proposed rule would require that a listing of documents accompany the documents themselves. This would permit cross-checking between lists and documents to ascertain whether or not discrepancies exists and reduce the possibility for later controversy:

The suggestion is being adopted. Under § 1.673(b) (1) a list of the documents would have to accompany the documents. One comment suggested that documents served should be "Bates numbered." While this suggestion is not being adopted in the sense of changing the language of a rule, it must be remembered that the party serving documents may be required to later prove exactly what was served. Using "Bates" numbers or an equivalent scheme may prove invaluable in later stages of an interference.

One comment discussing § 1.682 suggested that the language "not identified on the record during the taking of testimony of a witness" be deleted. This suggestion is not being adopted. If an official record or printed publication is made an exhibit during a deposition or in an affidavit, it need not be submitted under § 1.682. Section 1.682 permits a party to make an official record or printed publication part of the evidence being considered at final hearing without calling a witness. The official record or printed publication must, however, be self-authenticating. On the other hand, a party may present the official record or printed publication as an exhibit during testimony. When this latter course is followed, there is no need to take advantage of the provisions of § 1.682. The comment also suggested that a change be made in § 1.682(a) (4) because the requirement therein for a "certified" copy appeared to be inconsistent with § 1.671(d) which provides that a record of the PTO need not be certified. The suggestion is being adopted by adding "where approporiate" at the beginning of § 1.682(a) (4) and a reference to § 1.671(d) at the end of § 1.682(a) (4). If the official record is not a record of the PTO, it will be necessary to submit a certified copy of the official record.

Comments were received discussing § 1.684. One comment suggested that language be inserted in § 1.684(a) to make clear that the testimony authorized is for a case-in-chief or a case-in-rebuttal. The suggestion is not being adopted. The testimony authorized by § 1.684(a) is necessarily testimony for a case-in-chief or a case-

in-rebuttal. The commentator correctly notes that the use of written interrogatories under § 1.684 "for cross-examination would seem neither appropriate or justified." Section 1.684 does not apply to cross-examination. If a party submits an affidavit under § 1.672(b) or intends to rely on an affidavit under § 1.617(e), the party must make the affiant available for cross-examination at a deposition. See § 1.673(e). A deposition may be noticed only "for a reasonable time and place in the United States." See § 1.673(a). Accordingly it is not expected that § 1.684(a) will be used to cross-examine affiants residing in foreign countries. The party filing the affidavit will be required to make the affiant available for cross-examination in the United States.

One comment suggested that the provisions of § 1.685(d) are "harsher" than the corresponding provisions of 37 CFR 1.285(c). The comment is not fully understood. Section 1.685(d) requires an objection to be stated on the record. An objection to the admissibility of evidence must be stated on the record *and* a motion under § 1.656(h) renewing the objection at final hearing must be filed. No longer will a party be permitted to attend a deposition and fail to enter an objection only to raise the objection at final hearing. The current practice permits a party to delay the objection until it is often too late to permit an opponent to correct the evidentiary basis on which the objection is bottomed.

One comment suggested that the second sentence of § 1.687(b) ("If the witness refuses to produce a requested document or thing, the party may file a motion (§1.635) for additional discovery under paragraph (c) of this section.") be deleted. This suggestion is being adopted. the PTO agrees with the following remark by the commentator: "[o]mission of the sentence is recommended since it is clear from [paragraph] (c) [of § 1.687] that such a motion could be made in an appropriate case."

One comment at the hearing suggested that the PTO's inability to enter protective orders makes discovery unduly complicated. The commentator suggested that under § 1.687(c), as set out in the notice of proposed rulemaking, it is possible to obtain appropriate protective orders. The commentator correctly concedes that the maximum sanction which the PTO can enter upon a proven violation of a PTO entered protective order is judgment. See § 1.616. The commentator suggested, however, that additional discovery may be conditioned on the issuance of a subpoena *duces tecum* under 35 U.S.C. 24. Upon issuance of the subpoena, the commentator stated that the opponent could move the district court for entry of a protective order. If a party violates a protective order entered by a district court, the party would be subject to such sanctions as the district court might deem appropriate as well as a sanction by the PTO, including entry of judgment against the party. The PTO, unlike the district court, would not be able to apply a sanction after an interference is terminated.

The Commentator's suggestion is believed to be sound. No change in the language of §1.687(b) is believed to be necessary inasmuch as paragraph (b) authorizes the PTO to "specify the terms of conditions of such additional discovery." One of those terms could be requiring a party to issue a subpoena under 35 U.S.C. 24. By making a party proceed in the first instance in the PTO, appropriate PTO orders may be entered suggesting the scope of any protective order and stating the underlying basis for requiring a party to produce documents. The order could be of assistance to the district court in subsequent enforcement or contempt proceedings.

Additional discovery obtained under a protective order issued by either the PTO or a district court will not be admitted in evidence in the PTO in determining the interference. All evidence submitted in an interference must be made available to the public under the provisions of § 1.11(a). Accordingly, any protective orders have to be vacated before a document could be admitted in evidence in the PTO which is subject to a protective order.

Example 38 illustrates how the practice would work.

Example 38. An interference involves party X and party Y. During the interference, party X files a motion for additional discovery under § 1.687(c) asking that party Y be required to produce certain documents. Party Y opposes on the sole ground that the documents contain trade secret and confidential information. Party Y indicates that it has no objection to producing the documents for inspection by counsel for party X, but insists that party X not be permitted to inspect the documents. Accordingly, party Y asks the examiner-in-chief to authorize the discovery subject to entry of a protective order. Party Y argues, however, that the sanctions of § 1.616 are not sufficient in the event of a violation of the protective order. An examiner-in-chief concludes that additional discovery should be ordered, that a protective order is appropriate, and that the sanctions of § 1.616 are not sufficient in the event of a violation of the protective order. Under the circumstances, the examiner-in-chief would enter an order directing party Y to produce the documents for inspection by counsel of party X on the condition that party X seek production of the documents by a subpoena *duces tecum* under 35 U.S.C. 24. Upon issuance of any subpoena, party Y could move the district court for entry of a protective order. If the district court enters the protective order, party Y can produce the documents to counsel for party X. If the protective order of the examiner-in-chief is violated, an appropriate sanction up to and including judgment may be entered by the Board. In addition, party Y would be in a position to seek contempt or other sanctions in the district court. The documents produced for inspection by counsel for party X could not be admitted in evidence in the interference (until the protective order is vacated), because those documents are not documents which can be made available to the public under § 1.11(a).

The following is an anticipated time schedule for a two-party interference:

Event in interference	Time from last event in the interference (month)	Total time in interference (month)
Interference declared (1.611)		
Filing of preliminary statements (1.621) and preliminary motions (1.633)	3	3
Filing oppositions to preliminary motions (1.638(a))	⅓	3⅓
Filing replies to oppositions (1.638(b))	⅔	4⅓
Decision on preliminary motions (1.640 (b)(1)), open preliminary statements (1.631), set times for filing motions for discovery (1.687 (c) and testimony (1.651(a))	1	5⅓
Filing of motions for discovery (1.635, 1.651(a), 1.687(c))	1	6⅓
Filing of opposition to motion for discovery (1.638(a))	⅔	7
Filing reply to opposition to motion for discovery (1.638(b))	⅓	7⅓
Decision on motion for discovery	⅔	8⅓
Time for compliance with any discovery	⅔	9
Junior party testimony (case-in-chief; 1.672(b)):		
Testimony	2	11
Senior party cross-examination of affiants if needed	1	12
Senior party testimony (case-in-chief and case-in-rebuttal, 1.672(b)):		
Testimony	2	13⅔
Junior party cross-examination of affiants if needed	1	14⅔
Junior party testimony (case-in-rebuttal):		
Testimony	⅔	16
Senior party cross-examination of affiants if needed	⅔	16⅔
Filing of record (1.653(c))	1⅓	18
Brief for junior party (1.656)	1	19
Brief for senior party (1.656)	1	20
Reply brief for junior party (1.656)	⅔	20⅔
Final hearing (1.654)	1	21⅔
Decision (1.658)	2	23⅔

The following is an index for §§ 1.601 through 1.688:

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Sec.
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1.603 Interference between applications; subject matter of the interference.
1.604 Request for interference between applications by an applicant.
1.605 Suggestion of claim to applicant by examiner.
1.606 Interference between an application and a patent; subject matter of the interference.
1.607 Request by applicant for interference with patent.
1.608 Interference between an application and a patent; *prima facie* showing by applicant.
1.609 Preparation of interference papers by examiner.
1.610 Assignment of interference to examiner-in-chief, time period for completing interference.
1.611 Declaration of interference.
1.612 Access to applications.
1.613 Lead attorney, same attorney representing different parties in an interference, withdrawal of attorney or agent.
1.614 Jurisdiction over interference.
1.615 Suspension of *ex parte* prosecution.
1.616 Sanctions for failure to comply with rules or order.
1.617 Summary judgment against applicant.
1.618 Return of unauthorized papers.
1.621 Preliminary statement, time for filing, notice of filing.
1.622 Preliminary statement, who made invention, where invention made.
1.623 Preliminary statement; invention made in United States.
1.624 Preliminary statement; invention made abroad.
1.625 Preliminary statement; derivation by an opponent.
1.626 Preliminary statement; earlier application.
1.627 Preliminary statement, sealing before filing, opening of statement.
1.628 Preliminary statement, correction of error.
1.629 Effect of preliminary statement.
1.630 Reliance on earlier application.
1.631 Access to preliminary statement, service of preliminary statement.
1.632 Notice of intent to argue abandonment, suppression, or concealment by opponent.
1.633 Preliminary motions.
1.634 Motion to correct inventorship.
1.635 Miscellaneous motions.
1.636 Motions, time for filing.
1.637 Content of motions.
1.638 Opposition and reply, time for filing opposition and reply.
1.639 Evidence in support of motion, opposition, or reply.
1.640 Motions, hearing and decision, redeclaration of interference, order to show cause.
1.641 Unpatentability discovered by examiner-in-chief.
Sec.
1.642 Addition of application or patent to interference.
1.643 Prosecution of interference by assignee.
1.644 Petitions in interference.
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1.647 Translation of document in foreign language.
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1.657 Burden of proof as to date of invention.
1.658 Final decision.
1.659 Recommendation.
1.660 Notice of reexamination, reissue, protest, or litigation.
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1.662 Request for entry of adverse judgment; reissue filed by patentee.
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1.676 Certification and filing by officer, marking exhibits.
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1.682 Official records and printed publications.
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1.684 Testimony in a foreign country.
1.685 Errors and irregularities in depositions.
1.687 Additional Discovery.
1.688 Use of discovery.

The following is a table correlating the present rules (37 CFR 1.201 through 1.288) to the rules (37 CFR 1.601 through 1.688).

RULE CORRELATION TABLE

Old	New
1.201(a)	1.601(a).
1.201(b)	1.601 (b), (c).
1.201(c)	1.602.
1.202	None.
1.203(a)	1.603 (a), (b).
1.203(b)	1.605(a).
1.203(c)	1.605(b).
New	1.604(a).
1.203(d)	1.604(b).
1.204(a)	None.
1.204(b)	1.608(b).
1.204(c)	1.608(c).
1.205(a)	1.606 (a), (b).
1.205(b)	1.607 (a), (c).
1.205(c)	1.607(d).
New	1.608(a).
1.206(a)	1.607(b).
1.207(a)	1.609.
New	1.610.
1.207(b)	1.611.
1.208	1.613.
1.211	1.614.
1.212	1.615.
New	1.616.
1.228	1.617.
New	1.618.
1.215(a)	1.621(a).
1.215(b)	1.621(b).
1.215(c)	1.629(c).
1.216(a)	1.622 (a), (b).
1.216(a) (1)–(6)	1.623(a).
1.216(b)	1.623(b), 1.624(b), 1.625(b).
1.216(c)	1.666.
1.217(a)	1.624(a), 1.625(a).
1.217(b)	1.623(a).
1.218	1.621(a).
1.219	1.627.
1.222	1.628.
1.223	1.629.
1.224	1.630.
1.225	1.640 (d), (e), and 1.651(c)(4).
1.226	1.612.
1.227	1.631.
New	1.632.
1.231	1.633, 1.634.
1.237	1.641.
1.238	1.642.
1.242	1.643.
1.243	1.635, 1.636, 1.637(b), 1.638 through 1.640.
1.244	1.644.
1.245	1.645.
1.246	1.645.
1.247	1.646.
1.248	1.646.
New	1.647.
1.251	1.651.
1.252	1.652.
1.253	1.653.
1.254	1.656.
1.255	1.656(c).
1.256	1.654.
1.257(a)	1.657.
1.257(b)	1.658 (c), (d).
1.258	1.655.
1.259	1.659.
New	1.660.
1.262	1.662(a).
1.263	1.662 (a) and (d).
1.264	1.662 (b) and (c).
New	1.662(e).
1.265	1.663.
1.266	1.664.
1.267	1.665.
1.268	1.666.
1.271	1.671.
New	1.671(g).
1.272(a)	1.672 (a), (b).
1.272(b)	1.672(c).
1.272(c)	1.672 (d), (e).
1.273(a)	1.673 (a), (c), (d).
New	1.673(e).
1.273(b)	1.673(f).
1.274	1.674.
1.275	1.675.
1.276	1.676.
1.277	1.677.
1.278	1.678.
1.279	1.679.
1.281	1.645.
1.282	1.682.
1.283	1.683.
1.285	1.685.
1.286	Eliminated.
1.287(a)(1)(i), (ii)	1.673(b).
1.287(a)(1)(iii)	1.673(a).
1.287(a)(2), (3)	Eliminated.
1.287(b)	Eliminated.
1.287(c)	1.687.
1.287(d)(1)	1.673(c).
1.287(d)(2)	1.616.
1.287(e)	1.687(d).
1.288	1.688.

Other Considerations

These rules do not have a significant impact on the quality of the human environment or the conservation of energy resources.

The rules are in conformity with the requirements of the (1) Regulatory Flexibility Act (Pub. L. 96–354), (2) Executive Order 12291, and (3) the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce has certified to the Small Business Administration that these rules will not have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act; Pub. L. 96–354). The rules govern the conduct of interference cases which arise in the Patent and Trademark Office. In fiscal 1983, the Patent and Trademark Office received 105,704 patent applications. During the same period, 180 interferences were declared. It is expected that the overall cost will be reduced for obtaining a patent based on applications which become involved in an interference. See a "section-by-section" analysis submitted for the Record by Representative Kastenmeier during discussion of H.R. 6286 on the floor of the House in which the following statement appears (130 Cong. Rec. H10528, columns 2 and 3):

> It is expected that interferences will become simpler, more expeditious, and less costly. Under the bill, all issues of patentability and priority which arise in an interference can be decided in a single proceeding rather than in a series of complicated *inter parte* and *ex parte* proceedings.

These rules, therefore, will have no significant economic impact on small entities.

The Patent and Trademark Office has determined that this rule is not a major rule under Executive Order 12291. The annual effect on the economy would be less than $100 million. There would be no major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions. There would be no adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

These rules do not impose a burden under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, since no record keeping or reporting requirements within the coverage of the Act are placed upon the public.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Authority delegations, Conflict of interests, Courts, Inventions and patents, Lawyers.

PART 1—RULES OF PRACTICE IN PATENT CASES

For the reasons set out in the preamble and under the authority given to the Commissioner of Patents and Trademarks by 35 U.S.C. 6, 23, 41, and 135, Part 1 of Title 37 CFR is amended as set forth below.

1. Section 1.1 is amended by adding a new paragraph (e) to read as follows:

§ 1.1 All communications to be addressed to Commissioner of Patents and Trademarks.

* * * * *

(e) Communications relating to interferences and applications or patents involved in an interference should be additionally marked "BOX INTERFERENCE."

2. Section 1.4 is amended by revising paragraph (a)(2) and reprinting the introductory text of paragraph (a) to read as follows:

§ 1.4 Nature of correspondence.

(a) Correspondence with the Patent and Trademark Office comprises:

* * * * *

(2) Correspondence in and relating to a particular application or other proceeding in the Office. See particularly the rules relating to the filing, processing, or other proceedings of national applications in Subpart B, §§ 1.31 to 1.352; of international applications in Subpart C, §§ 1.401 to 1.482; of reexamination of patents in Subpart D, §§ 1.501 to 1.570; of interferences in Subpart E, §§ 1.601 to 1.688; and of trademark applications §§ 2.11 to 2.189.

* * * * *

3. Section 1.5 is amended by adding a new paragraph (e) to read as follows:

§ 1.5 Identification of application, patent or registration.

* * * * *

(e) When a paper concerns an interference, it should state the names of the parties and the number of the interference. The name of the examiner-in-chief assigned to the interference (§ 1.610) and the name of the party filing the paper should appear conspicuously on the first page of the paper.

4. Section 1.8 is amended by adding paragraph (a)(xii) to read as follows:

§ 1.8 Certificate of mailing.

* * * * *

(xii) The filing of a paper in an interference which an examiner-in-chief orders to be filed by hand or "Express Mail."

* * * * *

5. Section 1.9 is amended by adding a new paragraph (g) to read as follows:

§ 1.9 Definitions.

* * * * *

(g) For definitions in interferences see § 1.601.

6. Section 1.11 is amended by revising paragraph (a) to read as follows:

§ 1.11 Files open to the public.

(a) After a patent has been issued, the specification, drawings and all papers relating to the case in the file of the patent are open to inspection by the general public, and copies may be obtained upon paying the fee therefor. After entry of a judgment in an interference by the Board of Patent Appeals and Interferences as to all parties, the file of any interference which involved a patent, or an application on which a patent has issued, is similarly open to public inspection and procurement of copies. See § 2.27 for trademark files.

* * * * *

§ 1.14 [Amended]

7. Section 1.14 is amended by removing from paragraph (d) the words "Board of Patent Appeals or the Board of Patent Interferences" and inserting, in their place, the words "Board of Patent Appeals and Interferences."

8. Section 1.17 is amended by revising paragraphs (e), (g), (h), and (i) to read as follows:

§ 1.17 Patent application processing fees.

* * * * *

(e) For filing a notice of appeal from the examiner to the Board of Patent Appeals and Interferences:

By a small entity (§ 1.9(f))	$57.50
By other than a small entity	115.00

* * * * *

(g) For filing a request for an oral hearing before the Board of Patent Appeals and Interferences in appeal under 35 U.S.C. 134:

By a small entity (§ 1.9(f))	$50.00
By other than a small entity	100.00

(h) For filing a petition to the Commissioner under a section of this part listed below which refers to this paragraph, $120.00.

§ 1.47—for filing by other than all the inventors or a person not the inventor.

§ 1.48—for correction of inventorship.

§ 1.182—for decision on questions not specifically provided for.
§ 1.183—to suspend the rules.
§ 1.377—for review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of patent.
§ 1.378(e)—for reconsideration of decision on petition refusing to accept delayed payment of maintenance fee in expired patent.
§ 1.644(e)—for petition in an interference.
§ 1.644(f)—for request for reconsideration of a decision on petition in an interference.
§ 1.666(c)—for late filing of interference settlement agreement.
§§ 5.12, 5.13 & 5.14—for expedited handling of foreign filing license.
§ 5.15—for changing the scope of a license.
§ 5.25—for retroactive license.

(i) For filing a petition to the Commissioner under a section of this part listed below which refers to this paragraph, $60.00.

§ 1.12—for access to an assignment record.
§ 1.14—for access to an application.
§ 1.55—for entry of late priority papers.
§ 1.102—to make application special.
§ 1.103—to suspend action in application.
§ 1.177—for divisional reissues to issue separately.
§ 1.312—for amendment after payment of issue fee.
§ 1.313—to withdraw an application from issue.
§ 1.314—to defer issuance of a patent.
§ 1.334—for patent to issue to assignee, assignment recorded late.
§ 1.666(b)—for access to interference settlement agreement.

* * * * *

9. Section 1.36 is revised as follows:

§ 1.36 Revocation of power of attorney or authorization; withdrawal of attorney or agent.

A power of attorney or authorization of agent may be revoked at any stage in the proceedings of a case, and an attorney or agent may withdraw, upon application to and approval by the Commissioner. An attorney or agent, except an associate attorney or agent whose address is the same as that of the principal attorney or agent, will be notified of the revocation of the power of attorney or authorization, and the applicant or patent owner will be notified of the withdrawal of the attorney or agent. An assignment will not of itself operate as a revocation of a power or authorization previously given, but the assignee of the entire interest may revoke previous powers and be represented by an attorney or agent of the assignee's own selection. See § 1.613(d) for withdrawal of an attorney or agent of record in an interference.

10. Section 1.48 is revised as follows:

§ 1.48 Correction of inventorship.

If the correct inventor or inventors are not named in an application for patent through error without any deceptive intention on the part of the actual inventor or inventors, the application may be amended to name only the actual inventor or inventors. Such amendment must be diligently made and must be accompanied by (a) a petition including a statement of facts verified by the original named inventor or inventors establishing when the error without deceptive intention was discovered and how it occurred; (b) an oath or declaration by each actual inventor or inventors as required by § 1.63; (c) the fee set forth in § 1.17(h); and (d) the written consent of any assignee. When the application is involved in an interference, the petition shall comply with the requirements of this section and shall be accompanied by a motion under § 1.634.

§ 1.55 [Amended]

11. Section 1.55 is amended by removing from paragraph (a) "1.224" and inserting, in its place, "1.630".

12. Section 1.59 is revised as follows:

§ 1.59 Papers of application with filing date not to be returned.

Papers in an application which has received a filing date pursuant to § 1.53 will not be returned for any purpose whatever. If applicants have not preserved copies of the papers, the Office will furnish copies at the usual cost of any application in which either the requried basic filing fee (§ 1.16) or the processing and retention fee (§ 1.21(1)) has been paid. See § 1.618 for return of unauthorized and improper papers in interferences.

13. Section 1.68 is revised as follows:

§ 1.68 Declaration in lieu of oath.

Any document to be filed in the Patent and Trademark Office and which is required by any law, rule, or other regulation to be under oath may be subscribed to by a written declaration. Such declaration may be used in lieu of the oath otherwise required, if, and only if, the declarant is on the same document, warned that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001) and may jeopardize the validity of the application or any patent issuing thereon. The declarant must set forth in the body of the declaration that all statements made of the declarant's own knowledge are true and that all statements made on information and belief are believed to be true.

14. Section 1.103 is amended by revising paragraph (d) as follows:

§ 1.103 Suspension of action.

* * * * *

(d) Action on applications in which the Office has accepted a request filed under § 1.139 will be suspended for the entire pendency of these applications except for purposes relating to interference proceedings under §§ 1.601 through 1.688.

15. Section 1.122 is amended by revising paragraph (b) as follows:

§ 1.122 Entry and consideration of amendments.

* * * * *

(b) Ordinarily all amendments presented in a paper filed while the application is open to amendment are entered and considered, subsequent cancellation or correction being required of improper amendments. Untimely amendatory papers may be refused entry and consideration in whole or in part. For amendments presented during an interference see § 1.664.

§ 1.136 [Amended]

16. Section 1.136 is amended by removing "§ 1.207" and inserting, in its place, "§ 1.611" and by removing "§ 1.245" and inserting, in its place, "§ 1.645".

17. Section 1.138 is revised as follows:

§ 1.138 Express Abandonment.

An application may be expressly abandoned by filing in the Patent and Trademark Office a written declaration of abandonment signed by the applicant and the assignee of record, if any, and identifying the application. An application may also be expressly abandoned by filing a written declaration of abandonment signed by the attorney or agent of record. A registered attorney or agent acting under the provision of § 1.34(a), or of record, may also expressly abandon a prior application as of the filing date granted to a continuing application when filing such a continuing application. Express abandonment of the application may not be recognized by the Office unless it is actually received by appropriate officials in time to act thereon before the date of issue.

18. Section 1.181 is amended by revising paragraph (a) as follows:

§ 1.181 Petition to the Commissioner.

(a) Petition may be taken to the Commissioner: (1) From any action or requirement of any examiner in the *ex parte* prosecution of an application which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court; (2) in cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the

Commissioner; and (3) to invoke the supervisory authority of the Commissioner in appropriate circumstances. For petitions in interferences, see § 1.644.

* * * * *

19. The center heading preceding § 1.191 is revised to read:

Appeal to the Board of Patent Appeals and Interferences

20. Section 1.191 is amended by revising the section heading and paragraphs (a) and (c) as follows:

§ 1.191 Appeal to Board of Patent Appeals and Interferences.

(a) Every applicant for a patent or for reissue of a patent, or every owner of a patent under reexamination, any of the claims of which have been twice rejected or who has been given a final rejection (§ 1.113), may, upon the payment of the fee set forth in § 1.17(e), appeal from the decision of the examiner to the Board of Patent Appeals and Interferences within the time allowed for response.

* * * * *

(c) An appeal when taken must be taken from the rejection of all claims under rejection which the applicant or patent owner proposes to contest. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered.

* * * * *

§ 1.194 [Amended]

21. Section 1.194 is amended by removing the words "Board of Appeals" and inserting, in their place, the words "Board of Patent Appeals and Interferences."

22. Section 1.196 is revised as follows:

§ 1.196 Decision by the Board of Patent Appeals and Interferences.

(a) The Board of Patent Appeals and Interferences, in its decision, may affirm or reverse the decision of the examiner in whole or in part on the grounds and on the claims specified by the examiner. The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.

(b) Should the Board of Patent Appeals and Interferences have knowledge of any grounds not involved in the appeal for rejecting any appealed claim, it may include in the decision a statement to that effect with its reasons for so holding, which statement shall constitute a new rejection of the claims. When the Board of Patent Appeals and Interferences make a new rejection of an appealed claim, the appellant may exercise any one of the following three options:

(1) The appellant may submit an appropriate amendment of the claims so rejected or a showing of facts, or both, and have the matter reconsidered by the examiner in which event the application will be remanded to the examiner and the decision of the Board of Patent Appeals and Interferences shall not be considered final for the purpose of judicial review. The statement shall be binding upon the examiner unless an amendment or showing of facts not previously of record be made which, in the opinion of the examiner, overcomes the new ground for rejection stated in the decision. When appropriate, upon conclusion of proceedings on remand before the examiner, the Board of Patent Appeals and Interferences may enter an order otherwise making its decision final.

(2) The appellant may have the case reconsidered under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. Where request for such reconsideration is made the Board of Patent Appeals and Interferences shall, if necessary, render a new decision which shall include all grounds upon which a patent is refused.

(3) The appellant may treat the decision, including the new grounds for rejection given by the Board of Patent Appeals and Interferences, as a final decision in the case.

(c) Should the decision of the Board of Patent Appeals and Interferences include an explicit statement that a claim may be allowed in amended form, appellant shall have the right to amend in conformity with such statement which shall be binding on the examiner in the absence of new references or grounds of rejection.

(d) Although the Board of Patent Appeals and Interferences normally will confine its decision to a review of rejections made by the examiner, should it have knowledge of any grounds for rejecting any allowed claim it may include in its decision a recommended rejection of the claim and remand the case to the examiner. In such event, the Board shall set a period, not less than one month, within which the appellant may submit to the examiner an appropriate amendment, a showing of facts or reasons, or both, in order to avoid the grounds set forth in the recommendation of the Board of Patent Appeals and Interferences. The examiner shall be bound by the recommendation and shall enter and maintain the recommended rejection unless an amendment or showing of facts not previously of record is filed which, in the opinion of the examiner, overcomes the recommended rejection. Should the examiner make the recommended rejection final the applicant may again appeal to the Board of Patent Appeals and Interferences. Whenever a decision of the Board of Patent Appeals and Interferences includes a remand, that decision shall not be considered a final decision. When appropriate, upon conclusion of proceedings on remand before the examiner, the Board of Patent Appeals and Interferences may enter an order otherwise making its decision final.

23. Section 1.197 is amended by revising paragraphs (a) and (b) as follows:

§ 1.197 Action following decision.

(a) After decision by the Board of Patent Appeals and Interferences, the case shall be returned to the examiner, subject to the appellant's right of appeal or other review, for such further action by the appellant or by the examiner, as the condition of the case may require, to carry into effect the decision.

(b) A single request for reconsideration or modification of the decision may be made if filed within one month from the date of the original decision, unless that decision is so modified as to become, in effect, a new decision, and the Board of Patent Appeals and Interferences so states.

* * * * *

§ 1.198 [Amended]

24. Section 1.198 is amended by removing the words "Board of Appeals" and inserting, in their place, the words "Board of Patent Appeals and Interferences."

25. The center heading preceding § 1.201 is removed.

§§ 1.201 through 1.212 [Removed]

26. Sections 1.201 through 1.212 are removed.

27. The center heading preceding § 1.215 is removed.

§§ 1.215 through 1.228 [Removed]

28. Sections 1.215 through 1.228 are removed.

29. The center heading preceding § 1.231 is removed.

§§ 1.231 through 1.238 [Removed]

30. Sections 1.231 through 1.238 are removed.

31. The center heading preceding § 1.242 is removed.

§§ 1.242 through 1.247 [Removed]

32. Sections 1.242 through 1.247 are removed.

33. A center heading preceding § 1.248 is added which reads:

Miscellaneous Provisions

34. Section 1.248 is amended by adding paragraph (c) and revising the section heading as follows:

§ 1.248 Service of Papers; manner of service; proof of service in cases other than interferences.

* * * * *

(c) See § 1.646 for service of papers in interferences.

35. The center heading preceding § 1.251 is removed.

§§ 1.251 through 1.259 [Removed]

36. Sections 1.251 through 1.259 are removed.

37. The center heading preceding § 1.261 is removed.

§§ 1.261 through 1.268 [Removed]

38. Sections 1.261 through 1.268 are removed.

39. The center heading preceding § 1.271 is removed.

§§ 1.271 through 1.288 [Removed]

40. Sections 1.271 through 1.288 are removed.

41. Section 1.292 is amended by revising paragraph (a) and adding paragraph (c) as follows:

§1.292 Public use proceedings.

(a) When a petition for the institution of public use proceedings, supported by affidavits or declarations and the fee set forth in § 1.17(j) is filed by one having information of the pendency of an application and is found, on reference to the examiner, to make a *prima facie* showing that the invention claimed in an application believed to be on file had been in public use or on sale more than one year before the filing of the application, a hearing may be had before the Commissioner to determine whether a public use proceeding should be instituted. If instituted, the Commissioner may designate an appropriate official to conduct the public use proceeding, including the setting of times for taking testimony, which shall be taken as provided by §§ 1.671 through 1.685. The petitioner will be heard in the proceedings but after decision therein will not be heard further in the prosecution of the application for patent.

* * * * *

(c) A petition for institution of public use proceedings shall not be filed by a party to an interference as to an application involved in the interference. Public use and on sale issues in an interference shall be raised by a preliminary motion under § 1.633(a).

§ 1.301 [Amended]

42. Section 1.301 is amended by removing the words "Board of Appeals" and the words "Board of Patent Interferences" and inserting, in each of their places, the words "Board of Patent Appeals and Interferences."

§ 1.302 [Amended]

43. Section 1.302 is amended by removing from paragraph (b) "1.248" and inserting, in its place, "1.646" and by removing "and other contested cases".

§ 1.303 [Amended]

44. Section 1.303 is amended by removing from paragraph (a) the words "Board of Appeals" and the words "Board of Patent Interferences" and inserting, in each of their places, the words "Board of Patent Appeals and Interferences" and by removing from paragraph (c) "1.248" and inserting, in its place, "1.646".

45. Section 1.304 is amended by revising paragraph (a) as follows:

§ 1.304 Time for appeal or civil action.

(a) The time for filing the notice and reasons of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is sixty days from the date of the decision of the Board of Patent Appeals and Interferences. If a request for reconsideration or modification of the decision is filed within the time provided under § 1.197(b) or § 1.658(b), the time for filing an appeal or commencing a civil action shall expire at the end of the sixty-day period or thirty days after action on the request, whichever is later. Except for an appeal from or commencing a civil action after a decision of the Board of Patent Appeals and Interferences in a reexamination proceeding or an interference proceeding, the time periods set forth herein are subject to the provisions of § 1.136. See § 1.550(c) for extensions of time to appeal or commence a civil action in a reexamination proceeding. See § 1.645(a) for extensions of time to appeal or commence a civil action in an interference. An examiner-in-chief, upon a showing of excusable neglect, may extend the time for seeking judicial review of a decision of the Board of Patent Appeals and Interferences in an interference case when a request is untimely filed after expiration of the time prescribed by this section.

* * * * *

46. Section 1.322 is amended by revising paragraph (a) as follows:

§ 1.322 Certificate of correction of Office mistake.

(a) A certificate of correction under 35 U.S.C. 254 may be issued at the request of the patentee or the patentee's assignee. Such certificate will not be issued at the request or suggestion of anyone not owning an interest in the patent, nor on motion of the Office, without first notifying the patentee (including any assignee of record) and affording the patentee an opportunity to be heard. When the request relates to a patent involved in an interference, the request shall comply with the requirements of this section and shall be accompanied by a motion under § 1.635.

* * * * *

47. Section 1.323 is revised as follows:

§ 1.323 Certificate of correction of applicant's mistake.

Whenever a mistake of a clerical or typographical nature or of minor character which was not the fault of the Office, appears in a patent and a showing is made that such mistake occurred in good faith, the Commissioner may, upon payment of the fee set forth in § 1.20(a), issue a certificate, if the correction does not involve such changes in the patent as would constitute new matter or would require reexamination. A request for a certificate of correction of a patent involved in an interference shall comply with the requirements of this section and shall be accompanied by a motion under § 1.635.

48. Section 1.324 is revised as follows:

§ 1.324 Correction of inventorship in patent.

Whenever a patent is issued and it appears that the correct inventor or inventors were not named through error without deceptive intention on the part of the actual inventor or inventors, the Commissioner may, on petition of all the parties and the assignees and satisfactory proof of the facts and payment of the fee set forth in § 1.20(b), or on order of a court before which such matter is called in question, issue a certificate naming only the actual inventor or inventors. A request to correct inventorship of patent involved in an interference shall comply with the requirements of this section and shall be accompanied by a motion under § 1.634.

§ 1.550 [Amended]

49. Section 1.550 is amended by removing from paragraph (a) "Board of Appeals" and inserting, in its place, "Board of Patent Appeals and Interferences."

50. Section 1.565 is amended by revising paragraph (b) and adding paragraph (e) as follows:

§ 1.565 Concurrent office proceedings.

* * * * *

(b) If a patent in the process of reexamination is or becomes involved in litigation or a reissue application for the patent in filed or pending, the Commissioner shall determine whether or not to stay the reexamination or reissue proceeding.

* * * * *

(e) If a patent in the process of reexamination is or becomes involved in an interference, the Commissioner may stay reexamination or the interference. The Commissioner will not consider a request to stay an interference unless a motion (§ 1.635) to stay the interference has been presented to, and denied by, an examiner-in-chief and the request is filed within ten (10) days of a decision by an examiner-in-chief denying the motion for a stay or such other time as the examiner-in-chief may set.

51. A new subpart entitled "Subpart E—Interferences" is added which reads as follows:

Subpart E—Interferences

Sec.

1.601 Scope of rules, definitions.
1.602 Interest in applications and patents involved in interference.
1.603 Interference between applications; subject matter of the interference.
1.604 Request for interference between applications by an applicant.
1.605 Suggestion of claim to applicant by examiner.
1.606 Interference between an application and a patent; subject matter of the interference.
1.607 Request by applicant for interference with patent.
1.608 Interference between an application and a patent; *prima facie* showing by applicant.
1.609 Preparation of interference papers by examiner.
1.610 Assignment of interference to examiner-in-chief, time period for completing interference.
1.611 Declaration of interference.
1.612 Access to applications.
1.613 Lead attorney, same attorney representing different parties in an interference, withdrawal of attorney or agent.
1.614 Jurisdiction over interference.
1.615 Suspension of ex parte prosecution.
1.616 Sanctions for failure to comply with rules or order.
1.617 Summary judgment against applicant.
1.618 Return of unauthorized papers.
1.621 Preliminary statement, time for filing, notice of filing.
1.622 Preliminary statement, who made invention, where invention made.
1.623 Preliminary statement; invention made in United States.
1.624 Preliminary statement; invention made abroad.
1.625 Preliminary statement; derivation by an opponent.
1.626 Preliminary statement; earlier application.
1.627 Preliminary statement; sealing before filing, opening of statement.
1.628 Preliminary statement; correction of error.
1.629 Effect of preliminary statement.
1.630 Reliance on earlier application.
1.631 Access to preliminary statement, service of preliminary statement.
1.632 Notice of intent to argue abandonment, suppression, or concealment by opponent.
1.633 Preliminary motions.
1.634 Motion to correct inventorship.
1.635 Miscellaneous motions.
1.636 Motions, time for filing.
1.637 Content of motions.
1.638 Opposition and reply, time for filing opposition and reply.
1.639 Evidence in support of motion, opposition, or reply.
1.640 Motions, hearing and decision, redeclaration of interference, order to show cause.
1.641 Unpatentability discovered by examiner-in-chief.
1.642 Addition of application or patent to interference.
1.643 Prosecution of interference by assignee.
1.644 Petitions in interferences.
1.645 Extension of time, late papers, stay of proceedings.
1.646 Service of papers, proof of service.
1.647 Translation of document in foreign language.
1.651 Setting times for discovery and taking testimony, parties entitled to take testimony.
1.652 Judgment for failure to take testimony or file record.
1.653 Record and exhibits.
1.654 Final hearing.
1.655 Matters considered in rendering a final decision.
1.656 Briefs for final hearing.
1.657 Burden of proof as to date of invention.
1.658 Final decision.
1.659 Recommendation.
1.660 Notice of reexamination, reissue, protest, or litigation.
1.661 Termination of interference after judgment.
1.662 Request for entry of adverse judgment; reissue filed by patentee.
1.663 Status of claim of defeated applicant after interference.
1.664 Action after interference.
1.665 Second interference.
1.666 Filing of interference settlement agreements.
1.671 Evidence must comply with rules.
1.672 Manner of taking testimony.
1.673 Notice of examination of witness.
1.674 Persons before whom depositions may be taken.
1.675 Examination of witness, reading and signing transcipt of deposition.
1.676 Certification and filing by officer, marking exhibits.
1.677 Form of a transcript of deposition.
1.678 Transcript of deposition must be filed.
1.679 Inspection of transcript.
1.682 Official records and printed publications.
1.683 Testimony in another interference, proceeding, or action.
1.684 Testimony in a foreign country.
1.685 Errors and irregularities in depositions.
1.687 Additional Discovery.
1.688 Use of discovery.

Authority: 35 U.S.C. 6, 23, 41, and 135.

Subpart E—Interferences

§ 1.601 Scope of rules, definitions.

This subpart governs the procedure in patent interferences in the Patent and Trademark Office. This subpart shall be construed to secure the just, speedy, and inexpensive determination of every interference. For the meaning of terms in the Federal Rules of Evidence as applied to interferences, see § 1.671(c). Unless otherwise clear from the context, the following definitions apply to this subpart:

(a) "Additional discovery" is discovery to which a party may be entitled under § 1.687 in addition to discovery to which the party is entitled as a matter of right under § 1.673 (a) and (b).

(b) "Affidavit" means affidavit, declaration under § 1.68, or statutory declaration under 28 U.S.C. 1746. A transcript of an *ex parte* deposition may be used as an affidavit.

(c) "Board" means the Board of Patent Appeals and Interferences.

(d) "Case-in-chief" means that portion of a party's case where the party has the burden of going forward with evidence.

(e) "Case-in-rebuttal" means that portion of a party's case where the party presents evidence in rebuttal to the case-in-chief of another party.

(f) A "count" defines the interfering subject matter between (1) two or more applications or (2) one or more applications and one or more patents. When there is more than one count, each count shall define a separate patentable invention. Any claim of an application or patent which corresponds to a count is a claim involved in the interference within the meaning of 35 U.S.C. 135(a). A claim of a patent or application which is identical to a count is said to "correspond exactly" to the count. A claim of a patent or application

which is not identical to a count, but which defines the same patentable invention as the count, is said to "correspond substantially" to the count. When a count is broader in scope than all claims which correspond to the count, the count is a "phantom count." A phantom count is not patentable to any party.

(g) The "effective filing date" of an application or a patent is the filing date of an earlier application accorded to the application or patent under 35 U.S.C. 119, 120, or 365.

(h) In the case of an application, "filing date" means the filing date assigned to the application. In the case of a patent, "filing date" means the filing date assigned to the application which issued as the patent.

(i) An "interference" is a proceeding instituted in the Patent and Trademark Office before the Board to determine any question of patentability and priority of invention between two or more parties claiming the same patentable invention. An interference may be declared between two or more pending applications naming different inventors when, in the opinion of an examiner, the applications contain claims for the same patentable invention. An interference may be declared between one or more pending applications and one or more unexpired patents naming different inventors when, in the opinion of an examiner, any application and any unexpired patents contain claims for the same patentable invention.

(j) An "interference-in-fact" exists when at least one claim of a party which corresponds to a count and at least one claim of an opponent which corresponds to the count define the same patentable invention.

(k) A "lead" attorney or agent is a registered attorney or agent of record who is primarily responsible for prosecuting and interference on behalf of a party and is the attorney or agent whom an examiner-in-chief may contact to set times and take other action in the interference.

(l) A "party" is (1) an applicant or patentee involved in the interference or (2) a legal representative or an assignee of an applicant or patentee involved in an interference. Where acts of a party are normally performed by an attorney or agent, "party" may be construed to mean the attorney or agent. An "inventor" is the individual named as inventor in an application involved in an interference or the individual named as inventor in a patent involved in an interference.

(m) A "senior party" is the party with earliest effective filing date as to all counts or, if there is no party with the earliest effective filing date as to all counts, the party with the earliest filing date. A "junior party" is any other party.

(n) Invention "A" is the "same patentable invention" as a invention "B" when invention "A" is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention "B" assuming invention "B" is prior art with respect to invention "A". Invention "A" is a "separate patentable invention" with respect to invention "B" when invention "A" is new (35 U.S.C 102) and non-obvious (35 U.S.C. 103) in view of invention "B" assuming invention "B" is prior art with respect to invention "A".

(o) "Sworn" means sworn or affirmed.

(p) "United States" means the United States of America, its territories and possessions.

§ 1.602 Interest in applications and patents involved in an interference.

(a) Unless good cause is shown, an interference shall not be declared or continued between (1) applications owned by a single party or (2) applications and an unexpired patent owned by a single party.

(b) The parties, within 20 days after an interference is declared, shall notify the Board of any and all right, title, and interest in any application or patent involved or relied upon in the interference unless the right, title, and interest is set forth in the notice declaring the interference.

(c) If a change of any right, title, and interest in any application or patent involved or relied upon in the interference occurs after notice is given declaring the interference and before the time expires for seeking judicial review of a final decision of the Board, the parties shall notify the Board of the change within 20 days of the change.

§ 1.603 Interference between applications; subject matter of the interference.

Before an interference is declared between two or more applications, the examiner must be of the opinion that there is interfering subject matter claimed in the applications which is patentable to each applicant subject to a judgment in the interference. The interfering subject matter shall be defined by one or more counts. Each count shall define a separate patentable invention. Each application must contain, or be amended to contain, at least one claim which corresponds to each count. All claims in the applications which define the same patentable invention as a count shall be designated to correspond to the count.

§ 1.604 Request for interference between applications by an applicant.

(a) An applicant may seek to have an interference declared with an application of another by (1) suggesting a proposed count and presenting a claim corresponding to the proposed count, (2) identifying the other application and, if known, a claim in the other application which corresponds to the proposed count, and (3) explaining why an interference should be declared.

(b) When an applicant presents a claim known to the applicant to define the same patentable invention claimed in a pending application of another, the applicant shall identify that pending application, unless the claim is presented in response to a suggestion by the examiner. The examiner shall notify the Commissioner of any instance where it appears an applicant may have failed to comply with the provisions of this paragraph.

§ 1.605 Suggestion of claim to applicant by examiner.

(a) The examiner may suggest that an applicant present a claim in an application for the purpose of an interference with another application or a patent. The applicant to whom the claim is suggested shall amend the application by presenting the suggested claim within a time specified by the examiner, not less than one month. Failure or refusal of an applicant to timely present the suggested claim shall be taken without further action as a disclaimer by the applicant of the invention defined by the suggested claim. At the time the suggested claim is presented, the applicant may also (1) call the examiner's attention to other claims already in the application or which are presented with the suggested claim and (2) explain why the other claims would be more appropriate to be included in any interference which may be declared.

(b) The suggestion of a claim by the examiner for the purpose of an interference will not stay the period for response to any outstanding Office action. When a suggested claim is timely presented, *ex parte* proceedings in the application will be stayed pending a determination of whether an interference will be declared.

§ 1.606 Interference between an application and a patent; subject matter of the interference.

Before an interference is declared between an application and an unexpired patent, an examiner must determine that there is interfering subject matter claimed in the

application and the patent which is patentable to the applicant subject to a judgment in the interference. The interfering subject matter will be defined by one or more counts. Each count shall define a separate patentable invention. Any application must contain, or be amended to contain, at least one claim which corresponds to each count. All claims in the application and patent which define the same patentable invention as a count shall be designated to correspond to the count. At the time an interference is initially declared (§ 1.611), a count shall not be narrower in scope than any patent claim which corresponds to the count and any single patent claim will be presumed, subject to a motion under § 1.633(c), not to contain separate patentable inventions.

§ 1.607 Request by applicant for interference with patent.

(a) An applicant may seek to have an interference declared between an application and an unexpired patent by (1) presenting a proposed count and a claim corresponding to the proposed count and, if any claim of the patent or application does not correspond exactly to the proposed count, explaining why an interference should be declared, (2) identifying the patent and indicating which claim in the application and which claim or claims of the patent correspond to the proposed count, and (3) applying the terms of the application claim corresponding to the count to the disclosure of the application.

(b) When an applicant seeks an interference with a patent, examination of the application, including any appeal to the Board, shall be conducted with special dispatch within the Patent and Trademark Office. The examiner shall determine whether there is interfering subject matter claimed in the application and the patent which is patentable to the applicant subject to a judgment in an interference. If the examiner determines that there is any interfering subject matter, an interference will be declared. If the examiner determines that there is no interfering subject matter, the examiner shall state the reasons why an interference is not being declared and otherwise act on the application.

(c) When an applicant presents a claim which corresponds exactly or substantially to a claim of a patent, the applicant shall identify the patent and the number of the patent claim, unless the claim is presented in response to a suggestion by the examiner. The examiner shall notify the Commissioner of any instance where an applicant fails to identify the patent.

(d) A notice that an applicant is seeking to provoke an interference with a patent will be placed in the file of the patent and a copy of the notice will be sent to the patentee. The identity of the applicant will not be disclosed unless an interference is declared. If a final decision is made not to declare an interference, a notice to that effect will be placed in the patent file and will be sent to the patentee.

§ 1.608 Interference between an application and a patent; prima facie showing by applicant.

(a) When the earlier of the filing date or effective filing date of an application is three months or less after the earlier of the filing date or effective filing date of a patent, the applicant, before an interference will be declared, shall file an affidavit alleging that there is a basis upon which applicant is entitled to a judgment relative to the patentee.

(b) When the earlier of the filing date or the effective filing date of an application is more than three months after the earlier of the filing date or the effective filing date under 35 U.S.C. 120 of a patent, the applicant, before an interference will be declared, shall file (1) evidence which may consist of patents or printed publications, other documents, and one or more affidavits which demonstrate that applicant is *prima facie* entitled to a judgment relative to the patentee and (2) an explanation stating with particularity the basis upon which the applicant is *prima facie* entitled to the judgment. Where the basis upon which an applicant is entitled to judgment relative to a patentee is priority of invention, the evidence shall include affidavits by the applicant, if possible, and one or more corroborating witnesses, supported by documentary evidence, if available, each setting out a factual description of acts and circumstances performed or observed by the affiant, which collectively would *prima facie* entitle the applicant to judgment on priority with respect to the earlier of the filing date or effective filing date of the patent. To facilitate preparation of a record (§ 1.653 (g) and (h)) for final hearing, an applicant should file affidavits on paper which is 8½ x 11 inches (21.8 by 27.9 cm.). The significance of any printed publication or other document which is self-authenticating within the meaning of Rule 902 of the Federal Rules of Evidence or § 1.671(d) and any patent shall be discussed in an affidavit or the explanation. Any printed publication or other document which is not self-authenticating shall be authenticated and discussed with particularity in an affidavit. Upon a showing of sufficient cause, an affidavit may be based on information and belief. If an examiner finds an application to be in condition for declaration of an interference, the examiner will consider the evidence and explanation only to the extent of determining whether a basis upon which the applicant would be entitled to a judgment relative to the patentee is alleged and, if a basis is alleged, an interference may be declared.

§ 1.609 Preparation of interference papers by examiner.

When the examiner determines that an interference should be declared, the examiner shall forward to the Board:

(a) All relevant application and patent files and

(b) A statement identifying:

(1) The proposed count or counts;

(2) The claims of any application or patent which correspond to each count, stating whether the claims correspond exactly or substantially to each count;

(3) The claims in any application which are deemed by the examiner to be patentable over any count; and

(4) Whether an applicant or patentee is entitled to the benefit of the filing date of an earlier application and, if so, sufficient information to identify the earlier application.

§ 1.610 Assignment of interference to examiner-in-chief, time period for completing interference.

(a) Each interference will be declared by an examiner-in-chief who may enter all interlocutory orders in the interference, except that only a panel consisting of at least three members of the Board shall (1) hear oral argument at final hearing, (2) enter a decision under §§1.617, 1.640(c) or (e), 1.652, 1.656(i) or 1.658 or (3) enter any other order which terminates the interference.

(b) As necessary, another examiner-in-chief may act in place of the one who declared the interference. Unless otherwise provided in this section, at the discretion of the examiner-in-chief assigned to the interference, a panel consisting of two or more members of the Board may enter interlocutory orders.

(c) Unless otherwise provided in this subpart, times for taking action by a party in the interference will be set on a case-by-case basis by the examiner-in-chief assigned to the interference. Times for taking action shall be set and the examiner-in-chief shall exercise control over the interference such that the pendency of the interference before the Board does not normally exceed two years.

(d) An examiner-in-chief may hold a conference with the parties to consider: (1) Simplification of any issues, (2) the necessity or desirability of amendments to counts, (3) the possibility of obtaining admissions of fact and genuineness of documents which will avoid unnecessary proof, (4) any limitations on the number of expert witnesses, (5) the time and place for conducting a deposition (§ 1.673(g)), and (6) any other matter as may aid in the disposition of the interference. After a conference, the examiner-in-chief may enter any order which may be appropriate.

(e) The examiner-in-chief may determine a proper course of conduct in an interference for any situation not specifically covered by this part.

§ 1.611 Declaration of interference.

(a) Notice of declaration of an interference will be sent to each party.

(b) When a notice of declaration is returned to the Patent and Trademark Office undelivered, or in any other circumstance where appropriate, an examiner-in-chief may (1) send a copy of the notice to a patentee named in a patent involved in an interference or the patentee's assignee of record in the Patent and Trademark Office or (2) order publication of an appropriate notice in the *Official Gazette*.

(c) The notice of declaration shall specify:

(1) The name and residence of each party involved in the interference;

(2) The name and address of record of any attorney or agent of record in any application or patent involved in the interference;

(3) The name of any assignee of record in the Patent and Trademark Office;

(4) The identity of any application or patent involved in the interference;

(5) Where a party is accorded the benefit of the filing date of an earlier application, the identity of the earlier application;

(6) The count or counts;

(7) The claim or claims of any application or any patent which correspond to each count; and

(8) The order of the parties.

(d) The notice of declaration may also specify the time for: (1) Filing a preliminary statement as provided in § 1.621(a); (2) serving notice that a preliminary statement has been filed as provided § 1.621(b); and (3) filing preliminary motions authorized by § 1.633, oppositions to the motions, and replies to the oppositions.

(e) Notice may be given in the *Official Gazette* that an interference has been declared involving a patent.

§ 1.612 Access to applications.

(a) After an interference is declared, each party shall have access to and may obtain copies of the files of any application set out in the notice declaring the interference, except for affidavits filed under § 1.131 and any evidence and explanation under § 1.608(b) filed separate from an amendment.

(b) After preliminary motions under § 1.633 are decided (§ 1.640(b)), each party shall have access to and may obtain copies of any affidavit filed under § 1.131 and any evidence and explanation filed under § 1.608(b) in any application set out in the notice declaring the interference.

(c) Any evidence and explanation filed under § 1.608(b) in the file of any application identified in the notice declaring the interference shall be served when required by § 1.617(b).

(d) The parties at any time may agree to exchange copies of papers in the files of any application identified in the notice declaring the interference.

§ 1.613 Lead attorney, same attorney representing different parties in an interference, withdrawal of attorney or agent.

(a) Each party may be required to designate one attorney or agent of record as the lead attorney or agent.

(b) The same attorney or agent or members of the same firm of attorneys or agents may not represent two or more parties in an interference except as may be permitted under this Chapter.

(c) An examiner-in-chief may make necessary inquiry to determine whether an attorney or agent should be disqualified from representing a party in an interference. If an examiner-in-chief is of the opinion that an attorney or agent should be disqualified, the examiner-in-chief shall refer the matter to the Commissioner. The Commissioner will make a final decision as to whether any attorney or agent should be disqualified.

(d) No attorney or agent of record in an interference may withdraw as attorney or agent of record except with the approval of an examiner-in-chief and after reasonable notice to the party on whose behalf the attorney or agent has appeared. A request to withdraw as attorney or agent of record in an interference shall be made by motion (§ 1.635).

§ 1.614 Jurisdiction over interference.

(a) The Board shall assume jurisdiction over an interference when the interference is declared under § 1.611.

(b) When the interference is declared the interference is a contested case within the meaning of 35 U.S.C. 24.

(c) The examiner shall have jurisdiction over any pending application until the interference is declared. An examiner-in-chief, where appropriate, may for a limited purpose restore jurisdiction to the examiner over any application involved in the interference.

§ 1.615 Suspension of ex parte prosecution.

(a) When an interference is declared, ex parte prosecution of an application involved in the interference is suspended. Amendments and other papers related to the application received during pendency of the interference will not be entered or considered in the interference without the consent of an examiner-in-chief.

(b) *Ex parte* prosecution as to specified matters may be continued concurrently with the interference with the consent of the examiner-in-chief.

§ 1.616 Sanctions for failure to comply with rules or order.

An examiner-in-chief or the Board may impose an appropriate sanction against a party who fails to comply with the regulations of this part or any order entered by an examiner-in-chief or the Board. An appropriate sanction may include among others entry of an order:

(a) holding certain facts to have been established in the interference;

(b) precluding a party from filing a motion or a preliminary statement;

(c) precluding a party from presenting or contesting a particular issue;

(d) precluding a party from requesting, obtaining, or opposing discovery; or

(e) granting judgment in the interference.

§ 1.617 Summary judgment against applicant.

(a) An examiner-in-chief shall review any evidence filed by an applicant under § 1.608(b) to determine if the applicant is *prima facie* entitled to a judgment relative to the patentee. If the examiner-in-chief determines that the evidence shows the applicant is *prima facie* entitled to a judgment relative to the patentee, the interference shall proceed in the normal manner under the regulations of this part. If in the opinion of the examiner-in-chief the evidence fails to show that the applicant is *prima facie* entitled to a judgment relative to the patentee, the examiner-in-chief shall, concurrently with the notice declaring the interference, enter an order stating the reasons for the opinion and directing the applicant, within a time set in the

order, to show cause why summary judgment should not be entered against the applicant.

(b) The applicant any file a response to the order and state any reasons why summary judgment should not be entered. Any request by the applicant for a hearing before the Board shall be made in the response. Additional evidence shall not be presented by the applicant or considered by the Board unless the applicant shows good cause why any additional evidence was not initially presented with the evidence filed under § 1.608(b). At the time an applicant files a response, the applicant shall serve a copy of any evidence filed under § 1.608(b) and this paragraph.

(c) If a response is not timely filed by the applicant, the Board shall enter a final decision granting summary judgment against the applicant.

(d) If a response is timely filed by the applicant, all opponents may file a statement within a time set by the examiner-in-chief. The statement may set forth views as to why summary judgment should be granted against the applicant, but the statement shall be limited to discussing why all the evidence presented by the applicant does not overcome the reasons given by the examiner-in-chief for issuing the order to show cause. Evidence shall not be filed by any opponent. An opponent may not request an oral hearing.

(e) Within a time authorized by the examiner-in-chief, an applicant may file a reply to any statement filed by any opponent.

(f) When more than two parties are involved in an interference, all parties may participate in summary judgment proceedings under this section.

(g) If a response by the applicant is timely filed, the examiner-in-chief or the Board shall decide whether the evidence submitted under § 1.608(b) and any additional evidence properly submitted under paragraph (b) of this section shows that the applicant is *prima facie* entitled to a judgment relative to the patentee. If the applicant is not *prima facie* entitled to a judgment relative to the patentee, the Board shall enter a final decision granting summary judgment against the applicant. Otherwise, an interlocutory order shall be entered authorizing the interference to proceed in the normal manner under the regulations of this part.

(h) Only an applicant who filed evidence under § 1.608(b) may request a hearing. If that applicant requests a hearing, the Board may hold a hearing prior to entry of a decision under paragraph (g) of this section. The examiner-in-chief shall set a date and time for the hearing. Unless otherwise ordered by the examiner-in-chief or the Board, the applicant and any opponent will each be entitled to no more than 30 minutes of oral argument at the hearing.

§1.618 Return of unauthorized papers.

(a) The Patent and Trademark Office shall return to a party any paper presented by the party when the filing of the paper is not authorized by, or is not in compliance with the requirements of, this subpart. Any paper returned will not thereafter be considered by the Patent and Trademark Office in the interference. A party may be permitted to file a corrected paper under such conditions as may be deemed appropriate by an examiner-in-chief.

(b) When presenting a paper in an interference, a party shall not submit with the paper a copy of a paper previously filed in the interference.

§ 1.621 Preliminary statement, time for filing, notice of filing.

(a) Within the time set for filing preliminary motions under § 1.633, each party may file a preliminary statement. The preliminary statement may be signed by any individual having knowledge of the facts recited therein or an attorney or agent of record.

(b) When a party files a preliminary statement the party shall also simultaneously file and serve on all opponents in the interference a notice stating that a preliminary statement has been filed. A copy of the preliminary statement need not be served until ordered by an examiner-in-chief.

§ 1.622 Preliminary statement, who made invention, where invention made.

(a) A party's preliminary statement must identify the inventor who made the invention defined by each count and must state on behalf of the inventor the facts required by paragraph (a) of §§ 1.623, 1.624, and 1.625 as may be appropriate. When an inventor identified in the preliminary statement is not an inventor named in the party's application or patent, the party shall file a motion under § 1.634 to correct inventorship.

(b) The preliminary statement shall state whether the invention was made in the United States or abroad. If made abroad, the preliminary statement shall state whether the party is entitled to the benefit of the second sentence of 35 U.S.C. 104.

§ 1.623 Preliminary statement; invention made in United States.

(a) When the invention was made in the United States or a party is entitled to the benefit of the second sentence of 35 U.S.C. 104, the preliminary statement must state the following facts as to the invention defined by each count:

(1) The date on which the first drawing of the invention was made.

(2) The date on which the first written description of the invention was made.

(3) The date on which the invention was first disclosed by the inventor to another person.

(4) The date on which the invention was first conceived by the inventor.

(5) The date on which the invention was first actually reduced to practice. If the invention was not actually reduced to practice by or on behalf of the inventor prior to the party's filing date, the preliminary statement shall so state.

(6) The date after the inventor's conception of the invention when active exercise of reasonable diligence toward reducing the invention to practice began.

(b) If a party intends to prove derivation, the preliminary statement must also comply with § 1.625.

(c) When a party alleges under paragraph (a)(1) of this section that a drawing was made, a copy of the first drawing shall be filed with and identified in the preliminary statement. When a party alleges under paragraph (a)(2) of this section that a written description of the invention was made, a copy of the first written description shall be filed with and identified in the preliminary statement. See § 1.628(b) when a copy of the first drawing or written description cannot be filed with the preliminary statement.

§ 1.624 Preliminary statement; invention made abroad.

(a) When the invention was made abroad and a party intends to rely on introduction of the invention into the United States, the preliminary statement must state the following facts as to the invention defined by each count;

(1) The date on which a drawing of the invention was first introduced into the United States.

(2) The date on which a written description of the invention was first introduced into the United States.

(3) The date on which the invention was first disclosed to another person in the United States.

(4) The date on which the inventor's conception of the invention was first introduced into the United States.

(5) The date on which an actual reduction to practice of the invention was first introduced into the United States. If an actual reduction to practice of the invention was not introduced into the United States, the preliminary statement shall so state.

(6) The date after introduction of the inventor's conception into the United

States when active exercise of reasonable diligence in the United States toward reducing the invention to practice began.

(b) If a party intends to prove derivation, the preliminary statement must also comply with § 1.625.

(c) When a party alleges under paragraph (a)(1) of this section that a drawing was introduced into the United States a copy of that drawing shall be filed with and identified in the preliminary statement. When a party alleges under paragraph (a)(2) of this section that a written description of the invention was introduced into the United States a copy of that written description shall be filed with and identified in the preliminary statement. See § 1.628(b) when a copy of the first drawing or first written description introduced in the United States cannot be filed with the preliminary statement.

§ 1.625 Preliminary statement; derivation by an opponent.

(a) When the invention was made in the United States or abroad and a party intends to prove derivation by an opponent from the party, the preliminary statement must state the following as to the invention defined by each count:

(1) The name of the opponent.

(2) The date on which the first drawing of the invention was made.

(3) The date on which the first written description of the invention was made.

(4) The date on which the invention was first disclosed by the inventor to another person.

(5) The date on which the invention was first conceived by the inventor.

(6) The date on which the invention was first communicated to the opponent.

(b) If a party intends to prove priority, the preliminary statement must also comply with § 1.623 or § 1.624.

(c) When a party alleges under paragraph (a)(2) of this section that a drawing was made, a copy of the first drawing shall be filed with and identified in the preliminary statement. When a party alleges under paragraph (a)(3) of this section that a written description of the invention was made, a copy of the first written description shall be filed with and identified in the preliminary statement. See § 1.628(b) when a first drawing or first written description cannot be filed with the preliminary statement.

§ 1.626 Preliminary statement; earlier application.

When a party does not intend to present evidence to prove a conception or an actual reduction to practice and the party intends to rely solely on the filing date of an earlier application filed in the United States or abroad to prove a constructive reduction to practice, the preliminary statement may so state and identify the earlier application with particularity.

§ 1.627 Preliminary statement, sealing before filing, opening of statement.

(a) The preliminary statement and copies of any drawing or written description shall be filed in a sealed envelope bearing only the name of the party filing the statement and the style (e.g., Jones v. Smith) and number of the interference. The sealed envelope should contain only the preliminary statement and copies of any drawing or written description. If the preliminary statement is filed through the mail, the sealed envelope should be enclosed in an outer envelope addressed to the Commission of Patents and Trademarks in accordance with § 1.1(e).

(b) A preliminary statement may be opened only at the direction of an examiner-in-chief.

§ 1.628 Preliminary statement, correction of error.

(a) A material error arising through inadvertence or mistake in connection with (1) a preliminary statement or (2) drawings or a written description submitted therewith or omitted therefrom, may be corrected by a motion (§ 1.635) for leave to file a corrected statement. The motion shall be supported by an affidavit and shall show that the correction is essential to the ends of justice and shall be accompanied by the corrected statement. The motion shall be filed as soon as practical after discovery of the error.

(b) When a party cannot attach a copy of a drawing or a written description to the party's preliminary statement as required by § 1.623(c), 1.624(c), or 1.625(c), the party (1) shall show good cause and explain in the preliminary statement why a copy of the drawing or written description cannot be attached to the preliminary statement and (2) shall attach to the preliminary statement the earliest drawing or written description made in or introduced into the United States which is available. The party shall file a motion (§ 1.635) to amend its preliminary statement promptly after the first drawing, first written description, or drawing or written description first introduced into the United States becomes available. A copy of the drawing or written description may be obtained, where appropriate, by a motion (§ 1.635) for additional discovery under §1.687 or during a testimony period.

§ 1.629 Effect of preliminary statement.

(a) A party shall be strictly held to any date alleged in the preliminary statement. Doubts as to (1) definiteness or sufficiency of any allegation in a preliminary statement or (2) compliance with formal requirements will be resolved against the party filing the statement by restricting the party to the earlier of its filing date or effective filing date or to the latest date of a period alleged in the preliminary statement as may be appropriate. A party may not correct a preliminary statement except as provided by § 1.628.

(b) Evidence which shows that an act alleged in the preliminary statement occurred prior to the date alleged in the statement shall establish only that the act occurred as early as the date alleged in the statement.

(c) If a party does not file a preliminary statement, the party:

(1) Shall be restricted to the earlier of the party's filing date or effective filing date and

(2) Will not be permitted to prove that:

(i) The party made the invention prior to the party's filing date or

(ii) Any opponent derived the invention from the party.

(d) If a party files a preliminary statement which contains an allegation of a date of first drawing or first written description and the party does not file a copy of the first drawing or written description with the preliminary statement as required by § 1.623(c), § 1.624(c), or § 1.625(c), the party will be restricted to the earlier of the party's filing date or effective filing date as to that allegation unless the party complies with § 1.628(b). The content of any drawing or written description submitted with a preliminary statement will not normally be evaluated or considered by the Board.

(e) A preliminary statement shall not be used as evidence on behalf of the party filing the statement.

§ 1.630 Reliance on earlier application.

A party shall not be entitled to rely on the filing date of an earlier application filed in the United States or abroad unless (a) the earlier application is identified (§ 1.611(c)(5)) in the notice declaring the interference or (b) the party files a preliminary motion under § 1.633 seeking the benefit of the filing date of the earlier application.

§ 1.631 Access to preliminary statement, service of preliminary statement.

(a) Unless otherwise ordered by an examiner-in-chief, concurrently with entry of a decision by the examiner-in-chief on preliminary motions filed under

§ 1.633, any preliminary statement filed under § 1.621(a) shall be opened to inspection by the senior party and any junior party who filed a preliminary statement. Within a time set by the examiner-in-chief, a party shall serve copies of its preliminary statement on every opponent who served a notice under § 1.621(b).

(b) A junior party who does not file a preliminary statement shall not have access to the preliminary statement of any other party.

(c) If an interference is terminated before the preliminary statements have been opened, the preliminary statements will remain sealed and will be returned to the respective parties who submitted the statements.

§ 1.632 Notice of intent to argue abandonment, suppression or concealment by opponent.

A notice shall be filed by a party who intends to argue that an opponent has abandoned, suppressed or concealed an actual reduction to practice (35 U.S.C. 102(g)). A party will not be permitted to argue abandonment, suppression, or concealment by an opponent unless the notice is timely filed. Unless authorized otherwise by an examiner-in-chief, a notice is timely when filed within ten (10) days of the close of the testimony-in-chief of the opponent.

§ 1.633 Preliminary Motions.

A party may file the following preliminary motions:

(a) A motion for judgment on the ground that an opponent's claim corresponding to a count is not patentable to the opponent. In determining a motion filed under this paragraph, a claim may be construed by reference to the prior art of record. A motion under this paragraph shall not be based on: (1) Priority of invention of the subject matter of a count by the moving party as against any opponent or (2) derivation of the subject matter of a count by an opponent from the moving party. See § 1.637(a).

(b) A motion for judgment on the ground that there is no interference-in-fact. A motion under this paragraph is proper only if: (1) The interference involves a design application or patent or a plant application or patent or (2) no claim of a party which corresponds to a count is identical to any claim of an opponent which corresponds to that count. See § 1.637(a).

(c) A motion to redefine the interfering subject matter by (1) adding or substituting a count, (2) amending an application claim corresponding to a count or adding a claim in the moving party's application to be designated to correspond to a count, (3) designating an application or patent claim to correspond to a count, (4) designating an application or patent claim as not corresponding to a count, or (5) requiring an opponent who is an applicant to add a claim and to designate the claim to correspond to a count. See § 1.637 (a) and (c).

(d) A motion to substitute a different application owned by a party for an application involved in the interference. See § 1.637 (a) and (d).

(e) A motion to declare an additional interference (1) between an additional application not involved in the interference and owned by a party and an opponent's application or patent involved in the interference or (2) when an interference involves three or more parties, between less than all applications and any patent involved in the interference. See § 1.637 (a) and (e).

(f) A motion to be accorded the benefit of the filing date of an earlier application filed in the United States or abroad. See § 1.637 (a) and (f).

(g) A motion to attack the benefit accorded an opponent in the notice declaring the interference of the filing date of an earlier application filed in the United States or abroad. See § 1.637 (a) and (g).

(h) When a patent is involved in an interference and the patentee has on file or files an application for reissue under § 1.171, a motion to add the application for reissue to the interference. See § 1.637 (a) and (h).

(i) When a motion is filed under paragraph (a), (b), or (g) of this section, an opponent, in addition to opposing the motion, may file a motion to redefine the interfering subject matter under paragraph (c) of this section or a motion to substitute a different application under paragraph (d) of this section.

(j) When a motion is filed under paragraph (c)(1) of this section an opponent, in addition to opposing the motion, may file a motion for benefit under paragraph (f) of this section as to the count to be added or substituted.

§ 1.634 Motion to correct inventorship.

A party may file a motion to (a) amend its application involved in an interference to correct inventorship as provided by § 1.48 or (b) correct inventorship of its patent involved in an interference as provided in § 1.324. See § 1.637(a).

§ 1.635 Miscellaneous motions.

A party seeking entry of an order relating to any matter other than a matter which may be raised under §§ 1.633 or 1.634 may file a motion requesting entry of the order. See § 1.637 (a) and (b).

§ 1.636 Motions, time for filing.

(a) A preliminary motion under § 1.633 (a) through (h) shall be filed within a time period set by an examiner-in-chief.

(b) A preliminary motion under § 1.633 (i) or (j) shall be filed within 20 days of the service of the preliminary motion under § 1.633 (a), (b), or (g) unless otherwise ordered by an examiner-in-chief.

(c) A motion under § 1.634 shall be diligently filed after an error is discovered in the inventorship of an application or patent involved in an interference unless otherwise ordered by an examiner-in-chief.

(d) A motion under § 1.635 shall be filed as specified in this subpart or when appropriate unless otherwise ordered by an examiner-in-chief.

§ 1.637 Content of motions.

(a) Every motion shall include (1) a statement of the precise relief requested, (2) a statement of the material facts in support of the motion, and (3) a full statement of the reasons why the relief requested should be granted.

(b) A motion under § 1.635 shall contain a certificate by the moving party stating that the moving party has conferred with all opposing parties in an effort in good faith to resolve by agreement the issues raised by the motion. A moving party shall indicate in the motion whether any other party plans to oppose the motion. The provisions of this paragraph do not apply to a motion to suppress evidence (§ 1.656(h)).

(c) A preliminary motion under § 1.633(c) shall explain why the interfering subject matter should be redefined.

(1) A preliminary motion seeking to add or substitute a count shall:

(i) Propose each count to be added or substituted.

(ii) When the moving party is an applicant, show the patentability to the applicant of all claims in, or proposed to be added to, the party's application which correspond to each proposed count and apply the terms of the claims to the disclosure of the party's application; when necessary a moving party applicant shall file with the motion an amendment adding any proposed claim to the application.

(iii) Identify all claims in an opponent's application which should be designated to correspond to each proposed count; if an opponent's application does not contain such a claim, the moving party shall propose a

claim to be added to the opponent's application. The moving party shall show the patentability of any proposed claims to the opponent and apply the terms of the claims to the disclosure of the opponent's application.

(iv) Designate the claims of any patent involved in the interference which define the same patentable invention as each proposed count.

(v) Show that each proposed count defines a separate patentable invention from every other count in the interference.

(vi) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of any earlier application filed in the United States or abroad.

(2) A preliminary motion seeking to amend an application claim corresponding to a count or adding a claim to be designated to correspond to a count shall:

(i) Propose an amended or added claim.

(ii) Show that the proposed or added claim defines the same patentable invention as the count.

(iii) Show the patentability to the applicant of each amended or added claim and apply the terms of the amended or added claim to the disclosure of the application; when necessary a moving party applicant shall file with the motion an amendment making the amended or added claim to the application.

(iv) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of any earlier application filed in the United States or abroad.

(3) A preliminary motion seeking to designate an application or patent claim to correspond to a count shall:

(i) Identify the claim and the count.

(ii) Show the claim defines the same patentable invention as the count.

(iii) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of any earlier application filed in the United States or abroad.

(4) A preliminary motion seeking to designate an application or patent claim as not corresponding to a count shall:

(i) Identify the claim and the count.

(ii) Show the claim does not define the same patentable invention as any other claim designated in the notice declaring the interference as corresponding to the count.

(5) A preliminary motion seeking to require an opponent who is an applicant to add a claim and designate the claim as corresponding to a count shall:

(i) Propose a claim to be added by the opponent.

(ii) Show the patentability to the opponent of the claim and apply the terms of the claim to the disclosure of the opponent's application.

(iii) Identify the count to which the claim shall be designated to correspond.

(iv) Show the claim defines the same patentable invention as the count to which it will be designated to correspond.

(d) A preliminary motion under § 1.633(d) to substitute a different application shall:

(1) Identify the different application.

(2) Certify that a complete copy of the file of the different application, except for documents filed under § 1.131 or § 1.608(b), has been served on all opponents.

(3) Show the patentability to the applicant of all claims in, or proposed to be added to, the different application which correspond to each count and apply the terms of the claims to the disclosure of the different application; when necessary the applicant shall file with the motion an amendment adding a claim to the different application.

(4) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of an earlier application filed in the United States or abroad.

(e) A preliminary motion to declare an additional interference under § 1.633(e) shall explain why an additional interference is necessary.

(1) When the preliminary motion seeks an additional interference under § 1.633(e)(1), the motion shall:

(i) Identify the additional application.

(ii) Certify that a complete copy of the file of the additional application, except for documents filed under §§ 1.131 or 1.608(b), has been served on all opponents.

(iii) Propose a count for the additional interference.

(iv) Show the patentability to the applicant of all claims in, or proposed to be added to, the additional application which correspond to each proposed count for the additional interference and apply the terms of the claims to the disclosure of the additional application; when necessary the applicant shall file with the motion an amendment adding a claim to the additional application.

(v) When the opponent is an applicant, show the patentability to the opponent of any claims in, or proposed to be added to, the opponent's application which correspond to the proposed count and apply the terms of the claims to the disclosure of the opponent's application.

(vi) When the opponent is a patentee, designate the claims of the patent which define the same patentable invention defined by the proposed count.

(vii) Show that each proposed count for the additional interference defines a separate patentable invention from all counts of the interference in which the motion is filed.

(viii) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of an earlier application filed in the United States or abroad.

(2) When the preliminary motion seeks an additional interference under § 1.633(e)(2), the motion shall:

(i) Identify any application or patent to be involved in the additional interference.

(ii) Propose a count for the additional interference.

(iii) When the moving party's is an applicant, show the patentability to the applicant of all claims in, or proposed to be added to, the party's application which correspond to each proposed count and apply the terms of the claims to the disclosure of the party's application; when necessary a moving party applicant shall file with the motion an amendment adding any proposed claim to the application.

(iv) Identify all claims in any opponent's application which should be designated to correspond to each proposed count; if an opponent's application does not contain such a claim, the moving party shall propose a claim to be added to the opponent's application. The moving party shall show the patentability of any proposed claims to the opponent and apply the terms of the claims to the disclosure of the opponent's application.

(v) Designate the claims of any patent involved in the interference which define the same patentable invention as each proposed count.

(vi) Show that each proposed count for the additional interference defines a separate patentable invention from all counts in the interference in which the motion is filed.

(vii) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of an earlier application filed in the United States or abroad.

(f) A preliminary motion for benefit under § 1.633(f) shall:

(1) Identify the earlier application.

(2) When the earlier application is an application filed in the United States, certify that a complete copy of the file of the earlier application, except for documents filed under § 1.131 or § 1.608(b), has been served on all opponents. When the earlier application is an application filed abroad, certify that a copy of the application filed abroad has been served on all opponents. If the earlier application filed abroad is not in English, the requirements of § 1.647 must also be met.

(3) Show that the earlier application constitutes a constructive reduction to practice of each count.

(g) A preliminary motion to attack benefit under § 1.633(g) shall explain, as to each count, why an opponent should not be accorded the benefit of the filing date of the earlier application.

(h) A preliminary motion to add an application for reissue under § 1.633(h) shall:

(1) Identify the application for reissue.

(2) Certify that a complete copy of the file of the application for reissue has been served on all opponents.

(3) Show the patentability of all claims in, or proposed to be added to, the application for reissue which correspond to each count and apply the terms of the claims to the disclosure of the application for reissue; when necessary a moving applicant for reissue shall file with the motion an amendment adding a claim to the application for reissue.

(4) Be accompanied by a motion under § 1.633(f) requesting the benefit of the filing date of an earlier application filed in the United States or abroad.

§ 1.638 Opposition and reply, time for filing opposition and reply.

(a) Unless otherwise ordered by an examiner-in-chief, any opposition to any motion shall be filed within 20 days after service of the motion. An opposition shall (1) identify any material fact set forth in the motion which is in dispute and (2) include an argument why the relief requested in the motion should be denied.

(b) Unless otherwise ordered by an examiner-in-chief, a reply shall be filed within 15 days after service of the opposition. A reply shall be directed only to new points raised in the opposition.

§ 1.639 Evidence in support of motion, opposition, or reply.

(a) Proof of any material fact alleged in a motion, opposition, or reply must be filed and served with the motion, oppposition, or reply unless the proof relied upon is part of the interference file or the file of any patent or application involved in the interference or any earlier application filed in the United States of which a party has been accorded or seeks to be accorded benefit.

(b) Proof may be in the form of patents, printed publications, and affidavits.

(c) When a party believes that testimony is necessary to support or oppose a preliminary motion under § 1.633 or a motion to correct inventorship under § 1.634, the party shall describe the nature of the testimony needed. If the examiner-in-chief finds that testimony is needed to decide the motion, the examiner-in-chief may grant appropriate interlocutory relief and enter an order authorizing the taking of testimony and deferring a decision on the motion to final hearing.

§ 1.640 Motions, hearing and decision, redeclaration of interference, order to show cause.

(a) A hearing on a motion may be held in the discretion of the examiner-in-chief. The examiner-in-chief shall set the date and time for any hearing. The length of oral argument at a hearing on a motion is a matter within the discretion of the examiner-in-chief. An examiner-in-chief may direct that a hearing take place by telephone.

(b) Motions will be decided by an examiner-in-chief. An examiner-in-chief may consult with an examiner in deciding motions involving a question of patentability. An examiner-in-chief may grant or deny any motion or take such other action which will secure the just, speedy, and inexpensive determination of the interference.

(1) When preliminary motions under § 1.633 are decided, the examiner-in-chief will, when necessary, set a time for filing any amendment to an application involved in the interference and for filing a supplemental preliminary statement as to any new counts involved in the interference. Failure or refusal of a party to timely present an amendment required by an examiner-in-chief shall be taken without further action as a disclaimer by that party of the invention involved. A supplemental preliminary statement shall meet the requirements specified in §§ 1.623, 1.624, 1.625, or 1.626, but need not be filed if a party states that it intends to rely on a preliminary statement previously filed under § 1.621(a). After the time expires for filing any amendment and supplemental preliminary statement, the examiner-in-chief will, if necessary, redeclare the interference.

(2) After a decision is entered or preliminary motions filed under § 1.633, a further motion under § 1.633 will not be considered except as provided by § 1.655(b).

(c) When a decision on any motion under §§ 1.633, 1.634, or 1.635 is entered which does not result in the issuance of an order to show cause under paragraph (d) of this section, a party may file a request for reconsideration within 14 days after the date of the decision. The filing of a request for reconsideration will not stay any time period set by the decision. The request for reconsideration shall specify with particularity the points believed to have been misapprehended or overlooked in rendering the decision. No opposition to a request for reconsideration shall be filed unless requested by an examiner-in-chief or the Board. A decision of single examiner-in-chief will not ordinarily be modified unless an opposition has been requested by an examiner-in-chief or the Board. The request for reconsideration shall be acted on by a panel of the Board consisting of at least three examiners-in-chief, one of whom will normally be the examiner-in-chief who decided the motion.

(d) An examiner-in-chief may issue an order to show cause why judgment should not be entered against a party when:

(1) A decision on a motion is entered which is dispositive of the interference against the party as to all counts;

(2) The party is a junior party who fails to file a preliminary statement; or

(3) The party is a junior party whose preliminary statement fails to overcome the earlier of the filing date or effective filing date of another party.

(e) When an order to show cause is issued under paragraph (d) of this section, the Board shall enter a judgment in accordance with the order unless, within 20 days after the date of the order, the party against whom the order issued filed a paper which shows good cause why judgment should not be entered in accordance with the order. Any other party may file a response to the paper within 20 days of the date of service of the paper. If the party against whom the order was issued fails to show good cause, the Board shall enter judgment against the party. If a party wishes to take testimony in response to an order to show cause, the party's response should be accompanied by a motion (§ 1.635) requesting the testimony period. See § 1.651(c)(4).

§ 1.641 Unpatentability discovered by examiner-in-chief.

During the pendency of an interference, if the examiner-in-chief becomes aware of a reason why a claim corresponding to a count may not be patentable, the examiner-in-chief may notify the parties of the reason and set a time within which each party may present its views. After considering any timely filed views, the examiner-in-chief shall decide how the interference shall proceed.

§ 1.642 Addition of application or patent to interference.

During the pendency of an interference, if the examiner-in-chief

becomes aware of an application or a patent not involved in the interference which claims the same patentable invention as a count in the interference, the examiner-in-chief may add the application or patent to the interference on such terms as may be fair to all parties.

§ 1.643 Prosecution of interference by assignee.

(a) An assignee of record in the Patent and Trademark Office of the entire interest in an application or patent involved in an interference is entitled to conduct prosecution of the interference to the exclusion of the inventor.

(b) An assignee of a part interest in an application or patent involved in a interference may file a motion (§ 1.635) for entry of an order authorizing it to prosecute the interference. The motion shall show (1) the inability or refusal of the inventor to prosecute the interference or (2) other cause why the ends of justice require that the assignee of a part interest be permitted to prosecute the interference. The examiner-in-chief may allow the assignee of a part interest to prosecute the interference upon such terms as may be appropriate.

§ 1.644 Petitions in interferences.

(a) There is no appeal to the Commissioner in an interference from a decision of an examiner-in-chief or a panel consisting of more than one examiner-in-chief. The Commissioner will not consider a petition in an interference unless:

(1) The petition is from a decision of an examiner-in-chief or a panel and the examiner-in-chief or the panel shall be of the opinion (i) that the decision involves a controlling question of procedure or an interpretation of a rule as to which there is a substantial ground for a difference of opinion and (ii) that an immediate decision on petition by the Commissioner may materially advance the ultimate termination of the interference;

(2) The petition seeks to invoke the supervisory authority of the Commissioner and is not filed prior to the decision of the Board awarding judgment and does not relate to (i) the merits of priority of invention or patentability or (ii) the admissibility of evidence under the Federal Rules of Evidence; or

(3) The petition seeks relief under § 1.183.

(b) A petition under paragraph (a)(1) of this section filed more than 15 days after the date of the decision of the examiner-in-chief or the panel may be dismissed as untimely. A petition under paragraph (a)(2) of this section shall not be filed prior to decision by the Board awarding judgment. Any petition under paragraph (a)(3) of this section shall be timely if it is made as part of, or simultaneously with, a proper motion under §§ 1.633, 1.634, or 1.635. Any opposition to a petition shall be filed within 15 days of the date of service of the petition.

(c) The filing of a petition shall not stay the proceeding unless a stay is granted in the discretion of the examiner-in-chief, the panel, or the Commissioner.

(d) Any petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda, if any, in support of the petition or opposition shall accompany or be embodied therein. The petition will be decided on the basis of the record made before the examiner-in-chief or the panel and no new evidence will be considered by the Commissioner in deciding the petition. Copies of documents already of record in the interference shall not be submitted with the petition or opposition.

(e) Any petition under paragraph (a) of this section shall be accompanied by the petition fee set forth in § 1.17(h).

(f) Any request for reconsideration of a decision by the Commissioner shall be filed within 15 days of the decision of the Commissioner and must be accompanied by the fee set forth in § 1.17(h). No opposition to a request for reconsideration shall be filed unless requested by the Commissioner. The decision will not ordinarily be modified unless such an opposition has been requested by the Commissioner.

(g) Where reasonably possible, service of any petition, opposition, or request for reconsideration shall be such that delivery is accomplished within one working day. Service by hand or "Express Mail" complies with this paragraph.

(h) An oral hearing on the petition will not be granted except when considered necessary by the Commissioner.

(i) The Commissioner may delegate to appropriate Patent and Trademark Offfice employees the determination of petition under this section.

§ 1.645 Extension of time, late papers, stay of proceedings.

(a) A party may file a motion (§ 1.635) seeking an extension of time to take action in an interference, to file a notice of appeal (§§ 1.302, 1.304), or to commence a civil action (§§ 1.303, 1.304). The motion shall be filed within sufficient time to actually reach the examiner-in-chief before expiration of the time for taking action, filing the notice, or commencing the civil action. A moving party should not assume that the motion will be granted even if there is no objection by any other party. The motion will be denied unless the moving party shows good cause why an extension should be granted. The press of other business arising after an examiner-in-chief sets a time for taking action will not normally constitute good cause. A motion seeking additional time to take testimony because a party has not been able to procure the testimony of a witness shall set forth the name of the witness, any steps taken to procure the testimony of the witness, the dates on which the steps were taken, and the facts expected to be proved through the witness.

(b) Any paper belatedly filed will not be considered except upon motion (§1.635) which shows sufficient cause why the paper was not timely filed.

(c) The provisions of § 1.136 do not apply to time periods in interferences.

(d) In an appropriate circumstance, an examiner-in-chief may stay proceedings in an interference.

§ 1.646 Service of papers, proof of service.

(a) A copy of evey paper filed in the Patent and Trademark Office in an interference or an application or patent involved in the interference shall be served upon all other parties except:

(1) Preliminary statements when filed under § 1.621; preliminary statements shall be served when service is ordered by an examiner-in-chief.

(2) Certified transcripts and exhibits which accompany the transcripts filed under §§ 1.676 or 1.684; copies of transcripts shall be served as part of a party's record under § 1.653(c).

(b) Service shall be on an attorney or agent for a party. If there is no attorney or agent for the party, service shall be on the party. An examiner-in-chief may order additional service or waive service where appropriate.

(c) Unless otherwise ordered by an examiner-in-chief, or except as otherwise provided by this part, service of a paper shall be made as follows:

(1) By handing a copy of the paper to the person served.

(2) By leaving a copy of the paper with someone employed by the person at the person's usual place of business.

(3) When the person served has no usual place of business, by leaving a copy of the paper at the person's residence with someone of suitable age and discretion then residing therein.

(4) By mailing a copy of the paper by first class mail; when service is by mail

the date of mailing is regarded as the date of service.

(5) When it is shown to the satisfaction of an examiner-in-chief that none of the above methods of obtaining or serving the copy of the paper was successful, the examiner-in-chief may order service by publication of an appropriate notice in the *Official Gazette*.

(d) An examiner-in-chief may order that a paper be served by hand or "Express Mail".

(e) Proof of service must be made before a paper will be considered in an interference. Proof of service may appear on or be affixed to the paper. Proof of service shall include the date and manner of service. In the case of personal service under paragraphs (c)(1) through (c)(3) of this section, proof of service shall include the names of any person served and the person who made the service. Proof of service may be made by an acknowledgment of service by or on behalf of the person served or a statement signed by the party or the party's attorney or agent containing the information required by this section. A statement of an attorney or agent attached to, or appearing in, the paper stating the date and manner of service will be accepted as *prima facie* proof of service.

§ 1.647 Translation of document in foreign language.

When a party relies on a document in a language other than English, a translation of the document into English and an affidavit attesting to the accuracy of the translation shall be filed with the document.

§ 1.651 Setting times for discovery and taking testimony, parties entitled to take testimony.

(a) At an appropriate stage in an interference, an examiner-in-chief shall set (1) a time for filing motions (§ 1.635) for additional discovery under § 1.687(c) and (2) testimony periods for taking any necessary testimony.

(b) Where appropriate, testimony periods will be set to permit a party to:

(1) Present its case-in-chief and/or case-in-rebuttal and/or

(2) Cross-examine an opponent's case-in-chief and/or a case-in-rebuttal.

(c) A party is not entitled to take testimony to present a case-in-chief unless:

(1) The examiner-in-chief orders the taking of testimony under § 1.639(c);

(2) The party alleges in its preliminary statement a date of invention prior to the ealier of the filing date or effective filing date of the senior party;

(3) A testimony period has been set to permit an opponent to prove a date of invention prior to the earlier of the filing date or effective filing date of the party and the party has filed a preliminary statement alleging a date of invention prior to that date; or

(4) A motion (§ 1.635) is filed showing good cause why a testimony period should be set.

(d) Testimony shall be taken during the testimony periods set under paragraph (a) of this section.

§ 1.652 Judgment for failure to take testimony or file record.

If a junior party fails to timely take testimony authorized under § 1.651, or file a record under § 1.653(c), an examiner-in-chief, with or without a motion (§ 1.635) by another party, may issue an order to show cause why judgment should not be entered against the junior party. When an order is issued under this section, the Board shall enter judgment in accordance with the order unless, within 15 days after the date of the order, the junior party files a paper which shows good cause why judgment should not be entered in accordance with the order. Any other party may file a response to the paper within 15 days of the date of service of the paper. If the party against whom the order was issued fails to show good cause, the Board shall enter judgment against the party.

§ 1.653 Record and exhibits.

(a) Testimony shall consist of affidavits under § 1.672 (b) and (e), transcripts of depositions under §§ 1.672 (b) and (c), agreed statements of fact under § 1.672(f), and transcripts of interrogatories, cross-interrogatories, and recorded answers under § 1.684(c).

(b) An affidavit shall be filed as set forth in § 1.672 (b) or (e). A certified transcript of a deposition including a deposition cross-examining an affiant, shall be filed as set forth in § 1.676. An original agreed statement shall be filed as set forth in § 1.672(f). A transcript of interrogatories, cross-interrogatories, and recorded answers shall be filed as set forth under § 1.684(c).

(c) In addition to the items specified in paragraph (b) of this section and within a time set by an examiner-in-chief each party shall file three copies and serve one copy of a record consisting of:

(1) An index of the names of each witness giving the pages of the record where the direct testimony and cross-examination of each witness begins.

(2) An index of exhibits briefly describing the nature of each exhibit and giving the page of the record where each exhibit is first identified and offered into evidence.

(3) The count or counts.

(4) Each (i) affidavit, (ii) transcript, including transcripts of cross-examination of any affiant, (iii) agreed statement relied upon by the party, and (iv) transcript of interrogatories, cross-interrogatories, and recorded answers filed under paragraph (b) of this section.

(5) Each notice, official record, and publication relied upon by the party an filed under § 1.682(a).

(6) Any evidence from another interference, proceeding, or action relied upon by the party under § 1.683.

(7) Each request for an admission and the admission and each written interrogatory and the answer upon which a party intends to rely under § 1.688.

(d) The pages of the record shall be consecutively numbered.

(e) The name of each witness shall appear at the top of each page of each affidavit or transcript.

(f) The record may be typewritten or printed.

(g) When the record is printed, it may be produced by standard typographical printing or by any process capable of producing a clear black permanent image. All printed matter except on covers must appear in at least 11 point type on opaque, unglazed paper. Margins must be justified. Footnotes may not be printed in type smaller than 9 point. The pages size shall be 8½ by 11 inches (21.8 by 27.9 cm.) with type matter 6½ by 9½ inches (16.5 by 24.1 cm.). The record shall be found to lie flat when open.

(h) When the record is typewritten, it must be clearly legible on opaque, unglazed, durable paper approximately 8½ by 11 inches (21.8 by 27.9 cm.) in size (letter size). Typing shall be double-spaced on one side of the paper in not smaller than pica-type with a margin of 1½ (3.8 cm.) on the left-hand side of the page. The pages of the record shall be bound with covers at their left edges in such manner to lie flat when open in one or more volumes of convenient size (approximately 100 pages per volume is suggested). Multigraphed or otherwise reproduced copies conforming to the standards specified in this paragraph may be accepted.

(i) Each party shall file its exhibits with the record specified in paragraph (c) of this section. One copy of each documentary exhibit shall be served. Documentary exhibits shall be filed in an envelope or folder and shall not be bound as part of the record. Physical exhibits, if not filed by an officer under § 1.676(d), shall be filed with the record.

Each exhibit shall contain a label which identifies the party submitting the exhibit and an exhibit number, the style of the interference (e.g., Jones v. Smith), and the interference number. Where possible, the label should appear at the bottom right-hand corner of each documentary exhibit. Upon termination of an interference, an examiner-in-chief may return and exhibit to the party filing the exhibit. When any exhibit is returned, the examiner-in-chief shall enter an appropriate order indicating that the exhibit has been returned.

(j) Any testimony, record, or exhibit which does not comply with this section may be returned under § 1.618(a).

§ 1.654 Final hearing.

(a) At an appropriate stage of the interference, the parties will be given an opportunity to appear before the Board to present oral argument at a final hearing. An examiner-in-chief shall set a date and time for final hearing. Unless otherwise ordered by an examiner-in-chief or the Board, each party will be entitled to no more than 60 minutes of oral argument at final hearing.

(b) The opening argument of a junior party shall include a fair statement of the junior party's case and the junior party's position with respect to the case presented on behalf of any other party. A junior party may reserve a portion of its time for rebuttal.

(c) A party shall not be entitled to argue that an opponent abandoned, suppressed, or concealed an actual reduction to practice unless a notice under §1.632 was timely filed.

(d) After final hearing, the interference shall be taken under advisement by the Board. No further paper shall be filed except under § 1.658(b) or as authorized by an examiner-in-chief or the Board. No additional oral argument shall be had unless ordered by the Board.

§ 1.655 Matters considered in rendering a final decision.

(a) In rendering a final decision, the Board may consider any properly raised issue including (1) priority of invention, (2) derivation by an opponent from a party who filed a preliminary statement under §1.625, (3) patentability of the invention, (4) admissibility of evidence, (5) any interlocutory matter deferred to final hearing, and (6) any other matter necessary to resolve the interference. The Board may also consider whether any interlocutory order was manifestly erroneous or an abuse of discretion. All interlocutory orders shall be presumed to have been correct and the burden of showing manifest error or an abuse of discretion shall be on the party attacking the order.

(b) A party shall not be entitled to raise for consideration at final hearing a matter which properly could have been raised by a motion under §§ 1.633 or 1.634 unless (1) the motion was properly filed, (2) the matter was properly raised by a party in an opposition to a motion under §§1.633 or 1.634 and the motion was granted over the opposition, or (3) the party shows good cause why the issue was not timely raised by motion or opposition.

(c) To prevent manifest injustice, the Board may consider an issue even though it would not otherwise be entitled to consideration under this section.

§ 1.656 Briefs for final hearing.

(a) Each party shall be entitled to file briefs for final hearing. The examiner-in-chief shall determine the briefs needed and shall set the time and order for filing briefs.

(b) The opening brief of a junior party shall contain under appropriate headings and in the order indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for decision in the interference.

(3) A statement of the facts relevant to the issues presented for decision with appropriate references to the record.

(4) An argument, which may be preceded by a summary, which shall contain the contentions of the party with respect to the issues to be decided, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.

(5) A short conclusion stating the precise relief requested.

(6) An appendix containing a copy of the counts.

(c) The opening brief of the senior party shall conform to the requirements of paragraph (b) of this section except:

(1) a statement of the issues and of the facts need not be made unless the party is dissatisfied with the statement in the opening brief of the junior party and

(2) an appendix containing a copy of the counts need not be included if the copy of the counts in the opening brief of the junior party is correct.

(d) Briefs may be printed or typewritten. If typewritten, legal-size paper may be used. The opening brief of each party in excess of 50 legal-size double-spaced typewritten pages or any other brief in excess of 25 legal-size double-spaced typewritten pages shall be printed unless a satisfactory reason be given why the brief should not be printed. Any printed brief shall comply with the requirements of § 1.653(g). Any typewritten brief shall comply with the requirements of § 1.653(h), except legal-size paper may be used and the binding and covers specified are not required.

(e) An original and three copies of each brief must be filed.

(f) Any brief which does not comply with the requirements of this section may be returned under § 1.618(a).

(g) Any party, separate from its opening brief, but filed concurrently therewith, may file an original and three copies of concise proposed findings of fact and conclusions of law. Any proposed findings of fact shall be supported by specific references to the record. Any proposed conclusions of law shall be supported by citation of cases, statutes, or other authority. Any opposing party, separate from its opening or reply brief, but filed concurrently therewith, may file a paper accepting or objecting to any proposed findings of fact or conclusions of law; when objecting, a reason must be given. The Board may adopt the proposed findings of fact and conclusions of law in whole or in part.

(h) If a party wants the Board in rendering its final decision to rule on the admissibility of any evidence, the party shall file with its opening brief an original and three copies of a motion (§ 1.635) to suppress the evidence. The provisions of § 1.637(b) do not apply to a motion to suppress under this paragraph. Any objection previously made to the admissibility of an opponent's evidence is waived unless the motion required by this paragraph is filed. An original and three copies of an opposition to the motion may be filed with an opponent's opening brief or reply brief as may be appropriate.

(i) When a junior party fails to timely file an opening brief, an order may issue requiring the junior party to show cause why the Board should not treat failure to file the brief as a concession of priority. If the junior party fails to respond within a time period set in the order, judgment may be entered against the junior party.

§ 1.657 Burden of proof as to date of invention.

A rebuttable presumption shall exist that, as to each count, the inventors made their invention in the chronological order of the earlier of their filing dates or effective filing dates. The burden of proof shall be upon a party who contends otherwise.

§ 1.658 Final decision.

(a) After final hearing, the Board shall enter a decision resolving the issues raised at final hearing. The decision may (1) enter judgment, in whole or in part, (2) remand the interference to an examiner-in-chief for further proceedings, or (3) take further action not inconsistent with law. A judgment as to a count shall state whether or not each party is entitled to a patent containing the claims in the party's patent or application which correspond to the count. When the Board enters a decision awarding judgment as to all counts, the decision shall be regarded as a final decision.

(b) Any request for reconsideration of a decision under paragraph (a) of this section shall be filed within 14 days after the date of the decision. The request for reconsideration shall specify with particularity the points believed to have been misapprehended or overlooked in rendering the decision. Any reply to a request for reconsideration shall be filed within 14 days of the date of service of the request for reconsideration. Where reasonably possible, service of the request for reconsideration shall be such that delivery is accomplished by hand or "Express Mail." The Board shall enter a decision on the request for reconsideration. If the Board shall be of the opinion that the decision on the request for reconsideration significantly modifies its original decision under paragraph (a) of this section, the Board may designate the decision on the request for reconsideration as a new decision.

(c) A judgment in an interference settles all issues which (1) were raised and decided in the interference, (2) could have been properly raised and decided in the interference by a motion under § 1.633 (a) through (d) and (f) through (j) or § 1.634 and (3) could have been properly raised and decided in an additional interference with a motion under § 1.633(e). A losing party who could have properly moved, but failed to move, under §§ 1.633 or 1.634, shall be estopped to take *ex parte* or *inter partes* action in the Patent and Trademark Office after the interference which is inconsistent with that party's failure to properly move, except that a losing party shall not be estopped with respect to any claims which correspond, or properly could have corresponded, to a count as to which that party was awarded a favorable judgment.

§ 1.659 Recommendation.

(a) Should the Board have knowledge of any ground for rejecting any application claim not involved in the judgment of the interference, it may include in its decision a recommended rejection of the claim. Upon resumption of *ex parte* prosecution of the application, the examiner shall be bound by the recommendation and shall enter and maintain the recommended rejection unless an amendment or showing of facts not previously of record is filed which, in the opinion of the examiner, overcomes the recommended rejection.

(b) Should the Board have knowledge of any ground for reexamination of a patent involved in the interference as to a patent claim not involved in the judgment of the interference, it may include in its decision a recommendation to the Commissioner that the patent be reexamined. The Commissioner will determine whether reexamination will be ordered.

(c) The Board may make any other recommendation to the examiner or the Commissioner as may be appropriate.

§ 1.660 Notice of reexamination, reissue, protest, or litigation.

(a) When a request for reexamination of a patent involved in an interference is filed, the patent owner shall notify the Board within 10 days of receiving notice that the request was filed.

(b) When an application for reissue is filed by a patentee involved in an interference, the patentee shall notify the Board within 10 days of the day the application for reissue is filed.

(c) When a protest under § 1.291 is filed against an application involved in an interference, the applicant shall notify the Board within 10 days of receiving notice that the protest was filed.

(d) A party in an interference shall notify the Board promptly of any litigation related to any patent or application involved in an interference, including any civil action commenced under 35 U.S.C. 146.

§ 1.661 Termination of interference after judgment.

After a final decision is entered by the Board, an interference is considered terminated when no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had.

§ 1.662 Request for entry of adverse judgment; reissue filed by patentee.

(a) A party may, at any time during an interference, request and agree to entry of an adverse judgment. The filing by an applicant or patentee of a written disclaimer of the invention defined by a count, concession of priority or unpatentability of the subject matter of a count, abandonment of the invention defined by a count, or abandonment of the contest as to a count will be treated as a request for entry of an adverse judgment against the applicant or patentee as to all claims which correspond to the count. Abandonment of an application by an applicant, other than an applicant for reissue having a claim of the patent sought to be reissued involved in the interference, will be treated as a request for entry of an adverse judgment against the applicant as to all claims corresponding to all counts. Upon the filing by a party of a request for entry of an adverse judgment, the Board may enter judgment against the party.

(b) If a patentee involved in an interference files an application for reissue during the interference and omits all claims of the patent corresponding to the counts of the interference for the purpose of avoiding the interference, judgment may be entered against the patentee. A patentee who files an application for reissue other than for the purpose of avoiding the interference shall timely file a preliminary motion under § 1.633(h) or show good cause why the motion could not have been timely filed.

(c) The filing of a statutory disclaimer under 35 U.S.C. 253 by a patentee will delete any statutorily disclaimed claims from being involved in the interference. A statutory disclaimer will not be treated as a request for entry of an adverse judgment against the patentee unless it results in the deletion of all patent claims corresponding to a count.

§ 1.663 Status of claim of defeated applicant after interference.

Whenever an adverse judgment is entered as to a count against an applicant from which no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had, the claims of the application corresponding to the count stand finally disposed of without further action by the examiner. Such claims are not open to further *ex parte* prosecution.

§ 1.664 Action after interference.

(a) After termination of an interference, the examiner will promptly take such action in any application previously involved in the interference as may be necessary. Unless entered by order of an examiner-in-chief, amendments presented during the interference shall not be entered, but may be subsequently presented by the applicant subject to the provisions of this part provided prosecution of the application is not otherwise closed.

(b) After judgment, the application of any party may be held subject to further examination, including an interference with another application.

§ 1.665 Second interference.

A second interference between the same parties will not be declared upon an application not involved in an earlier interference for an invention defined by a count of the earlier interference. See § 1.658(c).

§ 1.666 Filing of interference settlement agreements.

(a) Any agreement or understanding between parties to an interference, including any collateral agreements referred to therein, made in connection with or in contemplation of the termination of the interference, must be in writing and a true copy thereof must be filed before the termination of the interference (§ 1.661) as between the parties to the agreement or understanding.

(b) If any party filing the agreement or understanding under paragraph (a) of this section so requests, the copy will be kept separate from the file of the interference, and made available only to Government agencies on written request, or to any person upon petition accompanied by the fee set forth in § 1.17(i) and on a showing of good cause.

(c) Failure to file the copy of the agreement or understanding under paragraph (a) of this section will render permanently unenforceable such agreement or understanding and any patent of the parties involved in the interference or any patent subsequently issued on any application of the parties so involved. The Commission may, however, upon petition accompanied by the fee set forth in § 1.17(h) and on a showing of good cause for failure to file within the time prescribed, permit the filing of the agreement or understanding during the six month period subsequent to the termination of the interference as between the parties to the agreement or understanding.

§ 1.671 Evidence must comply with rules.

(a) Evidence consists of testimony and exhibits, official records and publications filed under § 1.682, evidence from another interference, proceeding, or action filed under § 1.683, and discovery relied upon under § 1.688, and the specification (including claims) and drawings of any application or patent:

(1) Involved in the interference.

(2) To which a party has been accorded benefit in the notice declaring the interference or by a preliminary motion granted under § 1.633.

(3) For which a party has sought, but has been denied, benefit by a preliminary motion under § 1.633.

(4) For which benefit was rescinded by a preliminary motion granted under § 1.633.

(b) Except as otherwise provided in this part, the Federal Rules of Evidence shall apply to interference proceedings. Those portions of the Federal Rules of Evidence relating to criminal actions, juries, and other matters not relevant to interferences shall not apply.

(c) Unless the context is otherwise clear, the following terms of the Federal Rules of Evidence shall be construed as follows:

(1) "Courts of the United States," "U.S. Magistrate," "court," "trial court," or "trier of fact" means examiner-in-chief or Board as may be appropriate.

(2) "Judge" means examiner-in-chief.

(3) "Judicial notice" means official notice.

(4) "Civil action," "civil proceeding," "action," or "trial," mean interference.

(5) "Appellate court" means United States Court of Appeals for the Federal Circuit or a United States district court when judicial review is under 35 U.S.C. 146.

(6) "Before the hearing" in Rule 703 means before giving testimony by oral deposition or affidavit.

(7) "The trial or hearing" in Rules 803(24) and 804(5) means the taking of testimony by oral deposition.

(d) Certification is not necessary as a condition to admissibility when the record is a record of the Patent and Trademark Office to which all parties have access.

(e) A party may not rely on an affidavit filed by that party during *ex parte* prosecution of an application, an affidavit under § 1.608(b), or an affidavit under § 1.639(b) unless: (1) A copy of the affidavit is or has been served and (2) a written notice is filed prior to the close of the party's relevant testimony period stating that the party intends to rely on the affidavit. When proper notice is given under this paragraph, the affidavit shall be deemed filed under § 1.672(b). A copy of the affidavit shall be included in the record (§ 1.653).

(f) The significance of documentary and other exhibits shall be discussed with particularity by a witness during oral deposition or in an affidavit.

(g) A party must file a motion (§ 1.635) seeking permission from an examiner-in-chief prior to taking testimony or seeking documents or things under 35 U.S.C. 24. The motion shall describe the general nature and the relevance of the testimony, document, or thing.

(h) Evidence which is not taken or sought and filed in accordance with this subpart shall not be admissible.

§ 1.672 Manner of taking testimony.

(a) Testimony of a witness may be taken by oral deposition or affidavit in accordance with this subpart.

(b) A party wishing to take the testimony of a witness whose testimony will not be compelled under 35 U.S.C. 24 may elect to present the testimony of the witness by affidavit or deposition. A party electing to present testimony of a witness by affidavit shall, prior to the close of the party's relevant testimony period, file and serve an affidavit of the witness or, where appropriate, a notice under § 1.671(e). To facilitate preparation of the record (§ 1.653 (g) and (h)), a party shall file an affidavit on paper which is 8½ by 11 inches (21.8 by 27.9 cm). A party shall not be entitled to rely on any document referred to in the affidavit unless a copy of the document is filed with the affidavit. A party shall not be entitled to rely on any thing mentioned in the affidavit unless the opponent is given reasonable access to the thing. A thing is something other than a document. After the affidavit is filed and within a time set by an examiner-in-chief, any opponent may file a request to cross-examine the witness on oral deposition. If any opponent requests cross-examination of an affiant, the party shall notice a deposition under § 1.673(e) for the purpose of cross-examination by any opponent. Any redirect and recross shall take place at the deposition. At any deposition for the purpose of cross-examination of a witness whose testimony is presented by affidavit, the party shall not be entitled to rely on any document or thing not mentioned in one or more of the affidavits filed under this paragraph, except to the extent necessary to conduct proper redirect. A party electing to present testimony of a witness by deposition shall notice a deposition of the witness under § 1.673(a). The party who gives notice of a deposition shall be responsible for obtaining a court reporter and for filing a certified transcript of the deposition as required by § 1.676.

(c) A party wishing to take the testimony of a witness whose testimony will be compelled under 35 U.S.C. 24 must first obtain permission from an examiner-in-chief under § 1.671(g). If permission is granted, the party shall notice a deposition of the witness under § 1.673 and may proceed under 35 U.S.C. 24. The testimony of the witness shall be taken on oral deposition.

(d) Notwithstanding the provisions of this subpart, if the parties agree in writing, a deposition may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions.

(e) If the parties agree in writing, the testimony of any witness may be submitted in the form of an affidavit without opportunity for cross-examination. The affidavit of the witness shall be filed in the Patent and Trademark Office.

(f) If the parties agree in writing, testimony may be submitted in the form of an agreed statement setting forth: (1) How a particular witness would testify if called or (2) the facts in the case of one or more of the parties. The agreed statement shall be filed in the Patent and Trademark Office. See § 1.653(a).

§ 1.673 Notice of examination of witness.

(a) A party electing to take testimony of a witness by deposition shall, after complying with paragraphs (b) and (g) of this section, file and serve a single notice of deposition stating the time and place of each deposition to be taken. Depositions may be noticed for a reasonable time and place in the United States. Unless the parties agree in writing, a deposition may not be noticed for any other place without approval of an examiner-in-chief (see § 1.684). The notice shall specify the name and address of each witness and the general nature of the testimony to be given by the witness. If the name of a witness is not known, a general description sufficient to identify the witness or a particular class or group to which the witness belongs may be given instead.

(b) Unless the parties agree otherwise, a party shall serve, but not file, at least three days prior to the conference required by paragraph (g) of this section, if service is made by hand or "Express Mail," or at least ten days prior to the conference if service is made by any other means, the following:

(1) A list and copy of each document in the party's possession, custody, or control and upon which the party intends to rely at any deposition and

(2) A list of and a proffer of reasonable access to things in the party's possession, custody, or control and upon which the party intends to rely at any deposition.

(c) A party shall not be permitted to rely at any deposition on any witness not listed in the notice, or any document not served or any thing not listed as required by paragraph (b) of this section: (1) Unless all opponents agree in writing or on the record to permit the party to rely on the witness, document, or thing or (2) except upon a motion (§ 1.635) promptly filed which is accompanied by any proposed notice, additional documents, or lists and which shows sufficient cause why the notice, documents, or lists were not served in accordance with this section.

(d) Each opposing party shall have a full opportunity to attend a deposition and cross-examine. If an opposing party attends a deposition of a witness not named in a notice and cross-examines the witness or fails to object to the taking of the deposition, the opposing party shall be deemed to have waived any right to object to the taking of the deposition for lack of proper notice.

(e) A party electing to present testimony by affidavit and who is required to notice depositions for the purpose of cross-examination under § 1.672(b), shall, after complying with paragraph (g) of this section, file and serve a single notice of deposition stating the time and place of each cross-examination deposition to be taken.

(f) The parties shall not take depositions in more than one place at the same time or so nearly at the same time that reasonable opportunity to travel from one place of deposition to another cannot be had.

(g) Before serving a notice of deposition and after complying with paragraph (b) of this section, a party shall have an oral conference with all opponents to attempt to agree on a mutually acceptable time and place for conducting the deposition. A certificate shall appear in the notice stating that the oral conference took place or explaining why the conference could not be had. If the parties cannot agree to a mutually acceptable place and time for conducting the deposition at the conference, the parties shall contact an examiner-in-chief who shall then designate the time and place for conducting the deposition.

(h) A copy of the notice of deposition shall be attached to the certified transcript of the deposition filed under § 1.676(a).

§ 1.674 Persons before whom depositions may be taken.

(a) Within the United States or a territory or insular possession of the United States a deposition shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(b) Unless the parties agree in writing, the following persons shall not be competent to serve as an officer: (1) A relative or employee of a party, (2) a relative or employee of an attorney or agent of a party, or (3) a person interested, directly or indirectly, in the interference either as counsel, attorney, agent, or otherwise.

§ 1.675 Examination of witness, reading and signing transcript of deposition.

(a) Each witness before giving an oral deposition shall be duly sworn according to law by the officer before whom the deposition is to be taken.

(b) The testimony shall be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer or by some other person, who shall be subject to the provisions of § 1.674(b), in the presence of the officer unless the presence of the officer is waived on the record by agreement of all parties.

(c) All objections made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, or any other objection to the proceeding shall be noted on the record by the officer. Evidence objected to shall be taken subject to any objection.

(d) Unless the parties agree in writing or waive reading and signature by the witness on the record at the deposition, when the testimony has been transcribed a transcript of the deposition shall be read by the witness and then signed by the witness in the form of: (1) An affidavit in the presence of any notary or (2) a declaration.

§ 1.676 Certification and filing by officer, marking exhibits.

(a) The officer shall prepare a certified transcript of the deposition by attaching to a transcript of the deposition a copy of the notice of deposition, any exhibits to be annexed to the certified transcrip, and a certificate signed and sealed by the officer and showing:

(1) The witness was duly sworn by the officer before commencement of testimony by the witness.

(2) The transcript is a true record of the testimony given by the witness.

(3) The name of the person by whom the testimony was recorded and, if not recorded by the officer, whether the testimony was recorded in the presence of the officer.

(4) The presence or absence of any opposing party.

(5) The place where the deposition was taken and the day and hour when the deposition began and ended.

(6) The officer is not disqualified under § 1.674.

(b) If the parties waived any of the requirements of paragraph (a) of this section, the certificate shall so state.

(c) The officer shall note on the certificate the circumstances under which a witness refuses to sign a transcript.

(d) Unless the parties agree otherwise in writing or on the record at the deposition, the officer shall securely seal the certified transcript in an envelope endorsed with the style of the interference (e.g., Smith v. Jones), the interference number, the name of the witness, and the date of sealing and shall promptly forward the envelope to BOX INTERFERENCE, Commissioner of Patents and Trademarks, Washington, D.C. 20231. Documents and things produced for inspection during the examination of a witness, shall, upon request of a party, be marked for identification and annexed to the certified transcript, and may be inspected and copied by any party, except that if the person producing the documents and things desires to retain them, the person may: (1) Offer copies to be marked for identification and annexed to the certified transcript and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals or (2) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the documents and things may be used in the same manner as if annexed to the certified transcript. The exhibits shall then be filed as specified in § 1.653(i). If the weight or bulk of a document or thing shall reasonably prevent the document or thing from being annexed to the certified transcript, it shall, unless waived on the record at the deposition by all parties, be authenicated by the officer and fowarded to the Commissioner in a separate package marked and addressed as provided in this paragraph.

§ 1.677 Form of a transcript of deposition.

(a) A transcript of a deposition must be typewritten on opaque, unglazed, durable paper approximately 8½ by 11 inches (21.8 by 27.9 cm.) in size (letter size). Typing shall be double-spaced on one side of the paper in not smaller than pica-type with a margin of 1½ inches (3.8 cm.) on the left-hand side of the page. The pages must be consecutively numbered throughout the entire record of each party (§ 1.653(d)) and the name of the witness must be typed at the top of each page (§ 1.653(e)). The questions propounded to each witness must be consecutively numbered unless paper with numbered lines is used and each question must be followed by its answer.

(b) Exhibits must be numbered consecutively and each must be marked as required by § 1.653(i).

§ 1.678 Transcript of deposition must be filed.

Unless otherwise ordered by an examiner-in-chief, a certified transcript of a deposition must be filed in the Patent and Trademark Office within 45 days from the date of the deposition. If a party refuses to file a certified transcript, the examiner-in-chief or the Board may take appropriate action under § 1.616. If a party refuses to file a certified transcript, any opponent may move for leave to file the certified transcript and include a copy of the transcript as part of the opponent's record.

§ 1.679 Inspection of transcript.

A certified transcript filed in the Patent and Trademark Office may be inspected by any party. The certified transcript may not be removed from the Patent and Trademark Office for printing (§ 1.653(g)) unless authorized by an examiner-in-chief upon such terms as may be appropriate.

§ 1.682 Official records and printed publications.

(a) A party may introduce into evidence, if otherwise admissible, any official record or printed publication not identified on the record during the taking of testimony of a witness, by filing a notice offering the official record or publication into evidence. If the evidence relates to the party's case-in-chief, the notice shall be filed prior to close of testimony of the party's case-in-chief. If the evidence relates to rebuttal, the notice shall be filed prior to the close of testimony of the party's case-in-rebuttal. The notice shall: (1) Identify the official record or printed publication, (2) identify the portion thereof to be introduced in evidence, (3) indicate generally the relevance of the portion sought to be introduced in evidence, and (4) where appropriate, be accompanied by a certified copy of the official record or a copy of the printed publication (§ 1.671(d)).

(b) A copy of the notice, official record, and publication shall be served.

(c) Unless otherwise ordered by an examiner-in-chief, any written objection to the notice or to the admissibility of the official record or printed publication shall be filed within 15 days of service of the notice. See also § 1.656(h).

§ 1.683 Testimony in another interference, proceeding, or action.

(a) Prior to close of a party's appropriate testimony period or within such time as may be set by an examiner-in-chief, a party may file a motion (§ 1.635) for leave to use in an interference testimony of a witness from another interference, proceeding, or action involving the same parties, subject to such conditions as may be deemed appropriate by an examiner-in-chief. The motion shall specify with particularity the exact testimony to be used and shall demonstrate its relevance.

(b) Any objection to the admissibility of the testimony of the witness shall be made in an opposition to the motion. See also § 1.656(h).

§ 1.684 Testimony in a foreign country.

(a) An examiner-in-chief may authorize testimony of a witness to be taken in a foreign country. A party seeking to take testimony in a foreign country shall, prior to the close of the party's appropriate testimony period or within such time as may be set by an examiner-in-chief, file a motion (§ 1.635):

(1) Naming the witness.

(2) Describing the particular facts to which it is expected that the witness will testify.

(3) Stating the grounds on which the moving party believes that the witness will so testify.

(4) Demonstrating that the expected testimony is relevant.

(5) Demonstrating that the testimony cannot be taken in this country at all or cannot be taken in this country without hardship to the moving party greatly exceeding the hardship to which all opposing parties will be exposed by the taking of the testimony in a foreign country.

(6) Accompanied by an affidavit stating that the motion is made in good faith and not for the purpose of delay or harassing any party.

(7) Accompanied by written interrogatories to be asked of the witness.

(b) Any opposition under § 1.638(a) shall state any objection to the written interrogatories and shall include any cross-interrogatories to be asked of the witness. A reply under § 1.638(b) may be filed and shall be limited to stating any objection to any cross-interrogatories proposed in the opposition.

(c) If the motion is granted, the moving party shall be responsible for obtaining answers to the interrogatories and cross-interrogatories before an officer qualified to administer oaths in the foreign country under the laws of the United States or the foreign country. The officer shall prepare a transcript of the interrogatories, cross-interrogatories, and recorded answers to the interrogatories and cross-interrogatories

and shall transmit the transcript to BOX INTERFERENCE, Commissioner of Patents and Trademarks, Washington, D.C. 20231, with a certificate signed and sealed by the officer and showing:

(1) The witness was duly sworn by the officer before answering the interrogatories and cross-interrogatories.

(2) The recorded answers are a true record of the answers given by the witness to the interrogatories and cross-interrogatories.

(3) The name of the person by whom the answers were recorded and, if not recorded by the officer, whether the answers were recorded in the presence of the officer.

(4) The presence or absence of any party.

(5) The place, day, and hour that the answers were recorded.

(6) A copy of the recorded answers was read by or to the witness before the witness signed the recorded answers and that the witness signed the recorded answers in the presence of the officer. The officer shall state the circumstances under which a witness refused to read or sign recorded answers.

(7) The officer is not disqualified under § 1.674.

(d) If the parties agree in writing, the testimony may be taken before the officer on oral deposition.

(e) A party taking testimony in a foreign country shall have the burden of proving that false swearing in the giving of testimony is punishable as perjury under the laws of the foreign country. Unless false swearing in the giving of testimony before the officer shall be punishable as perjury under the laws of the foreign country where testimony is taken, the testimony shall not be entitled to the same weight as testimony taken in the United States. The weight of the testimony shall be determined in each case.

§ 1.685 Errors and irregularities in depositions.

(a) An error in a notice for taking a deposition is waived unless a motion (§ 1.635) to quash the notice is filed as soon as the error is, or could have been, discovered.

(b) An objection to a qualification of an officer taking a deposition is waived unless:

(1) The objection is made on the record of the deposition before a witness begins to testify.

(2) If discovered after the deposition, a motion (§ 1.635) to suppress the deposition is filed as soon as the objection is, or could have been, discovered.

(c) An error irregularity in the manner in which testimony is transcribed, a certified transcript is signed by a witness, or a certified transcript is prepared, signed, certified, sealed, indorsed, forwarded, filed, or otherwise handled by the officer is waived unless a motion (§ 1.635) to suppress the deposition is filed as soon as the error or irregularity is, or could have been, discovered.

(d) An objection to the competency of a witness, admissibility of evidence, manner of taking the deposition, the form of questions and answers, any oath or affirmation, or conduct of any party at the deposition is waived unless an objection is made on the record at the deposition stating the specific ground of objection. Any objection which a party wishes considered by the Board at final hearing shall be included in a motion to suppress under § 1.656(h).

(e) Nothing in this section precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of an examiner-in-chief or the Board.

§ 1.687 Additional discovery.

(a) A party is not entitled to discovery except as authorized in this subpart.

(b) Where appropriate, a party may obtain production of documents and things during cross-examination of an opponent's witness or during the testimony period of the party's case-in-rebuttal.

(c) Upon a motion (§ 1.635) brought by a party within the time set by an examiner-in-chief under § 1.651 or thereafter as authorized by § 1.645 and upon a showing that the interest of justice so requires, an examiner-in-chief may order additional discovery, as to matters under the control of a party within the scope of the Federal Rules of Civil Procedure, specifying the terms and conditions of such additional discovery.

(d) The parties may agree to discovery among themselves at any time. In the absence of an agreement, a motion for additional discovery shall not be filed except as authorized by this subpart.

§ 1.688 Use of discovery.

(a) If otherwise admissible a party may introduce into evidence, an answer to a written request for an admission or an answer to a written interrogatory obtained by discovery under § 1.687 by filing a copy of the request for admission or the written interrogatory and the answer. If the answer relates to a party's case-in-chief, the answer shall be filed prior to the close of testimony of the party's case-in-chief. If the answer relates to the party's rebuttal, the admission or answer shall be filed prior to the close of testimony of the party's case-in-rebuttal. Unless otherwise ordered by an examiner-in-chief, any written objection to the admissibility of an answer shall be filed within 15 days of service of the answer.

(b) A party may not rely upon any other matter obtained by discovery unless it is introduced into evidence under this subpart.

Dated: November 8, 1984.

Donald J. Quigg,

Acting Commissioner of Patents and Trademarks.

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Part III

Environmental Protection Agency

40 CFR Part 86

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Selective Enforcement Auditing of New Gasoline-Fueled and Diesel Light-Duty Vehicles; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-2695-6]

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Selective Enforcement Auditing of New Gasoline-Fueled and Diesel Light-Duty Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending the regulations governing Selective Enforcement Auditing (SEA) of new gasoline and diesel-fueled light-duty vehicles (LDVs). Regulations which will be affected by this rulemaking are codified in Subparts A and G of 40 CFR Part 86. The main purpose of these amendments is to replace the "batch" sampling plans used in current SEAs with "sequential" sampling plans. The sequential sampling plan is already in effect for SEA testing of light-duty trucks (LDTs) under Subpart K. *See* 45 FR 1406 (January 12, 1983). In addition, these amendments are intended to clarify specific aspects of the existing regulations and to improve the efficiency of the LDV SEA program. Each amendment and the reason for its implementation are described in the accompanying chart. The more significant amendments are described in detail in the **SUPPLEMENTARY INFORMATION** section.

EFFECTIVE DATE: This final rule is effective January 11, 1985.

ADDRESS: Copies of materials relevant to this rulemaking are contained in Public Docket EN-80-8 at the Central Docket Section of the U.S. Environmental Protection Agency, West Tower Lobby/Gallery 1, 401 M Street SW., Washington, D.C. 20460, and are available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Sinkez, Manufacturers Operations Division [EN-340], U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460. Telephone number: (202) 382-4104.

SUPPLEMENTARY INFORMATION:

I. Background

A notice of proposed rulemaking (NPRM) was published on March 9, 1984. The public comment period closed May 8, 1984. Eight LDV manufacturers submitted written comments. The comments have been analyzed, and this final rulemaking action is based on the analysis. The EPA staff has summarized and responded to the comments in a document called "Summary and Analysis of Comments" that is available in the Public Docket (see ADDRESS above).

II. More Significant Amendments

The following is a description of the more significant amendments and an abbreviated discussion of the respective comments. The changes include paragraph citations adjacent to each of the headings. These citations refer to the amendment discussed under that heading.

A. Sampling Plans (§ 86.610, Appendix XI (Appendix XIII in NPRM Is Redesignated as Appendix XI), Miscellaneous Paragraphs)

The objective of an SEA is to determine, on a probabilistic basis, whether a certain minimum percentage of the manufacturer's production of a specific LDV configuration is meeting the appropriate emission standards over the designated useful life. Because of the statistical nature of this decision, there is some chance that a manufacturer who is actually in compliance will fail an audit, and likewise it is possible that a manufacturer who is largely out of compliance will pass. The SEA sampling plan has been designed to control these risks at the following levels: a manufacturer with no more than 40 percent of its vehicles exceeding a standard will have no more than a 5 percent chance of failing with respect to the standard (5 percent "producer's risk" at a 40 percent noncompliance rate); a manufacturer with 65 percent or more of its vehicles exceeding a standard will have no more than a 10 percent chance of passing (10 percent "consumer's risk" at a 65 percent noncompliance rate).

EPA is implementing new sampling plans for SEA testing under Subpart G that may significantly decrease a manufacturer's emission testing burden while maintaining the statistical confidence in the decision reached. Attendant costs both to the Agency and the manufacturers should be lowered. An EPA analysis of 1982 and 1983 model year SEA emission tests indicates that approximately 27 percent fewer tests would have been conducted under the sequential sampling technique. This analysis, entitled "Potential Test Savings Using a Sequential Sampling Plan for Conducting Selective Enforcement Audits," is available in the Public Docket for this rulemaking.

Presently, the sampling plan requires that the population of test vehicles be subdivided into "batches." Under the sequential sampling plan, the test vehicles may be selected all at once or a few at a time, resulting in a more efficient use of manufacturer and EPA resources.

Under the sequential sampling plan, it is possible to make a "pass/fail" decision regarding the outcome of the audit after testing each vehicle in the test sample, although a minimum number of vehicles must be tested. The sequential sampling plans thus employ "sequential" decision rules. These plans are identical to those presently in effect for testing heavy-duty engines (HDEs) and LDTs under Subpart K.

The sequential sampling plans have several advantages over the fixed size ("batch") plans currently specified in Appendix VIII and used in the current Subpart G program. An audit decision can often be made after conducting fewer tests than would be required for a fixed-size sampling plan of comparable statistical validity. The need to have large sample populations of the desired configuration available in order to select the requisite number of batches is eliminated. The possibility of holding large numbers of test vehicles for the duration of the audit, most of which will not normally require testing, will be diminished. The sequential sampling plans also have simpler decision rules than do the fixed-size plans, thereby easing administration.

Tables for determining the audit outcome are given in Appendix XI and are used in the following manner. First, the appropriate sampling plan code letter will be selected on the basis of the projected annual sales of the configuration to be tested. Vehicles are then selected from the production line or storage facility and tested in this same sequence at the laboratory. After each test, the number of vehicles with emission test results (with deterioration factor applied) exceeding the standard are compared to the pass and fail number appropriate to the number of vehicles tested. On the basis of this comparison, a decision will be made to pass, fail, or to select another vehicle for testing. A minimum number of vehicles, however, must be tested before a pass or fail audit decision can be reached. All the decision rules have a maximum test sample size and will usually terminate before that point.

A support document entitled "An Analytical Development of Sampling Plans for Selective Enforcement Auditing of Light-Duty Vehicles and

Light-Trucks" is available in the Public Docket for this rulemaking.

All of the manufacturers that commented on the proposed sequential sampling plans overwhelmingly supported their implementation. They cited the decreased testing burden as the principal reason.

B. Entry and Access (§§ 86.084–30(d)(1)(v), 86.606)

The entry and access requirements related to SEA are amended to allow EPA Enforcement Officers to enter a facility through the voluntary consent of the party controlling the facility or under the authority of a warrant or court order. This warrant or court order may be sought *ex parte*, without first requesting permission to enter a plant. Neither suspension nor revocation of a certicate of conformity nor assessment of a civil penalty may be imposed if permission to enter or have access is refused, unless authority to conduct these activities is specifically provided for in a warrant or court order.

These amendments are intended to implement that portion of the Supreme Court decision in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), which requires, in many cases, that a Federal agency obtain a valid warrant or court order to conduct inspection activities if entry has been denied.

The revision of § 86.606 also deletes old paragraph § 86.606(e)(5), which provided that a test order issued without 24 hours prior notice to the manufacturer must be authorized by the EPA Assistant Administrator for Enforcement, even though other test orders could be signed by ". . . the Assistant Administrator . . . or his designee . . ." under § 86.603(b). (Paragraph § 86.603(b) has been changed to designate the Assistant Administrator for Air and Radiation because of an Agency reorganization.) Regardless of which EPA official signs short notice test orders under the amended rule, manufacturers are protected against unreasonable entry by the warrant or court order requirements of the revised § 86.606. In addition, this deletion makes § 86.606 consistent with the Subpart K version of this section (§ 86.1006–84, 45 FR 63774 (September 25, 1980)) and may ease some paperwork burdens for EPA.

One manufacturer commented that the proposed wording of the regulations was not consistent with the decision in *Marshall* v. *Barlow's Inc.* General Motors Corporation (GM) stated that EPA must seek voluntary permission to enter a facility before obtaining a warrant. Also, GM stated that EPA does not have authority to enter an emission-related component facility, as was proposed.

EPA has carefully considered GM's comments. With regard to the *Barlow's* decision, subsequent cases make clear that there is no requirement that EPA seek voluntary access before seeking a warrant *ex parte*. In response to GM's comment that EPA does not have authority to enter an emission-related component facility, EPA has authority to enter such facilities owned or operated by manufacturers under, and for the purposes stated in, section 206(c) of the Clean Air Act (Act). For non-manufactures, EPA has the authority to conduct such inspections under, and for the purposes stated in, section 114 of the Act. Therefore, EPA retains this amendment in the final rule.

C. Entry and Access in Foreign Jurisdictions (§§ 86.084–30(d)(1)(v), 86.606)

Foreign testing and manufacturing facilities should be located in jurisdictions that will permit entry and access of Agency personnel for SEA purposes. The amendment clarifies that the Administrator may suspend a certificate of conformity when EPA is unable to have entry and access, or to obtain "reasonable assistance" in inspecting premises because a manufacturer has located a facility in a foreign jurisdiction where local law prohibits entry and access to EPA Enforcement Officers. In this situation, EPA cannot be assured that testing is being performed properly and that test results are being reported accurately, and thus cannot be assured that production vehicles are being manufactured in conformance to regulations with respect to the issued certificate of conformity. No attempt to enter such permises need be made before the Administrator may suspend the relevant certificate for this reason.

Two manufacturers were opposed to this proposal. GM stated that the Clean Air Act does not authorize EPA to require that manufacturers locate plants in accessible jurisdictions. Ford Motor Company (Ford) stated that it has no power over foreign governments and pointed out that the vehicles are available to EPA at the port of entry in the U.S.

Section 206(b)(1) of the Clean Air Act authorizes the Administrator to determine by testing whether new motor vehicle or new motor vehicle engines conform to regulations with respect to the issued certificate of conformity. Such tests must be conducted by the manufacturer in accordance with conditions specified by the Administrator. To ensure that manufacturers are conducting tests in the required manner, EPA believes that it is necessary that the manufacturers' foreign plants be accessible to EPA inspectors and that sections 206(b) and 301 of the Act authorize EPA to provide for suspension of a certificate where a manufacturer locates a plant in a jurisdiction where access is impossible. This provision is a logical extension of the current regulation (§ 86.084–30(d)(1)) which authorizes suspension whenever EPA is denied access or reasonable assistance.

EPA understands that an unforeseeable situation may arise in a foreign country which would prevent EPA from gaining access and entry to a manufacturer's plant. The SEA regulations state that no suspension would be issued until after the manufacturer has been offered an opportunity for a hearing. EPA retains this provision in the final rulemaking.

D. Manufacturer's Test Data (§ 86.605(c), Appendix XIV)

In the NPRM, EPA proposed to mandate the submission of manufacturers' internal quality audit data from their emission testing programs on production vehicles. In addition, EPA proposed that the submissions be in a standard format on an Automatic Data Processing (ADP) storage device. Manufacturers currently conducting such a program are voluntarily submitting their data to EPA in paper form. The data from these programs, when submitted to EPA, assist in providing the Agency with the assurance that manufacturers are producing engines and vehicles in compliance with applicable emission regulations.

Several manufacturers were strongly opposed to EPA's proposal to require the submission of data. GM strongly objected to mandatory submissions because it is concerned that the data will be used for enforcement activities, despite the fact that their audit emission testing of new production vehicles is not performed in a manner which necessarily correlates with either certification or SEA procedures. Toyota Motor Corporation (Toyota) believes that it is not equitable to place the burden of mandatory submission on manufacturers that voluntarily conduct assembly line testing, and that any additional burden may prompt manufacturers to discontinue assembly line testing programs. Volkswagen of America (VW) stated that the submission of test data should be the manufacturer's option.

The Office of Management and Budget (OMB), in its review of EPA's Information Collection Request (ICR)

associated with the NPRM, commented that mandating the reporting of voluntary audits may create negative incentives for the manufacturers, which would not improve EPA's program implementation.

Consequently, based on the comments received, EPA is deleting this requirement in the final rule. While the submission of emissions test data is critical to EPA's SEA program implementation, EPA has no reason to believe that the current SEA program would be improved by mandating that manufacturers submit their emissions test data, given that the data generally is voluntarily submitted. Also, it appears that EPA may be able to exercise the authority of section 208(a) of the Clean Air Act to require submission of certain data, when necessary, should a manufacturer discontinue submitting data voluntarily.

EPA will attempt to work with interested manufacturers in setting up a voluntary ADP program with the hope that in the long term this system of submitting data will be efficient and cost effective for both EPA and the manufacturers. This program will be coordinated by EPA outside of this rulemaking.

E. Production Changes During SEA (§§ 86.607(b), 86.609(d)(6))

To determine emission compliance during SEA, a representative sample of LDVs of a particular configuration is selected during the audit from the total population of that configuration which is manufactured during the model year. The selected units are then tested for emissions, according to the procedures specified in § 86.608. The design of the sequential sampling plans allows EPA to deduce the overall emissions compliance of the population from the few units that are sampled and tested.

To ensure that vehicles tested during an audit are representative of normal production, EPA has placed certain restrictions on the selection of the test sample. These restrictions are specified in paragraphs (b) and (c) of § 86.607: "The manufacturer shall have assembled the test vehicles of the configuration selected for testing using its normal production processes for vehicles to be distributed into commerce;" and "No quality control, testing, or assembly procedures will be used on the completed test vehicles or any portion thereof that has not been or will not be used during the production and assembly of all other vehicles of that configuration." The intent of these paragraphs is to assure that a manufacturer does not institute special assembly line procedures, such as increased quality control inspections, solely for the purpose of checking SEA test vehicles and thereby artificially increasing the chances of passing the audit.

Test sample data would provide little confidence in the emission compliance of the entire configuration if the test sample is unrepresentative of the procedures by which the test configuration is normally assembled. To provide EPA with a high degree of confidence that this situation will not occur, these amendments require that a manufacturer notify the Agency if it makes any changes to production processes involving the test configuration, at any time between the receipt of the test order and the completion of test sample selection. In addition, the manufacturer must affirm in writing, as part of its SEA report endorsement statement, that no such changes have been made.

Several manufacturers interpreted this proposal as a requirement to report *any* changes made on the assembly line between receipt of the test order and completion of test sample selection. They commented that this requirement created excessive reporting burdens due to the complexity of the production processes. In the NPRM, a comma was inadvertently omitted and this may have caused some confusion. This oversight has been corrected by inserting a comma between "control" and "which" in § 86.607(b) of the final rule. EPA retains this proposal in the final rule and intends that manufacturers notify the Agency of any changes implemented in its production processes which may reasonably be expected to affect the emissions of the vehicles selected.

F. Testing of Alternate Configurations (§ 86.603(c)(1))

The present SEA program under Subpart G allows for the selection and testing of the alternate configuration, if any, specified in the test order only when the primary configuration is clearly not available. However, even under the more flexible sequential sampling plans, testing of the primary configuration may still cause delays in completing an audit if production of this configuration is lower than the minimum daily SEA testing requirement of four LDVs. In the interest of conserving both EPA and manufacturer resources, these amendments allow the selection and testing of the alternate configuration if production of the primary configuration is below this minimum requirement. Ford supported this proposal. No other comments were submitted.

G. Sales Projections (§§ 86.603(e), 86.610(c))

Sales projections are used in the SEA program (1) to determine a manufacturer's annual quota of audits and (2) to select the appropriate sampling plan (tables 2–5 in Appendix XI). For LDVs, sales projections previously were obtained from the manufacturer's Application for Certification submitted under 40 CFR Part 86, Subpart A. Subsequent revisions to the certification program have deleted the requirement that manufacturers provide sales projections in the Applications for Certification. However, manufacturers are currently required to submit sales projections under the Automobile Fuel Economy Regulations (40 CFR Part 600) and, therefore, EPA will utilize the sales projections required in the Fuel Economy Regulations to obtain the desired sales projections, a practice which is now informally conducted.

These amendments also allow manufacturers to submit updated sales projections during the model year. This provision will permit audit quotas and sampling plan code letter selections to be based on the most up-to-date sales information available.

One manufacturer commented that a recent revision to the Fuel Economy Regulations deleted the requirement to submit sales projections, and recommended that manufacturers be required to submit sales projections separately. EPA recently revised the Corporate Average Fuel Economy (CAFE) reporting requirements to delete the requirement that manufacturers submit a preliminary CAFE report. However, the requirement for submitting sales projections is unchanged and is contained in 40 CFR § 600.207–80 of the Fuel Economy Regulations.

H. Predelivery Preparations (§ 86.608(b)(1))

This amendment deletes the provision allowing manufacturers to automatically perform dealer or predelivery center preparation procedures. Dealer surveys conducted by EPA indicate that in several cases dealer preparations were not performed or were not performed correctly. A document entitled "Analysis of Dealer Surveys" is available in the Public Docket for this rulemaking.

Through this amendment, EPA endeavors to ensure that test vehicles represent production vehicles at the point they are introduced into commerce. However, a dealer preparation procedure may be

performed if it is approved in advance by the EPA Administrator. EPA approval will be facilitated if the manufacturer provides sufficient dealer survey data or other documented evidence to allow EPA to conclude that the procedures are actually being correctly performed at dealerships.

Four manufacturers were opposed to this proposal to restrict predelivery preparations on SEA test vehicles. GM stated that the results of EPA's dealer surveys were an inadequate justification for restricting predelivery procedures. Ford recommended that fluid level checks and break-in mileage be allowed. Chrysler stated that it requires dealers to perform predelivery preparations. American Motors Corporation (AMC) stated that EPA has provided no guidance for the manufacturer to demonstrate that predelivery procedures are being performed.

EPA believes that the results of its dealership surveys are a valid representation of what is taking place under "real world" conditions. SEA vehicles that have undergone dealer preparation procedures will represent "real world" conditions to the extent that these procedures are actually and correctly performed by dealers. The amended regulation allows the manufacturer to perform predelivery preparations based upon evidence sufficient to allow EPA to conclude that the procedures are being performed. EPA will consider a manufacturer's own survey data or other satisfactory documentation when making such a determination. A manufacturer's statement that the dealers are required to perform predelivery procedures is insufficient for EPA to determine that the procedures are being performed.

EPA intends to allow safety-related checks of the test vehicles, such as checks of fluid levels, brake lines and lights, as is currently allowed for SEAs of LDTs under Subpart K. This amendment does not change any provisions regarding mileage accumulation and, therefore, break-in mileage is allowed.

I. Retesting (§§ 86.608(i), 86.612(b))

The present paragraph (i) of § 86.608 allows a manufacturer to retest any test vehicle. Permitting a manufacturer to retest a test vehicle before an actual audit failure has occurred can delay the audit, increasing attendant costs to both the Agency and the manufacturer. However, in a few other cases, it may be expeditious to allow retesting before a fail decision is reached, particularly when using sequential sampling plans. The revision of paragraph (i) allows for the latter situation. The Administrator may approve retesting at certain times during the audit based upon a request by the manufacturer accompanied by a satisfactory justification.

EPA is revising paragraph (b) of § 86.612 to allow EPA, at its discretion, to suspend or revoke a certificate based on a failure of a single test on each vehicle in the test sequence, i.e., before any retesting has begun. This revision is intended to avoid unnecessary delays in the audit when the initial test results indicate that retesting will have little effect on the ultimate audit decision. For example, if the emission results after one test on each vehicle in the sequence exceed the applicable emission standard by a large magnitude, such as two or three times the standard, then retesting and averaging the two tests on each vehicle could not lower the final emission result enough to "pass" the audit.

In all cases, the certificate of conformity may not be suspended before ten days after the audit failure. If the manufacturer needs additional time (beyond ten days) to rectify the nonconformity which produced the SEA failure, it is encouraged to notify the Agency.

Two manufacturers commented on this proposal. GM stated that manufacturers should have the option of retesting on a vehicle-by-vehicle basis. Chrysler suggested that retesting be allowed after a failure but before suspension or revocation of a certificate of conformity unless the results are so high that it would be statistically impossible to pass a retest.

To permit a manufacturer to retest at any time may unnecessarily delay the audit. To allow some vehicles to be tested more times than others will bias the test results from a statistical viewpoint because of inherent test-to-test variability.

However, EPA will allow retesting before suspension or revocation of a certificate of conformity in those situations where it appears that retesting may reverse an initial audit failure.

III. Less Significant Amendments

In addition to the more significant amendments discussed in the previous section, EPA is implementing several less significant technical and procedural amendments. These amendments are intended to clarify specific aspects of the existing regulations and to improve the efficiency with which the LDV SEA program will be conducted in the future. Some minor comments on the less significant amendments were received and are addressed in the Summary and Analysis of Comments.

Each amendment contained in this final rule and the reason for its implementation are described in the chart at the end of this preamble.

Administrative Designation

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. The Agency has determined that this regulation is not "Major" for the following reasons:

(1) The SEA amendments will not result in an annual effect on the economy of $100 million or more. The majority of these amendments are administrative and will have no measurable cost impact. Some amendments, such as those discussed in the **SUPPLEMENTARY INFORMATION** section under the headings of "sampling plans," "retesting", and "testing of alternate configurations," are intended to expedite the completion of audits through a reduced testing burden and should therefore save manufacturer and EPA resources.

(2) Because of the limited cost impact and expected cost savings of these amendments due to the reduced testing burden, this rulemaking will not result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local governments, or geographic regions.

(3) Due to its limited cost impact and its applicability to all LDV manufacturers, both domestic and foreign, EPA does not expect this rulemaking to have any significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S. manufacturers to compete with foreign manufacturers in domestic or export markets.

Compliance With Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, EPA is required to perform a regulatory flexibility analysis of any regulation unless the Administrator certifies that the regulation will not have a significant impact on a substantial number of small entities. Most of the manufacturers affected by these amendments are not small entities and the amendments will not increase compliance costs for those few manufacturers that might be considered small.

Therefore, I hereby certify, pursuant to 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Agency has not

prepared a regulatory flexibility analysis to accompany this rule.

Office of Management and Budget Review

As required by Executive Order 12291, this regulation has been reviewed by the Office of Management and Budget (OMB) for compliance with regulatory development criteria and for general content. Any OMB comments and EPA's response to those comments are available for inspection in the Public Docket for this rulemaking.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2060–0064. The modifications contained in this rule result in a slight reduction of respondent burden.

List of Subjects in 40 CFR Part 86

Intergovernmental relations, Administrative practice and procedure, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Authority: Secs. 206(b), 208(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7525(b), 7542(a), 7601(a)).

Dated: November 30, 1984.

William D. Ruckelshaus,

Administrator.

SEA LDV Amendments Explanation of Amendments and Revisions

Section	Paragraph	Changes	Reason
§ 86.078–6	(a)(1), (a)(3), (b)(1)	Reference to 86.084–30 becomes 86.084–30 (b) or (c)	Paragraph 86.084–30(d) refers to SEA, which has separate hearing procedures.
§ 86.084–30	(d)(1)(v)	Added requirement for warrant or court order for entry and access (E&A) activities.	Requirements of Supreme Court decision in *Marshall* v. *Barlow's, Inc.*
	(d)(1)(vi)	Added suspension provision for facilities in foreign jurisdiction where SEA activities are prohibited.	Clarifies foreign location requirements.
		Deleted specific entry and access activities in old (d)(1)(vi)	All E&A activities covered under new (d)(1)(v).
	(d)(1)(vii)	Deleted old (d)(1)(vii)	All E&A activities covered under new (d)(1)(v).
		Revised section references in old (d)(1)(viii)	Section numbers changed because of new sampling plans.
	(d) (2), (3)	Revised paragraph (d)(1) references	Restructured sub-paragraphs under (d)(1).
	(d)(5)	Deleted references to paragraphs (d)(1)(vi), (vii)	Restructured sub-paragraphs under (d)(1).
	(d)(6)(i)	§ 86.613 becomes § 86.614	Change in section designations.
§ 86.084–30	(d)(7)	New provision to allow manufacturer opportunity for hearing before voiding a certificate.	Provides manufacturer with opportunity for a hearing before a sanction may be imposed.
§ 86.602	(a), (b)	Deleted definitions related to batch type sampling plans. Clarified definitions of "Test Sample", "Inspection Criteria", and "Vehicle". Added definitions of "Axle Ratio" and "Configuration".	New sampling plans being proposed. Axle Ratios within ±3% are expected to have similar emission characteristics. Define "Configuration" for purpose of SEA Test Order.
§ 86.603	(b)	Revised Assistant Administrator (AA) who can sign test orders: "Enforcement" becomes "Air and Radiation". Revised old paragraph (e) and added to the end of paragraph (b) to require compliance with test order instructions.	Environmental Protection Agency reorganization. CAA obligates manufacturers to comply with instructions in the test order.
	(b)	Added statement to allow for delivery of test order to assembly plants.	Formalizes procedure EPA currently employs in practice.
	(c)(1)	Deleted references to batch selection. Added Assistant Administrator for Air and Radiation discretion in selecting alternate configuration if production of primary configuration is less than four vehicles per day.	Not applicable to new sampling plans. Expedites audits by ensuring that at least four vehicles per day are available for testing.
	(c)(2)	Previously standardized test order instructions and information are being placed in the regulations.	EPA requirements for each audit are being formalized to greatest extent practical.
	(e)	Revision of old paragraph (f). Sales projections in the Fuel Economy Report will be used to determine annual limit on SEA test orders. New provision allowing manufacturers to update their annual sales projections.	To provide a source of this information due to a change in the content of the manufacturer's Application for Certification. The manufacturer's annual limit would be based on most current production trends.
	(e)(1)	Revision of old paragraphs (f) and (g)	Clarified intent of this provision.
	(e)(2)	Additional test orders issued on basis of noncompliance will include explanatory statement.	Provide explanation when issuing a test order beyond annual limit.
§86.604	(a)	Selection procedure for testing by the Administrator conforms to § 86.607.	Clarification of EPA intent when selecting vehicles for its own testing purposes.
§ 86.605	(a)(1), (a)(3)	"General Records" section only requires description of equipment used for SEA testing. The existing paragraph (a)(1)(iii)(E) moved to paragraph (a)(3).	Description of vehicles, emission control systems, and test procedures are already contained in Applications for Certification and regulations.
	(a)(2)	Reorganized paragraph for clarity. Deleted reference to batch sample selection.	New sampling plans.
	(a)(4)	Clarify requirement for description of each test cell used for SEA testing.	EPA must be able to verify that equipment used for SEA testing conforms with Subpart B.
	(f)	New provision allowing manufacturer to claim confidentiality on information submitted for SEA purposes.	The Agency makes submitted information available for public review, except for "confidential" information.
§ 86.606		Section amended to require warrants or court orders for entry and access where voluntary consent is refused.	Ensures that regulations comply with requirements of Supreme Court decision in *Marshall* v. *Barlow's, Inc.*
		Deleted old § 86.606(e)(5) requirement that AA shall authorize any entry without 24-hour prior notification to manufacturer.	Makes consistent with new 86.603(b) which says AA or designee may sign test orders.
§ 86.607	(a)	Deleted requirements of old paragraphs (a)–(d) and (g) relating to batches and random sampling.	Not required by new sampling plans.
		Manufacturer allowed to request alternate selection procedure	May be required by new sampling plans or unusual situations.
	(b)	Manufacturer must inform EPA of any emissions related changes in production processes from issuance of test order until end of selection.	Expansion of old paragraph (e). Enables EPA to ensure that appropriate vehicles are being selected for testing.
	(c)	Revision of old paragraph (f)	Clarified intent of this provision.
	(d)	*Redesignation of old paragraph (h)	Restructured section.
	(e)	New provision: order of selection determines order of test results for making audit decision.	To provide an objective basis for applying test results to the sequential decision criteria. This provision is currently in the test orders.
	(f)	Revision of old paragraph (i); references to "batches" deleted	New sampling plans.
§ 86.608	(a)(2)(i)	New provision allowing manufacturers to use diesel emission test fuel for mileage accumulation.	Formalizes procedure that is currently in effect for diesel vehicles.
	(b)(1)	Revised provision to allow manufacturer's predelivery inspection procedures only after EPA approval.	Ensure that vehicles tested are representative of vehicles introduced into commerce.
	(d), (f)	Deleted references to batch sample, vehicle substitution, or vehicle replacement.	New sampling plans. Malfunctioning vehicles are deleted from test sequences.

SEA LDV AMENDMENTS EXPLANATION OF AMENDMENTS AND REVISIONS—Continued

Section	Paragraph	Changes	Reason
	(g)	Clarify requirements for EPA notification of manufacturer's test facility.	EPA test order issued under § 86.604(a) is not applicable.
	(i)	Retests permitted only after fail decision is reached on first test, unless otherwise allowed by EPA.	Prevents unreasonable delays in reaching initial audit decisions and beginning retest except in unusual circumstances.
§ 86.609	(d)	Deleted reference to batch sequence	New sampling plans.
	(d)(1)	Deleted reference to Subparts	Confusing and out of date.
	(d)(2)	Deleted old paragraph (d)(2). Substituted new requirement to list applicable standards in audit report.	Old paragraph (d)(2) inapplicable to new testing procedures. Standards may change in future model years; possible waivers.
	(d)(4)	Revision of old paragraph (d)(2); description of selection process required.	New sampling plans.
	(d)(5)	Same as old paragraph (d)(4), except for sub-paragraphs (v), (vi), and (vii).	Reorganization of paragraph (d) by adding (d)(2).
	(d)(5)(v)	Added requirement for submission of CO2 values in audit report	Move requirement from test order to regulations.
	(d)(5)(vi)	Revised "replacement vehicle" provision to require reporting reason for elimination of any test vehicle.	Under sequential sampling plans, vehicles may be deleted from test sequence.
	(d)(6)	Added statement to audit report endorsement that no emission-related changes were made on the assembly line during the audit.	To verify that SEA test vehicles selected are representative of vehicles that are introduced into commerce.
§ 86.610		Replaces old § 86.610 and § 86.611. Deleted all references to batch-type sampling plans and decision rules. Explains how to use new sampling plans and decision rules.	Reorganized sections due to new sampling plans and decision rules.
	(c)	The sampling plan to be used for SEA testing is based on sales projections from the manufacturer's Fuel Economy report.	Projected sales will no longer be provided in the manufacturer's Application for Certification.
§ 86.611		Removed and reserved	Reorganized sections due to new sampling plans and decision rules.
§ 86.612		Amendment of old § 86.612	Reorganized sections due to new sampling plans and decision rules.
	(b)	Deleted references to batch sequence and batch sample. Allows for suspension based on first test results.	Not required by new sampling plans. Avoids possible delays in imposing sanction when failure is imminent.
	(e)	Added statement that the proposed remedy for nonconformity shall be reported by manufacturer to EPA.	Clarification of existing paragraph.
	(f)(2)	Added 30-day time period for submitting failed vehicle report (changed from 5-day time period in NPRM).	Establishes a definite schedule for reporting remedies for vehicle nonconformities.
	(g)(2)	Deleted reference to batch selection	New sampling plans. New decision criteria for re-audits.
	(h)	Clarified language to correspond with intent of regulations	Cannot re-issue a certificate for a revoked configuration (must be modified, producing a new configuration).
	(h) (1), (2)	Added statements that fuel economy testing may also be required in conjunction with approving a design change.	For consistency with amendments to vehicle Fuel Economy program.
	(j)	*Revised section references	Consistency with most current section. Revised section numbering in Subpart G.
§ 86.613		*Reserved	Reorganized sections due to hearings on voidings of certificates.
§ 86.614 (former § 86.613).		*Allows hearing to be held for voidings of certificates as well as suspensions and revocations.	Provides manufacturer with opportunity for a hearing before a sanction may be imposed
	(a)	*Added paragraph reference to voided certificates as additional criteria for hearings.	Hearings can also be requested for voided certificates.
	(c)(1)	*Added reference to voided certificate as basis for hearing	Same as paragraph (a) above.
	(c)(2)(ii)(C)	*Changed sampling plan Appendix references	New Appendix proposed for sampling plans.
	(c)(2)(ii)(D)	*The word "tested" is changed to "selected"	Incorrect word printed in original promulgation.
	(d)(1)	*Revised section reference	§ 86.613 becomes 86.614.
	(d)(2)	*Revised section reference	Provides consistency with most current Subpart A.
	(f)(3)(ii)	*§ 85.612(i) becomes 86.612(i)	Incorrect section reference in original promulgation.
Appendix VIII		*Reserved	New sampling plans of Appendix XI to be used.
Appendix XI		*Added new sampling plans to replace Appendix VIII (Appendix XIII in NPRM redesignated as Appendix XI in Final Rule).	Allows for more expeditious audit, less manufacturer burden and costs.

* In the NPRM these amendments were omitted from the change chart but were included in the regulatory language.

PART 86—[AMENDED]

For the reasons set forth in this preamble, Part 86, Subparts A and G, Chapter I of Title 40, Code of Federal Regulations is amended as follows:

1. Section 86.078–6 is amended by revising paragraphs (a)(1), (a)(3) and (b)(1) as follows:

§ 86.078–6 Hearings on certification.

(a)(1) After granting a request for a hearing under §§ 86.084–22, 86.084–30(b), or 86.084–30(c), the Administrator shall designate a Presiding Officer for the hearing.

* * * * *

(3) If a time and place for the hearing have not been fixed by the Administrator under §§ 86.084.22, 86.084–30(b), or 86.084–30(c), the hearing shall be held as soon as practicable at a time and place fixed by the Administrator or by the Presiding Officer.

* * * * *

(b)(1) Upon his appointment pursuant to paragraph (a) of this section, the Presiding Officer will establish a hearing file. The file shall consist of the notice issued by the Administrator under §§ 86.084–22, 86.084–30(b), or 86.084–30(c) together with any accompanying material, the request for a hearing and the supporting data submitted therewith, and all documents relating to the request for certification and all documents submitted therewith, and correspondence and other data material to the hearing.

2. Section 86.084–30 is amended by revising paragraphs (d)(1)(v) through (d)(1)(vii), the first sentence in (d)(2), (d)(3), (d)(5), (d)(6)(i), by removing paragraph (d)(1)(viii), and by adding a new paragraph (d)(7), as follows:

§ 86.084–30 Certification.

* * * * *

(d) * * *

(1) * * *

(v) Any EPA Enforcement Officer is denied the opportunity to conduct activities related to entry and access as authorized in § 86.606 of this part and in a warrant or court order presented to the manufacturer or the party in charge of a facility in question; or

(vi) EPA Enforcement Officers are unable to conduct activities related to entry and access or to obtain "reasonable assistance" as authorized in § 86.606 of this part because a manufacturer has located its facility in a foreign jurisdiction where local law prohibits those activities; or

(vii) The manufacturer refuses to or in fact does not comply with §§ 86.604(a), 86.605, 86.607, 86.608, or 86.610.

(2) The sanction of suspending a certificate may not be imposed for the reasons in paragraph (d)(1) (i), (ii), or (vii) of this section where the refusal is caused by conditions and circumstances outside the control of the manufacturer which render it impossible to comply with those requirements. * * *

(3) The sanction of suspending a certificate may be imposed for the reasons in paragraph (d)(1) (iii), (iv), or (v) of this section only when the infraction is substantial.

* * * * *

(5) In any case in which certification of a vehicle is proposed to be suspended under paragraph (d)(1)(v) of this section and in which the Administrator has presented to the manufacturer involved reasonable evidence that a violation of § 86.606 in fact occurred, if the manufacturer wishes to content that, although the violation occurred, the vehicle configuration or engine family in question was not involved in the violation to a degree that would warrant suspension of certification under paragraph (d)(1)(v) of this section, the manufacturer shall have the burden of establishing that contention to the satisfaction of the Administrator.

(6) * * *

(i) Be made only after the manufacturer concerned has been offered an opportunity for a hearing conducted in accordance with § 86.614; and

* * * * *

(7) Any voiding of a certificate of conformity under paragraph (d)(4) of this section will be made only after the manufacturer concerned has been offered an opportunity for a hearing conducted in accordance with § 86.614.

* * * * *

3. Section 86.602 is revised to read as follows:

§ 86.602 Definitions.

(a) The definitions in this section apply to this subpart.

(b) As used in this subpart, all terms not defined herein have the meaning given them in the Act.

(1) "Acceptable Quality Level" (AQL) means the maximum percentage of failing vehicles that, for purposes of sampling inspection, can be considered satisfactory as a process average.

(2) "Axle Ratio" means all ratios within ±3% of the axle ratio specified in the configuration in the test order.

(3) "Configuration" means a subclassification of an engine-system combination on the basis of engine code, inertia weight class, transmission type and gear ratios, axle ratio, and other parameters which may be designated by the Administrator.

(4) "Test Sample" means the collection of vehicles of the same configuration which have been drawn from the population of vehicles of that configuration and which will receive exhaust emission testing.

(5) "Inspection Criteria" means the pass and fail numbers associated with a particular sampling plan.

(6) "Vehicle" means any new production light-duty vehicle as defined in Subpart A of this part.

(7) "Test Vehicle" means a vehicle in a test sample.

(8) "In the Hands of the Manufacturer" means that vehicles are still in the possession of the manufacturer and have not had their bills of lading transferred to another person for the purpose of transporting.

4. Section 86.603 is amended by revising paragraphs (b), (c) and (e), removing paragraphs (f) and (g), and adding the OMB control number to the end of the section as follows:

§ 86.603 Test orders.

* * * * *

(b) The test order will be signed by the Assistant Administrator for Air and Radiation or his designee. The test order will be delivered in person by an EPA Enforcement Officer to a company representative or sent by registered mail, return receipt requested, to the manufacturer's representative who signs the Application for Certification submitted by the manufacturer pursuant to the requirements of the applicable sections of Subpart A of this part. Upon receipt of a test order, the manufacturer shall comply with all of the provisions of this subpart and instructions in the test order.

(c)(1) The test order will specify the vehicle configuration selected for testing, the time and location at which vehicles must be selected, and the procedure by which vehicles of the specified configuration must be selected. The test order may include alternative configurations (primary, secondary, etc.) to be selected for testing in the event that vehicles of the first specified configuration are not available for testing because those vehicles are not being manufactured at the specified assembly plant, not being manufactured during the specified time, or not being stored at the specified assembly plant or associated storage facility. If the first specified configuration is not being manufactured at a rate of at least four vehicles per day over the expected duration of the audit, the Assistant Administrator for Air and Radiation or his designated representative may select vehicles of a primary alternate configuration for testing in lieu of the first specified configuration. Likewise, vehicles may be selected of a secondary alternate configuration in lieu of the first specified configuration or primary alternate configuration. In addition, the test order may include other directions or information essential to the administration of the required testing.

(2) The following instructions are applicable to each test order issued under this subpart:

(i) The manufacturer shall make the following documents available to an EPA Enforcement Officer upon request:

(A) A properly filed and current Application for Certification following the format prescribed by the EPA for the appropriate model year; and

(B) A copy of the shop manual, dealer service bulletins, and pre-delivery inspection procedures for the configuration being tested.

(ii) Only one mechanic at a time per vehicle shall make authorized checks, adjustments, or repairs, unless a particular check, adjustment, or repair requires a second mechanic as indicated in the shop manual or dealer service bulletins.

(iii) A mechanic shall not perform any check, adjustment, or repair without an Enforcement Officer present unless otherwise authorized.

(iv) The manufacturer shall utilize only those tools and test equipment utilized by its dealers when performing authorized checks, adjustments, or repairs.

* * * * *

(e) During a given model year, the Administrator shall not issue to a manufacturer more SEA test orders than an annual limit determined by dividing the projected sales bound for the U.S. market for that model year, as made by the manufacturer in its report submitted under paragraph (a)(2) of § 600.207-80 of the Automobile Fuel Economy Regulations, by 300,000 and rounding to the nearest whole number, unless the projected sales are less than 150,000, in which case the annual limit is one. However, the annual limit for SEA test orders will be recalculated if a manufacturer submits to EPA in writing prior to or during the model year a sales projection update.

(1) Any SEA test order for which the configuration fails in accordance with § 86.610 or for which testing is not completed does not count against the annual limit.

(2) When the annual limit has been met, the Administrator may issue additional test orders for those configurations for which evidence exists indicating noncompliance. An SEA test order issued on this basis will include a statement as to the reason for its issuance.

(Approved by the Office of Management and Budget under the control number 2060-0064)

5. Section 86.604 is amended by revising paragraph (a) as follows:

§ 86.604 Testing by the Administrator.

(a) The Administrator may require by test order that vehicles of a specified configuration be selected in a manner consistent with the requirements of § 86.607 and submitted to him at such place as he may designate for the purpose of conducting emission tests. These tests shall be conducted in accordance with § 86.608 of these regulations to determine whether vehicles manufactured by the manufacturer conform with the regulations with respect to which the certificate of conformity was issued.

* * * * *

6. Section 86.605 is amended by revising paragraphs (a)(1) and (a)(2), adding paragraphs (a)(3), (a)(4) and (f), and adding the OMB control number to the end of the section as follows:

§ 86.605 Maintenance of records; submittal of information.

(a) * * *

(1) *General records.* (i) A description of all equipment used to test vehicles in accordance with § 86.608 pursuant to a test order issued under this subpart, including the following information:

(A) Dynamometer.

(*1*) Inertia loading.

(*2*) Road load power absorption at 50 m.p.h.

(*3*) Manufacturer, model and serial number.

(B) Constant Volume Sampler.

(*1*) Pressure of the mixture of exhaust and dilution air entering the positive displacement pump, pressure increase across the pump, and the temperature set point of the temperature control system.

(*2*) Number of revolutions of the positive displacement pump accumulated while test is in progress and exhaust samples are being collected.

(*3*) Humidity of dilution air.

(*4*) Manufacturer, model, type and serial number.

(C) Instrumentation.

(*1*) Manufacturer, model and serial number for each analyzer.

(*2*) Pertinent information such as tuning, gain, ranges and calibration data.

(*3*) Identification of zero, span, exhaust gas and dilution air sample traces.

(*4*) Temperature set point of heated sample line and heated hydrocarbon detector temperature control system (for diesel vehicles only).

(D) Test cell.

(*1*) Barometric pressure, ambient temperature and humidity.

(*2*) Data and time of day.

(ii) In lieu of recording test equipment information, reference to a vehicle test cell number may be used, with the advance approval of the Administrator: Provided, the test cell records show the pertinent information.

(2) *Individual records.* These records pertain to each audit conducted pursuant to this subpart.

(i) The location where audit testing was performed, and the date and time for each emissions test.

(ii) The number of miles on the test vehicle when the test began and ended.

(iii) The names of supervisory personnel responsible for the conduct of the audit.

(iv) A record and description of any repairs performed prior to and/or subsequent to approval by the Administrator, giving the date and time of the repair, the reason for it, the person authorizing it, and the names of supervisory personnel responsible for the repair.

(v) The dates when the test vehicles were shipped from the assembly plant or the storage facility and when they were received at the testing facility.

(vi) The drive wheel tire pressure and the inertia weight class for each test vehicle, and the actual curb weight for each test vehicle required to be weighed pursuant to a test order.

(vii) A complete record of all emission tests performed pursuant to this subpart (except tests performed by EPA directly) including all individual worksheets and/or other documentation relating to each test, or exact copies thereof.

(viii) A brief description of all significant audit events, commencing with the test vehicle selection process, but not described by any other subparagraph under paragraph (a)(2) of this section, including such extraordinary events as vehicle accident.

(3) Additional required records for diesel vehicles.

(4) The manufacturer shall record test equipment description, pursuant to paragraph (a)(1) of this section, for each test cell that is used to perform emission testing under this subpart.

* * * * *

(f) A manufacturer may assert a business confidentiality claim covering all or part of the information submitted pursuant to this subpart. To assert a business confidentiality claim, the manufacturer should do so in a manner consistent with the requirements of 40 CFR § 2.203(b). If no claim accompanies business information when it is received by EPA, it may be made available to the public by EPA without further notice to the manufacturer. If a claim is received, the information covered by the claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 CFR Part 2.

(Approved by the Office of Management and Budget under the control number 2060-0064)

7. Section 86.606 is amended by redesignating paragraph (e) as paragraph (h), revising the introductory text of paragraph (a), paragraphs (a)(1), (b) through (d), and (h), by adding new paragraphs (e), (f) and (g), and adding to the OMB control number to the end of the section as follows:

§ 86.606 Entry and access.

(a) In order to allow the Administrator to determine whether a manufacturer is complying with the provisions of this subpart and a test order issued thereunder, EPA Enforcement Officers may enter during normal operating hours upon presentation of credentials any of the following:

(1) Any facility where any vehicle to be introduced into commerce or any emission-related component is or has been manufactured, assembled, or stored;

* * * * *

(b) Upon admission to any facility referred to in paragraph (a) of this section, EPA Enforcement Officers may:

(1) Inspect and monitor any part or aspect of vehicle manufacturer, assembly, storage, testing and other procedures, and the facilities in which these procedures are conducted;

(2) Inspect and monitor any part or aspect of vehicle test procedures or activities, including, but not limited to, vehicle selection, preparation, mileage accumulation, preconditioning, emission tests, and maintenance; and verify calibration of test equipment;

(3) Inspect and make copies of any records or documents related to the assembly, storage, selection and testing of a vehicle in compliance with a test order; and

(4) Inspect and photograph any part or aspect of any vehicle and any

component used in its assembly that is reasonably related to the purpose of the entry.

(c) EPA Enforcement Officers may obtain reasonable assistance without cost from those in charge of a facility to help them perform any function listed in this subpart and may request the recipient of a test order to arrange with those in charge of a facility operated for its benefit to furnish reasonable assistance without cost to EPA whether or not the recipient controls the facility.

(d) EPA Enforcement Officers may seek a warrant or court order authorizing the FPA Enforcement Officers to conduct activities related to entry and access as authorized in this section. EPA Enforcement Officers may proceed *ex parte* to obtain a warrant whether or not the Enforcement Officers first sought permission from the recipient of the test order or the party in charge of the facilities in question to conduct those activities related to entry and access.

(e) A recipient of a test order shall permit EPA Enforcement Officers who present a warrant or court order as described in paragraph (d) of this section to conduct activities related to entry and access as authorized in this section and as described in the warrant or court order. A recipient of a test order shall cause those in charge of its facility or a facility operated for its benefit to permit EPA Enforcement Officers to conduct these activities related to entry and access pursuant to a warrant or court order whether or not the recipient controls the facility. In the absence of such a warrant or court order, EPA Enforcement Officers may conduct those activities related to entry and access only upon the consent of either the recipient of the test order or the party in charge of the facilities in question.

(f) It is not a violation of this part or the Clean Air Act for any person to refuse to permit EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section without a warrant or court order.

(g) A manufacturer is responsible for locating its foreign testing and manufacturing facilities in jurisdictions in which local foreign law does not prohibit EPA Enforcement Officers from conducting the entry and access activities specified in this section. EPA will not attempt to make any inspections which it has been informed that local foreign law prohibits.

(h) For purposes of this section:

(1) "Presentation of Credentials" means display of the document designating a person as an EPA Enforcement Officer.

(2) Where vehicle storage areas or facilities are concerned, "operating hours" means all times during which personnel other than custodial personnel are at work in the vicinity of the area or facility and have access to it.

(3) Where facilities or areas other than those covered by paragraph (h)(2) of this section are concerned, "operating hours" means all times during which an assembly line is in operation, vehicle assembly is occurring, or testing, repair, mileage accumulation, production or compilation of records, or any other procedure or activity related to testing, or to vehicle manufacture or assembly, is being conducted in a facility.

(4) "Reasonable assistance" includes, but is not limited to, providing clerical, copying, interpreting and translating services and, at the request of an EPA Enforcement Officer, making available personnel of the facility being inspected during their working hours to provide information relevant to the Enforcement Officer's activities authorized in this section. Any employee whom a manufacturer has instructed to appear at the request of an Enforcement Officer may be accompanied, represented, and advised by counsel.

(Approved by the Office of Management and Budget under the control number 2060–0064)

8. Section 86.607 is revised to read as follows:

§ 86.607 Sample selection.

(a) Vehicles comprising a test sample which are required to be tested, pursuant to a test order issued in accordance with this subpart, will be selected at the location and in the manner specified in the test order. If a manufacturer determines that the test vehicles cannot be selected in the manner specified in the test order, an alternative selection procedure may be employed: *Provided*, That the manufacturer requests approval of the alternative procedure in advance of the start of test sample selection and that the Administrator approves the procedure. Special order vehicles are exempt from sample selection unless a test sample cannot be completed otherwise.

(b) The manufacturer shall have assembled the test vehicles of the configuration selected for testing using its normal mass production processes for vehicles to be distributed into commerce. During the audit, the manufacturer shall inform the Administrator of any change(s) implemented in its production processes, including quality control, which may be reasonably expected to affect the emissions of the vehicles selected, between the time the manufacturer received the test order and the time the manufacturer finished selecting test vehicles.

(c) No quality control, testing, or assembly procedures will be used on the completed test vehicles or any portion thereof, including parts and subassemblies, that has not been or will not be used during the production and assembly of all other vehicles of that configuration.

(d) The test order may specify that EPA Enforcement Officers, rather than the manufacturer, will select the test vehicles according to the method described in paragraph (a) of this section.

(e) The order in which test vehicles are selected determines the order in which test results are to be used in applying the sampling plan in accordance with § 86.610.

(f) The manufacturer shall keep on hand all untested vehicles, if any, comprising the test sample until a pass or fail decision is reached in accordance with paragraph (d) of § 86.610. The manufacturer may ship any tested vehicle which has not failed in accordance with paragraph (a) of § 86.610. However, once a manufacturer ships any vehicle from the test sample, it relinquishes the prerogative to conduct retests provided in paragraph (i) of § 86.608.

(Approved by the Office of Management and Budget under the control number 2060–0064)

9. Section 86.608 is amended by revising paragraphs (a)(2)(i), (b)(1), (d), and (f), the first sentence of paragraph (g) and paragraph (i), and adding the OMB control number to the end of the section as follows:

§ 86.608 Test procedures.

(a) * * *

(2) * * *

(i) The manufacturer may use test fuel meeting the specifications of paragraph (a)(1) or (b)(2) of § 86.113–82 for mileage accumulation. Otherwise, the manufacturer may use fuels other than those specified in this section only with advance approval of the Administrator.

* * * * *

(b)(1) The manufacturer shall not adjust, repair, prepare, or modify the vehicles selected for testing and shall not perform any emission tests on vehicles selected for testing pursuant to the test order unless this adjustment, repair, preparation, modification, and/or tests are documented in the manufacturer's vehicle assembly and inspection procedures and are actually performed or unless these adjustments and/or tests are required or permitted

under this subpart or are approved in advance by the Administrator.

* * * * *

(d) The manufacturer shall not perform any maintenance on test vehicles after selection for testing nor shall the Administrator allow deletion of any test vehicle from the test sequence, unless requested by the manufacturer and approved by the Administrator before any test vehicle maintenance or deletion.

* * * * *

(f) If a vehicle cannot complete the mileage accumulation or emission tests because of vehicle malfunction, the manufacturer may request the Administrator to authorize the repair of that vehicle or its deletion from the test sequence.

(g) Whenever the manufacturer conducts testing pursuant to a test order issued under this subpart, the manufacturer shall notify the Administrator within one working day of receipt of the test order, which test facility will be used to comply with the test order and the number of available test cells at that facility. * * *

* * * * *

(i) The manufacturer may retest any test vehicle after a fail decision has been reached in accordance with paragraph (d) of § 86.610 based on the first test on each vehicle; *except*, that the Administrator may approve retesting at other times during the audit based upon a request by the manufacturer accompanied by a satisfactory justification. The manufacturer may test each vehicle a total of three times. The manufacturer shall test each vehicle the same number of times. The manufacturer may accumulate additional mileage on test vehicles before conducting retests, subject to the provisions of paragraph (c) of this section.

(Approved by the Office of Management and Budget under the control number 2060–0064)

10. Section 86.609 is amended by redesignating paragraphs (d)(2) as (d)(4), (d)(4) as (d)(5), and (d)(5) as (d)(6), adding a new paragraph (d)(2), revising paragraphs (d) introductory text, (d)(1), and (d)(4) through (d)(6), and adding the OMB control number to the end of the section as follows:

§ 86.609 Calculation and reporting of test results.

* * * * *

(d) Within five working days after completion of testing of all vehicles pursuant to a test order, the manufacturer shall submit to the Administrator a report which includes the following information:

(1) The location and description of the manufacturer's exhaust emission test facilities which were utilized to conduct testing reported pursuant to this section;

(2) The applicable standards against which the vehicles were tested;

* * * * *

(4) A description of the vehicle selection method used;

(5) For each test conducted,

(i) Test vehicle description including:

(A) Configuration and engine family identification.

(B) Year, make, build date, and model of vehicle.

(C) Vehicle Identification Number.

(D) Miles accumulated on vehicle.

(ii) Location where mileage accumulation was conducted and description of accumulation schedule.

(iii) Test number, date, initial test results, final results and final deteriorated test results for all valid and invalid exhaust emission tests, and the reason for invalidation.

(iv) A complete description of any modification, repair, preparation, maintenance and/or testing which was performed on the test vehicle and (A) has not been reported pursuant to any other paragraph of this subpart and (B) will not be performed on all other production vehicles.

(v) Carbon dioxide emission values for all valid and invalid exhaust emission tests;

(vi) Where a vehicle was deleted from the test sequence by authorization of the Administrator, the reason for the deletion;

(vii) Any other information the Administrator may request relevant to the determination as to whether the new motor vehicles being manufactured by the manufacturer do in fact conform with the regulations with respect to which the certificate of conformity was issued.

(6) The following statement and endorsement:

This report is submitted pursuant to sections 206 and 208 of the Clean Air Act. This Selective Enforcement Audit was conducted in complete conformance with all applicable regulations under 40 CFR Part 86 et seq. and the conditions of the test order. No emission related change(s) to production processes or quality control procedures for the vehicle configuration tested have been made between receipt of this test order and conclusion of the audit. All data and information reported herein is, to the best of

_____

(Company Name)

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

_____

(Authorized Company Representative)

(Approved by the Office of Management and Budget under the control number 2060–0064)

11. Section 86.610 is revised to read as follows:

§ 86.610 Compliance with acceptable quality level and passing and failing criteria for Selective Enforcement Audits.

(a) The prescribed acceptable quality level is 40 percent.

(b) A failed vehicle is one whose final deteriorated test results pursuant to paragraph (c) of § 86.609, for one or more of the applicable exhaust pollutants, exceed the applicable emission standard.

(c) The manufacturer shall test vehicles comprising the test sample until a pass decision is reached for all pollutants or a fail decision is reached for one pollutant. A pass decision is reached when the cumulative number of failed vehicles, as defined in paragraph (b) of this section, for each pollutant is less than or equal to the pass decision number appropriate to the cumulative number of vehicles tested. A fail decision is reached when the cumulative number of failed vehicles for one pollutant is greater than or equal to the fail decision number appropriate to the cumulative number of vehicles tested. The pass and fail decision numbers associated with the cumulative number of vehicles tested are determined by use of the Tables in Appendix XI of this part appropriate for the annual projected sales as made by the manufacturer in its report submitted under paragraph (a)(2) of § 600.207–80 of the Automobile Fuel Economy Regulations. In the Tables in Appendix XI, sampling plan "stage" refers to the cumulative number of vehicles tested. Once a pass decision has been made for a particular pollutant, the number of vehicles whose final deteriorated test results exceed the emission standard for that pollutant shall not be considered any further for purposes of the audit.

(d) Passing or failing of an SEA audit occurs when the decision is made on the last vehicle required to make a decision under paragraph (c) of this section.

(e) The Administrator may terminate testing earlier than required in paragraph (c) of this section.

§ 86.611 [Reserved]

12. Section 86.611 is removed and reserved.

13. Section 86.612 is amended by revising paragraphs (a), (b), (e), (f)(2), (g)(2), (h), (j), and (k), and by adding the OMB control number to the end of the section as follows:

§ 86.612 Suspension and revocation of certificates of conformity.

(a) The certificate of conformity is suspended with respect to any vehicle failing pursuant to paragraph (b) of § 86.610 effective from the time that testing of that vehicle is completed.

(b) The Administrator may suspend the certificate of conformity for a configuration which does not pass a Selective Enforcement Audit pursuant to paragraph § 86.610(c) based on the first test, or all tests, conducted on each vehicle. This suspension will not occur before ten days after failure to pass the audit.

* * * * *

(e) The Administrator may revoke a certificate of conformity for a configuration when the certificate has been suspended pursuant to paragraph (b) or (c) of this section if the proposed remedy for the nonconformity, as reported by the manufacturer to the Administrator, is one requiring a design change(s) to the engine and/or emission control system as described in the Application for Certification of the affected configuration.

(f) * * *

(2) Submit a written report to the Administrator within thirty days after successful completion of testing on the failed vehicle, which contains a description of the remedy and test results for the vehicle in addition to other information that may be required by this regulation.

(g) * * *

(2) Demonstrate that the vehicle configuration for which the certificate of conformity has been suspended does in fact comply with these regulations by testing vehicles selected from normal production runs of that vehicle configuration, at the plant(s) or the facilities specified by the Administrator, in accordance with the conditions specified in the initial test order; *except*, that if the Administrator has not revoked the certificate pursuant to paragraph (e) of this section and if the manufacturer elects to continue testing individual vehicles after suspension of a certificate, the certificate is reinstated for any vehicle actually determined to have its final deteriorated test results in conformance with the applicable standards through testing in accordance with the applicable test procedures.

(h) Once a certificate for a failed configuration has been revoked under paragraph (e) of this section and the manufacturer desires to introduce into commerce a modified version of that configuration, the following actions will be taken before the Administrator may issue a certificate for the new configuration:

(1) If the Administrator determines that the proposed change(s) in vehicle design may have an effect on emission performance deterioration and/or fuel economy, he shall notify the manufacturer within 5 working days after receipt of the report in paragraph (g) of this section whether subsequent testing under this subpart will be sufficient to evaluate the proposed change(s) or whether additional testing will be required; and

(2) After implementing the change(s) intended to remedy the nonconformity, the manufacturer shall demonstrate that the modified vehicle configuration does in fact conform with these regulations by testing vehicles selected from normal production runs of that modified vehicle configuration in accordance with the conditions specified in the initial test order. The Administrator shall consider this testing to satisfy the testing requirements of § 86.079–32 or § 86.079–33 if the Administrator had so notified the manufacturer. If the subsequent testing results in passing of the audit, the Administrator shall reissue or amend the certificate, if necessary, to include that configuration: *Provided*, That the manufacturer has satisfied the testing requirements specified in paragraph (h)(1) of this section. If the subsequent audit is failed, the revocation remains in effect. Any design change approvals under this subpart are limited to the modification of the configuration specified by the test order.

* * * * *

(j) After the Administrator suspends or revokes a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend, revoke or void a certificate of conformity under paragraph (d) of § 86.084–30, and prior to the commencement of a hearing under § 86.614, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend, revoke or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

(k) To permit a manufacturer to avoid storing non-test vehicles when conducting an audit of a configuration subsequent to suspension or revocation of the certificate of conformity for that configuration, resulting from failure of the initial audit of that configuration, he may request that the Administrator conditionally reinstate the certificate for that configuration. The Administrator may reinstate the certificate subject to the condition that the manufacturer consents to recall all vehicles of that configuration produced from the time the certificate is conditionally reinstated if the configuration fails the subsequent audit and to remedy any nonconformity at no expense to the owner.

(Approved by the Office of Management and Budget under the control number 2060–0064)

14. Section 86.613 is reserved, the title and text are redesignated as § 86.614, and the text is amended by revising paragraph (a), the first sentence of paragraph (c)(1), and paragraphs (c)(2)(ii) introductory text, (c)(2)(ii) (C) and (D), (d)(1), (d)(2), and (f)(3)(ii) as follows:

§ 86.613 [Reserved]

§ 86.614 Hearings on suspension, revocation, and voiding of certificates of conformity.

(a) *Applicability.* The procedures prescribed by this section apply whenever a manufacturer requests a hearing under § 86.084–30(d)(6)(i), 86.084–30(d)(7), or 86.612(i).

* * * * *

(c) *Request for public hearing.* (1) If the manufacturer disagrees with the Administrator's decision to suspend, revoke, or void a certificate or disputes the basis for an automatic suspension under § 86.612(a), it may request a public hearing as described in this section. * * *

* * * * *

(2) * * *

(ii) A concise statement of the issues to be raised by the manufacturer at the hearing for each vehicle configuration or engine family or vehicle for which the manufacturer has requested the hearing: Provided, however, that in the case of a hearing request under paragraph § 86.612(i), the hearing is restricted to the following issues:

* * * * *

(C) Whether sampling procedures specified in Appendix XI of this part were followed; and

(D) Whether there exists a basis for distinguishing vehicles produced at plants other than the one from which vehicles were selected which would invalidate the Administrator's decision under § 86.612(c);

* * * * *

(d) *Summary decision.* (1) In the case of a hearing requested under § 86.612(i), when it clearly appears from the data and other information contained in the request for a hearing that there is no genuine and substantial question of fact with respect to the issues specified in § 86.614(c)(2)(ii), the Administrator shall enter an order denying the request for a hearing. In addition, if the original

decision to suspend or revoke a certificate of conformity was made under § 86.612(d) prior to the decision to deny the request for a hearing, the order denying the request will reaffirm the suspension or revocation.

(2) In the case of a hearing requested under § 86.084–30(d)(6)(i), to challenge a proposed suspension of a certificate of conformity for the reasons specified in § 86.084–30(d)(1) (i) or (ii), when it clearly appears from the data and other information contained in the request for a hearing that there is no genuine and substantial question of fact with respect to the issue of whether the refusal to comply with the provisions of a test order or any other requirement of § 86.603 was caused by conditions and circumstances outside the control of the manufacturer, the Administrator will enter an order denying the request for a hearing, and suspending the certificate of conformity.

* * * * *

(t) * * *

(3) * * *

(ii) A specification of the issues intended to be urged: *Provided, however,* That in the case of a hearing requested under § 86.612(i), the brief shall be restricted to the issues specified in paragraph (c)(2)(ii) of this section;

* * * * *

15. Part 86 is amended by removing and reserving Appendix VIII and by adding Appendix XI as follows:

Appendix XI—Sampling Plans for Selective Enforcement Auditing of Light-Duty Vehicles

40% AQL

TABLE 1.—SAMPLING PLAN CODE LETTER

Annual sales of configuration	Code letter
50–99	A
100–299	B
300–499	C
500 or greater	D

TABLE 2.—SAMPLING PLAN FOR CODE LETTER "A" 40% AQL

[Sample inspection criteria]

Stage	Pass No.	Fail No.
1	(1)	(2)
2	(1)	(2)
3	(1)	(2)
4	0	(2)
5	0	(2)
6	1	6
7	1	7
8	2	7
9	2	8
10	3	8
11	3	9
12	4	9
13	5	10
14	5	10
15	6	11
16	6	11
17	7	12
18	7	12
19	8	13
20	8	13
21	9	14
22	10	14
23	10	15
24	11	15
25	11	16
26	12	16
27	12	17
28	13	17
29	14	17
30	16	17

[1] Test sample passing not permitted at this stage.
[2] Test sample failure not permitted at this stage.

TABLE 3.—SAMPLING PLAN FOR CODE LETTER "B" 40% AQL

[Sample inspection criteria]

Stage	Pass No.	Fail No.
1	(1)	(2)
2	(1)	(2)
3	(1)	(2)
4	(1)	(2)
5	0	(2)
6	1	6
7	1	7
8	2	7
9	2	8
10	3	8
11	3	9
12	4	9
13	4	10
14	5	10
15	5	11
16	6	12
17	6	12
18	7	13
19	8	13
20	8	14
21	9	14
22	9	15
23	10	15
24	10	16
25	11	16
26	11	17
27	12	17
28	12	18
29	13	18
30	13	19
31	14	19
32	14	20
33	15	20
34	16	21
35	16	21
36	17	22
37	17	22
38	18	22
39	18	22
40	21	22

[1] Test sample passing not permitted at this stage.
[2] Test sample failure not permitted at this stage.

TABLE 4.—SAMPLING PLAN FOR CODE LETTER "C" 40% AQL

[Sample inspection criteria]

Stage	Pass No.	Fail No.
1	(1)	(2)
2	(1)	(2)
3	(1)	(2)
4	(1)	(2)
5	0	(2)
6	0	6
7	1	7
8	2	7
9	2	8
10	3	9
11	3	9
12	4	10
13	4	10
14	5	11
15	5	11
16	6	12
17	6	12
18	7	13
19	7	13
20	8	14
21	8	14
22	9	15
23	10	15
24	10	16
25	11	16
26	11	17
27	12	17
28	12	18
29	13	18
30	13	19
31	14	19
32	14	20
33	15	20
34	15	21
35	16	21
36	16	22
37	17	22
38	18	23
39	18	23
40	19	24
41	19	24
42	20	25
43	20	25
44	21	26
45	21	27
46	22	27
47	22	27
48	23	27
49	23	27
50	26	27

[1] Test sample passing not permitted at this stage.
[2] Test sample failure not permitted at this stage.

TABLE 5.—SAMPLING PLAN FOR CODE LETTER "D" 40% AQL

[Sample inspection criteria]

Stage	Pass No.	Fail No.
1	(1)	(2)
2	(1)	(2)
3	(1)	(2)
4	(1)	(2)
5	0	(2)
6	0	6
7	1	7
8	2	8
9	2	8
10	3	9
11	3	9
12	4	10
13	4	10
14	5	11
15	5	11
16	6	12
17	6	12
18	7	13
19	7	13
20	8	14
21	8	14
22	9	15
23	9	15
24	10	16
25	11	16
26	11	17
27	12	17
28	12	18
29	13	19
30	13	19
31	14	20
32	14	20
33	15	21
34	15	21
35	16	22
36	16	22
37	17	23

TABLE 5.—SAMPLING PLAN FOR CODE LETTER "D" 40% AQL—Continued

[Sample inspection criteria]

Stage	Pass No.	Fail No.
38	17	23
39	18	24
40	18	24
41	19	25
42	19	26
43	20	26
44	21	27
45	21	27
46	22	28
47	22	28
48	23	29
49	23	29
50	24	30
51	24	30
52	25	31
53	25	31
54	26	32
55	26	32
56	27	33
57	27	33
58	28	33
59	28	33
60	32	33

[1] Test sample passing not permitted at this stage.
[2] Test sample failure not permitted at this stage.

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federal register

Wednesday
December 12, 1984

Part IV

Department of Health and Human Services

Public Health Service

Cooperative Agreements To Support National Health Promotion Programs; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Cooperative Agreements To Support National Health Promotion Programs

The Office of Disease Prevention and Health Promotion (ODPHP) announces its Cooperative Agreement Program for Fiscal Year 1985 and solicits preapplication concept papers for projects under this program.

Background

As mandated by Title XVII of the Public Health Service Act, as amended, the Office of Disease Prevention and Health Promotion coordinates Federal and private sector activities for health promotion and disease prevention. ODPHP works with a variety of Federal agencies on projects aimed at promulgating health promotion and disease prevention programming in schools, worksites, health care settings, and communities. In addition, ODPHP works with various non-Federal organizations to strengthen private sector involvement in health promotion and disease prevention in these settings.

Due to significant changes during the past century in the leading causes of death as well as an increase in knowledge about specific risk factors associated with morbidity and mortality, fundamental changes are occurring in the manner in which the nation's health problems are addressed. As a result, important new preventive measures are being added to traditional approaches like sanitation and immunization. Among the more significant developments of the 1970's was the growth in knowledge and awareness of how important health promotion and disease prevention could be in realizing further reductions in unnecessary death and disability. For example, specific behavioral risk factors are identifiable for the major health problems confronting Americans, including those for heart disease, stroke, and cancer.

As our understanding deepens about the influence that personal behavior can have on health status, a significant effort is developing to help Americans achieve greater gains in the maintenance and improvement of their health. It is clear that more emphasis on strategies for prevention of disease are required by both private and the public sector when behavior choice is a factor in each of the ten leading causes of death.

In 1979, the Surgeon General issued a report on health promotion and disease prevention entitled *Health People*, which highlighted the principal preventable health problems facing Americans and outlined strategies that might be used to address those problems. In the report, prominent health challenges that people face at five different life stages were discussed, and specific goals for health improvement to be attained by 1990 were established for each life stage.

The Department of Health and Human Services published the document *Promoting Health/Preventing Disease: Objectives for the Nation* in 1980. It detailed specific objectives for the nation to reach the goals outlined in *Healthy People*—227 objectives in all, distributed across 15 areas which fell into the three broad categories of health promotion, health protection, and personal preventive services. For example, the five areas identified as targets for health promotion efforts were: Smoking and health; misuse of alcohol and drugs; nutrition; physical fitness and exercise; and control of stress and violent behavior. In order to meet the 1990 health objectives for the nation, it is necessary to enlist the support and commitment of groups representing information sciences, worksites, primary health care providers, nutritionists, community organizations, and schools. By working with national organizations that have local chapters, affiliates, or members, ODPHP will be better able to facilitate this process. ODPHP seeks to extend the reach of health promotion/disease prevention programs by working through cooperative agreements with national organizations that are in a position to influence programming in these settings.

The purpose of the National Health Promotion Program is to educate the public about environmental, occupational, societal and behavioral factors which affect health in order that individuals may make informed decisions about health-related behavior. It also serves as a Federal focal point for the development, implementation, and coordination of programs that promote good health habits designed to prevent disease and disability. These objectives are consistent with the General Authorities set forth in Section 1701(1) and 301 of the Public Health Service Act. Cooperative agreements are granted as part of the National Health Promotion Program number 13.990, as described in the *Catalog of Federal Domestic Assistance*. To date, ODPHP has funded a total of seven separate cooperative agreements with the American Red Cross, the National Board of YMCA's, the National Coalition of Hispanic Mental Health and Human Services Organizations, the National Urban League, the Washington Business Group on Health, the Workplace Health Fund, and the American Association of School Administrators.

FY 1985 Priorities

In support of ODPHP's mandate to help promote health and prevent disease among Americans through the oversight and support of the Department of Health and Human Service's programs in prevention, ODPHP works to foster partnerships with the private sector that will further the reach of health promotion and disease prevention activities and programs. To this end, ODPHP intends to establish cooperative agreements in FY 1985 with national organizations that have constituencies whose concerns address the following ODPHP initiative areas:

- *Nutrition Initiative*: The Nutrition Initiative works to strengthen the Department's capabilities and national leadership in nutrition research, nutrition monitoring, nutrition services and training, nutrition education, food safety and quality, and international nutrition. The effort is overseen by the DHHS Nutrition Policy Board, chaired by the ODPHP Director, and includes activities such as the Interagency Committee on Human Nutrition Research, the Joint DHHS/USDA Nutrition Monitoring Evaluation Committee and the development of the first Surgeon General's Report on Nutrition and Health.
- *Preventive Services Initiative:* The ODPHP fosters the delivery of personal preventive services in clinical settings through its Preventive Services Initiative, which works with major academic institutions, professional organizations, reimbursement agencies, and scientific groups to identify preventive services for hospitals and physicians' offices and to assess the clinical and economic issues in their delivery. Specific examples include the 1982 National Conference on the Role of Prevention in Medical Education and the ongoing U.S./Canadian Task Force on Preventive Services.
- *School Health Initiative*: ODPHP has cosponsored with the Department of Education and Interagency Committee on Health Promotion Through the Schools. It also has undertaken the first comprehensive health-oriented effort to assess the fitness level of school children, fostered the development of a special review on the use of computers for health education, and supported with CDC a major evaluation of curricula developed for school health education.
- *Worksite Health Promotion Initiative*: Given the rising costs of health care as a business expense,

employers have both a special opportunity and a special incentive to enhance the health of employees and their families. The National Worksite Health Promotion Initiative has sponsored the following projects: the first National Conference on Health Promotion in Occupational Settings (1979); materials to assist in the development of programs; case studies of the health promotion activities of business coalitions and the needs of small businesses; collaborative efforts to improve the quality of evaluation of worksite health promotion; a national survey of worksite health promotion activities; and a project to explore the future of work and health. The two existing worksite cooperative agreements focus on expanding activities through media and union involvement.

• *Community Health Promotion Initiative*: The National Health Promotion Program has used media-based efforts to mobilize community resources for health promotion. Activities were addressed first to the general public through the HealthStyle campaign, then to mothers and children through the Healthy Mothers/Healthy Babies program. Now attention is directed to older Americans with the Initiative on Health Promotion for the Elderly. This initiative is designed to use the fundamental principles of both media marketing and community organization to enhance the health practices of older people with respect to diet, exercise, smoking, and alcohol use, and appropriate use of medications and preventive services.

• *Health Information Initiative*: Through the National Health Information Clearinghouse (NHIC), ODPHP is able to respond directly to requests for health information. Serving both the general public and health professionals, NHIC receives more than 2,000 requests a month. It answers these in two ways: by retrieving information from the NHIC's onsite library and database or by forwarding requests to other organizations for direct response. In addition, the NHIC serves as a resource for disseminating information in support of the various ODPHP initiatives. NHIC also prepares the monthly DHHS Prevention Abstracts, which summarizes prevention-oriented findings in the scientific literature, and the DHHS Prevention Activities Calendar, which highlights major prevention events for the month.

In FY 1985, ODPHP intends to award at least one cooperative agreement in each of the designated initiative areas.

As further guidance, a list of suggested project ideas for each initiative area has been included in Appendix A. This list is intended to be suggestive, not prescriptive, and applicants are encouraged to develop innovative proposals within the specified initiative areas that are appropriate for their constituencies.

ODPHP has identified 15 priority issue areas, that are the focus for the Office's work in health promotion and disease prevention. The priority issue areas are:

- High blood pressure control
- Family planning
- Pregnancy and infant health
- Immunization
- Sexually transmitted diseases
- Toxic agent control
- Occupational safety and health
- Accident prevention and injury control
- Fluoridation and dental health
- Surveillance and control of infectious diseases
- Smoking and health
- Misuse of alcohol and drugs
- Nutrition
- Physical fitness and exercise
- Control of stress and violent behavior

Organizations submitting proposals are strongly urged to focus their projects on priority issues and target populations which are most congruent with their own organizational missions and constituencies.

Objectives

Under the cooperative agreement program, participating organizations should advance the concepts of health promotion and disease prevention. In addition, organizations should work to stimulate the adoption of health promotion programs among their members and/or constituents. Specific objectives for the cooperative agreement program are as follows:

1. To stimulate and develop support for health promotion/disease prevention programming in national organizations by:

• Providing support for nationally coordinated efforts to develop and implement health promotion programs,

• Influencing their membership and the individuals they serve about aspects of lifestyle that are related to health status, and

• Enhancing organizational support for and involvement in the 1990 Health Objectives for the Nation.

2. To expand the reach of health promotion/disease prevention activity and improve the knowledge of how programs work by:

• Stimulating the development of health promotion/disease prevention programs/activities for populations not now served by health promotion programs,

• Stimulating the development of health promotion/disease prevention programs designed to meet the special health needs for an organization's members,

• Increasing the number, improving the quality, and expanding the scope of health promotion/disease prevention programs conducted by national organizations, and

• Conducting an assessment of the project's outcomes during the period of support.

Anticipated outcomes of the Cooperative Agreement Program are an increase in the number, kind, and quality of health promotion programs initiated and supported by national organizations, especially for those populations not previously reached. Activities should, where possible, be tied to the achievement of the Objectives for the Nation set forth in *Promoting Health/Preventing Disease: Objectives for the Nation.*

Eligibility Requirements

In order to be eligible to participate in this cooperative agreement, an organization must meet *all* of the following requirements:

• Be a national, private nonprofit, organization;

• Have a national membership, state/local chapters, and/or affiliates;

• Demonstrate an understanding of the current and potential role of the membership in health promotion efforts;

• Have in place a variety of communication mechanisms that are appropriate for influencing members and other constituents to become involved in health promotion/and disease prevention;

• Demonstrate top level support within the organization for the project and, where appropriate, demonstrate similar support from the membership; and

Activities undertaken by each organization will depend on the goals of the organization, its programming and communication mechansims, and the potential its membership has for promoting health and preventing disease.

ODPHP will be involved in all activities undertaken as part of the cooperative agreement program and will:

• Provide up to 20 percent of one professional staff person per year to participate in the planning and management of the cooperative agreement and to coordinate activities between the organization and ODPHP;

• Make available informational and technical assistance from government sources, within resources available and as determined appropriate by the project officer;

• Provide liaison with other government and private agencies as appropriate; and

• Stimulate the exchange of ideas and problems among cooperative agreement recipients through regularly scheduled meetings.

Project Narrative

To be considered for a cooperative agreement, organizations must submit preapplication concept papers using the attached form 5161–1. Preapplications are not to exceed ten double-spaced pages (five single-spaced) for a competitive review by a panel of non-Federal and Federal experts and by ODPHP staff. Applicants, in writing their narrative, are required to describe the proposed project, provide an outline of a budget, describe how the project information relates to the budget information, and set forth brief job description(s) for proposed project staff. Applicants are strongly urged to organize the narrative of their proposals following the outline provided by the review criteria.

Review Criteria

Concept papers must demonstrate that the applicant meets all the eligibility requirements listed and must concisely address the following review criteria.

I. Description of what the organization proposes to accomplish and demonstrate the potential of the proposed project to make an innovative and/or significant contribution to national efforts to achieve the 1990 disease prevention and health promotion Objectives for the Nation. (Review points—20)

II. Description of the extent to which the project addresses the needs of populations that have been underserved by past efforts, the priority issues of the ODPHP and the appropriateness of the project for the identified constituency. (Review points—15)

III. Description of the overall track record, capability and commitment of the organization to reaching and influencing its membership or constituents on programmatic issues and topics, and its commitment to maintaining the health promotion/disease prevention effort after the funding period. (Review points—20)

IV. Outline briefly a specific, sound, feasible, and appropriate workplan, including a plan to assess program outcomes. (Review points—15)

V. Description of how the organization will provide the administrative capability and staff expertise required to successfully complete the proposed project. (Review points—15)

IV. Outline briefly the project's budget, with a clear financial or in-kind commitment of resources by the applicant organization to the support of the proposed project, equivalent to a minimum of 20 percent of the project costs (Review points—5)

Review Process and Requests for Full Application

Upon receipt of preapplications by ODPHP, they will be screened to assure that all eligibility requirements have been met. Preapplications meeting these requirements will be reviewed by non-Federal experts and Federal staff using the criteria outlined above. Based on the results of this review and the priorities of ODPHP, the Director of ODPHP will select projects for preparation by applicants of detailed work plans and budgets. Those applicants whose preapplication concept papers are selected for further development will be notified in writing and a date for submitting full applications will be set. Those whose preapplications are not selected also will be informed in writing.

Upon receipt of full applications by ODPHP, they will be reviewed by the same non-Federal experts and Federal staff who reviewed the concept papers. The result of their final review will be recommendations to the Director of ODPHP for FY 1985 cooperative agreement awards. ODPHP intends to make awards in April 1985.

Period of Support

Contingent on the availability of funds and satisfactory performance, cooperative agreements will be awarded to national organizations for project periods of up to three years. To obtain funding after the initial 12-month award, a continuation application and approval will be required for each subsequent year. Continuation applications will not be subjected to competitive review. Anticipated funding levels for FY 1985 will be approximately $50,000. Subsequent years will be funded at a similar level. It is expected that eight separate cooperative agreements with national organizations will be awarded in FY 1985.

Terms and Conditions of the Award

The HHS Appropriations Act requires that recipients of funds share in the cost of activities supported by cooperative agreements. Federal funds should be viewed as seed money to assist organizations in the development of health promotion initiatives. Monies allocated for cooperative agreements are not intended to cover all of the costs that will be incurred in the process of completing the projects. Applicants should demonstrate a commitment of financial or in-kind resources to the support of proposed projects equivalent to a minimum of 20 percent of their total costs.

Organizations participating in the cooperative agreement program may use awarded funds to support salaries of individuals assigned to the project, the development or purchase of direct program materials, direct program-related activities, or for travel related to the cooperative agreement.

All award recipients will be required to submit quarterly progress statements in a format and on a schedule to be determined after the award. In addition, recipients will be required to submit a detailed summary report describing the project and its outcomes no later than 90 days after termination of the period of support.

Preapplication Procedures

1. All preapplications must be covered by a signed copy of PHS Form *5161–1*, with the required information filled in appropriately. See Appendix B for Copy of PHS Form *5161–1*.

2. All preapplications must be *received* at the following address no later than 45 days after publication of this notice. Hand delivered applications are accepted during the normal working hours of 9:00 a.m. to 5:30 p.m., Monday through Friday. Applications hand delivered or postmarked later than 45 days after publication will be ineligible.

3. Preapplication packages should be sent to: National Health Promotion Program, Office of Disease Prevention and Health Promotion, 330 "C" Street, SW., Room 2132, Washington, D.C. 20201.

4. Preapplications must be typed on one side of the page only. They should not exceed 10 pages double-spaced (5 pages single-spaced) plus, title/cover page and material describing the applicant organization.

5. The original and two copies of each preapplication must be submitted to: Office of Disease Prevention and Health Promotion, 2132 Switzer Building, 330 C Street, S.W., Washington, D.C. 20201, Attention Cheryl Damberg. Submitted of 4 additional copies will expedite processing. There is no penalty for not submitting additional copies.

6. One copy of the preapplication must be sent to the applicant's State Single Point of Contact (SSPOC) for review, as required by Executive Order 12372. The

SSPOC will have 60 days starting from the application deadline date to comment on preapplications for funding covered by PHS programs.

Further Information

To request a copy of PHS Form 5161–1 or for further clarification, contact: Cheryl Damberg, (202) 472–5660 or James Harrell, (202) 245–7611, Room 2132 Switzer Building, 330 C Street, SW., Washington, D.C. 20201

(National Health Promotion Program, Catalog of Domestic Assistance Number 13.990)

Dated: December 4, 1984.

J.M. McGinnis,

Deputy Assistant Secretary for Health (Disease Prevention and Health Promotion), Assistant Surgeon General.

Appendix A—Suggested Project Ideas

The following ideas for cooperative agreement projects are meant to be suggestive, not prescriptive.

For cooperative agreements dealing with the *worksite health promotion* initiative:

Mechanisms to expand the reach of worksite health promotion activities to dependents.

Mechanisms that focus on improving mental health and reducing unproductive and harmful reactions to stress by helping individuals adapt to changes in work environments.

Mechanisms to meet the needs of underserved employee groups, such as migrant farmworkers, new immigrants, veterans and disabled persons.

For cooperative agreements dealing with the *school health* initiative:

Mechanisms that focus on extending and evaluating the use of new educational technologies in health instruction and services.

Mechanisms for the development of standarized school health records for students.

Mechanisms for emphasizing that "back to basics in education" requires a healthy school-age population.

Programs to help constituencies understand and lend support to comprehensive school health education.

Mechanisms for maintaining surveillance of school health education and physical education mandates by state and local area.

For cooperative agreements dealing with the *health information* initiative:

Programs to supplement DHHS's Health Promotion for the Elderly campaign.

Prototypes of a health promotion/disease prevention resource center.

Continuing education for librarians and information scientists in health promotion/disease prevention subjects.

For cooperative agreements dealing with the *nutrition* initiative:

Improvement of nutrition awareness and availability of nutritionally healthy meals in away-from-home eating establishments.

For cooperative agreements dealing with the *community health promotion* initiative:

Programs focused on leisure time of adolescents.

Mechanisms to collect, analyze and disseminate exemplary community approaches to health promotion for the elderly.

Programs that target health promotion/disease prevention efforts to racial and ethnic minority populations vulnerable to particular kinds of health risks.

Programs that address the health promotion/disease prevention aspects of city environments.

Programs that engage news and entertainment media to expose women to relevant health promotion/disease prevention messages.

For cooperative agreements dealing with the *preventive services* initiative:

Educational and training programs and materials directed at health care professionals focusing on recommended preventive services and their delivery (e.g., smoking cessation, nutrition counseling, stress reduction counseling, accident prevention, exercise and fitness counseling).

Educational programs on sexually transmitted diseases targeted at adolescents for use by medical offices and outpatient facilities.

Educational programs targeted to low income-inner city expectant mothers to improve prenatal care.

Programs to collect, evaluate, analyze and disseminate information on issues in delivery of preventive services, including current knowledge base, barriers to effective preventive services delivery, innovative educational approaches, cost effectiveness/cost benefits of varied services.

For cooperative agreements dealing with *cross-cutting* issues:

Worksite health promotion programs for school employees.

Community-based media programs which emphasize the importance of healthy children as part of "back-to-basics" education changes.

Nutrition programs at the worksite, with special attention to worksites not served by company cafeterias.

Development and implementation of a standard school and medical office health record for recording preventive services and other health information for school-age children.

Information systems for collecting, storing and disseminating preventive service evaluations and recommendations for easy access, referral and cross-reference by practitioners in clinical settings.

BILLING CODE 4160–17–M

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATIO AND WELFARE
PUBLIC HEALTH SERVICE

APPLICATION FOR FEDERAL ASSISTANCE *(NONCONSTRUCTION PROGRAMS)*

OMB Approval No. 29-R0218

SECTION I—APPLICANT/RECIPIENT DATA

PART I

1. TYPE OF ACTION (Mark appropriate box)
- ☐ PREAPPLICATION
- ☐ APPLICATION
- ☐ NOTIFICATION OF INTENT (OpL)
- ☐ REPORT OF FEDERAL ACTION

2. APPLICANT'S APPLICATION
a. NUMBER
b. DATE Year month day 19

3. STATE APPLICATION IDENTIFIER
a. NUMBER
b. DATE ASSIGNED Year month day 19

Leave Blank

4. LEGAL APPLICANT/RECIPIENT
a. Applicant Name :
b. Organization Unit :
c. Street/P.O. Box :
d. City :
e. County :
f. State :
g. ZIP Code:
h. Contact Person (Name & telephone No.) :

5. FEDERAL EMPLOYER IDENTIFICATION NO.

6. PROGRAM (From Federal Catalog)
a. NUMBER | | | • | | | |
b. TITLE

7. TITLE AND DESCRIPTION OF APPLICANT'S PROJECT

8. TYPE OF APPLICANT/RECIPIENT
A-State
B-Interstate
C-Substate District
D-County
E-City
F-School District
G-Special Purpose District
H-Community Action Agency
I- Higher Educational Institution
J- Indian Tribe
K-Other (Specify):
Enter appropriate letter ☐

9. TYPE OF ASSISTANCE
A-Basic Grant
B-Supplemental Grant
C-Loan
D-Insurance
E-Other
Enter appropriate letter(s) ☐☐

10. AREA OF PROJECT IMPACT (Names of cities, counties, States, etc.)

11. ESTIMATED NUMBER OF PERSONS BENEFITING

12. TYPE OF APPLICATION
A-New
B-Renewal
C-Revision
D-Continuation
E-Augmentation
Enter appropriate letter ☐

13. PROPOSED FUNDING

a. FEDERAL	$	.00
b. APPLICANT		.00
c. STATE		.00
d. LOCAL		.00
e. OTHER		.00
f. TOTAL	$	.00

14. CONGRESSIONAL DISTRICTS OF:
a. APPLICANT
b. PROJECT

16. PROJECT START DATE Year month day 19

17. PROJECT DURATION Months

18. ESTIMATED DATE TO BE SUBMITTED TO FEDERAL AGENCY ▶ Year month day 19

15. TYPE OF CHANGE (For 12c or 12e)
A-Increase Dollars
B-Decrease Dollars
C-Increase Duration
D-Decrease Duration
E-Cancellation
F-Other (Specify):
Enter appropriate letter(s) ☐☐☐

19. EXISTING FEDERAL IDENTIFICATION NUMBER

20. FEDERAL AGENCY TO RECEIVE REQUEST (Name, City, State, ZIP code)

21. REMARKS ADDED
☐ Yes ☐ No

SECTION II—CERTIFICATION

22. THE APPLICANT CERTIFIES THAT ▶

a. To the best of my knowledge and belief, data in this preapplication/application are true and correct, the document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is approved.

b. If required by OMB Circular A-95 this application was submitted, pursuant to instructions therein, to appropriate clearinghouses and all responses are attached:

	No response	Response attached
(1)	☐	☐
(2)	☐	☐
(3)	☐	☐

23. CERTIFYING REPRESENTATIVE
a. TYPED NAME AND TITLE
b. SIGNATURE
c. DATE SIGNED Year month day 19

SECTION III—FEDERAL AGENCY ACTION

24. AGENCY NAME

25. APPLICATION RECEIVED Year month day 19

26. ORGANIZATIONAL UNIT

27. ADMINISTRATIVE OFFICE

28. FEDERAL APPLICATION IDENTIFICATION

29. ADDRESS

30. FEDERAL GRANT IDENTIFICATION

31. ACTION TAKEN
- ☐ a. AWARDED
- ☐ b. REJECTED
- ☐ c. RETURNED FOR AMENDMENT
- ☐ d. DEFERRED
- ☐ e. WITHDRAWN

32. FUNDING

a. FEDERAL	$	.00
b. APPLICANT		.00
c. STATE		.00
d. LOCAL		.00
e. OTHER		.00
f. TOTAL	$	.00

33. ACTION DATE ▶ Year month day 19

34. STARTING DATE Year month day 19

35. CONTACT FOR ADDITIONAL INFORMATION (Name and telephone number)

36. ENDING DATE Year month day 19

37. REMARKS ADDED
☐ Yes ☐ No

38. FEDERAL AGENCY A-95 ACTION

a. In taking above action, any comments received from clearinghouses were considered. If agency response is due under provisions of Part 1, OMB Circular A-95, it has been or is being made.

b. FEDERAL AGENCY A-95 OFFICIAL (Name and telephone no.)

PHS 5161 1 (PAGE 1) Form Approved
(Rev. 3 79) OMB No. 68 R1379

STANDARD FORM 424 PAGE 1 (10-75)
Prescribed by OMB Circular No A 102

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federal register

Wednesday
December 12, 1984

Part V

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Part 668

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary proposes to amend the Student Assistance General Provisions regulations for postsecondary institutions participating in the student financial assistance programs authorized by Title IV of the Higher Education Act (Title IV, HEA programs). These regulations are being amended to clarify requirements, to reduce institutional administrative burden, and to consolidate definitions and provisions common to all the Title IV, HEA programs that were previously contained in individual program regulations.

DATES: Comments must be received on or before February 11, 1985.

ADDRESSES: Comments should be addressed to Mr. Brian Kerrigan, Office of Student Financial Assistance, U.S. Department of Education, 400 Maryland Avenue, SW., (Room 4318, Regional Office Building No. 3), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Kerrigan or Ms. Gail L. Cornish, Telephone (202) 472–4300.

SUPPLEMENTARY INFORMATION: On December 31, 1980, the Student Assistance General Provisions regulations governing the participation of postsecondary institutions in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs) were published in the **Federal Register**. The Title IV, HEA programs include the Pell Grant, Supplemental Educational Opportunity Grant (SEOG), College Work-Study (CWS), National Direct Student Loan (NDSL), State Student Incentive Grant (SSIG), Guaranteed Student Loan (GSL), and PLUS Programs. Although these regulations were final regulations implementing statutory amendments to Title IV of the Higher Education Act by the Education Amendments of 1980 (Pub. L. 96–374), comments were also requested.

These proposed regulations are being issued in accordance with the Department's deregulation initiative. They also reflect comments received from the postsecondary education community in response to the regulations published on December 31, 1980, as well as subsequent amendments to the Student Assistance General Provisions regulations published in the **Federal Register** on April 11, August 30 and October 6, 1983. These proposed amendments clarify requirements, reduce institutional administrative burden and consolidate common Title IV, HEA program definitions and provisions.

The following is a discussion of the proposed amendments to the Student Assistance General Provisions regulations.

I. Subpart A—General

Section 668.2—General definitions. A "general definitions" section is proposed in Subpart A to consolidate definitions common to all the Title IV, HEA programs from the individual program regulations in an effort to ease confusion. This consolidation eliminates redundancy in the definition sections of the program regulations and clarifies which terms are common to all the programs. Those definitions which are peculiar to each program remain in the individual program regulations.

Section 668.3—Public or private nonprofit institution of higher education. In the current definition, a public or private nonprofit institution of higher education which seeks to participate solely in the GSL or PLUS Program but cannot be accredited or approved because there is no nationally recognized accrediting agency or association qualified to accredit or approve that type of institution, may be approved by a committee appointed by the Secretary. Although still contained in Section 435 of the Higher Education Act, this provision is deleted in these proposed regulations. It has been the experience of the Department that the need for such a procedure no longer exists because of the growth in number and type of nationally recognized accrediting agencies and associations.

Section 668.6—Vocational school. For purposes of the Student Assistance General Provisions regulations, an "institution" includes a public or private nonprofit institution of higher education, a proprietary institution of higher education, a postsecondary vocational institution and, in connection with eligibility to participate in the GSL and PLUS Programs, a vocational school.

Therefore, in order to consolidate the four institutional definitions in one set of regulations, the definition of a "vocational school" is included with the other three definitions in these proposed regulations and will be deleted from the GSL (34 CFR 682–200) and PLUS (34 CFR 683.10) Program regulations when they are published. Two substantive changes to the definition are proposed in these regulations:

(1) The current definition requires that a vocational school provide a program (other than by correspondence) of no less then 300 clock hours of instruction or its equivalent. These proposed regulations specify a minimum equivalent of 300 clock hours in terms of semester, trimester and quarter hours. They propose that a program be no less than eight semester or trimester hours or 12 quarter hours at institutions using credit hours to measure academic progress. The 300 clock hour program length required to be provided by a vocational school is one-third as long as a "one year training program" which is defined to be at least 900 clock hours, 24 semester or trimester hours or 36 quarter hours. Therefore, it is proposed that the credit hour equivalent of 300 clock hours in the definition of a vocational school also be one-third that of the one year training program requirement which is eight semester or trimester hours or 12 quarter hours.

(2) In the current definition, a vocational school that cannot be accredited or approved because there is no nationally recognized accrediting agency or association qualified to approve that type of institution, may be approved by a State approval agency recognized by the Secretary or by a committee appointed by the Secretary. Although still contained in Section 435 of the Higher Education Act, this provision is deleted in these proposed regulations. It has been the experience of the Department that the need for such a procedure no longer exists because of the growth in number and type of nationally recognized accrediting agencies and associations.

Ability to benefit requirements. The institutional eligibility requirements in § 668.6 entitled "Ability to benefit" of the existing Student Assistance General Provisions regulations are included as paragraph (c) in the institutional definitions of a public or private nonprofit institution of higher education, a proprietary institution of higher education, a postsecondary vocational institution, and a vocational school (§§ 668.3 through 668.6) in the proposed regulations.

The Secretary is aware that there has been some confusion concerning the meaning of the ability to benefit requirements. This confusion resulted from the discussion in the preamble when the existing regulations were published in the **Federal Register** on December 31, 1980 (45 FR 86854). The preamble stated that:

* * * Institutions no longer need to document and keep records for each student. An institution may now satisfy this

requirement if it can demonstrate that it had developed and consistently applies criteria for determining that its students have the ability to benefit from the education or training it offers. Of course, however, the institution must be able to justify, upon request, that the students it admits have that ability.

Unless an institution chooses to participate solely in the GSL and PLUS Programs, the Higher Education Act permits an institution to qualify as an eligible institution of higher education if it, *inter alia*, admits as regular students, "persons who are beyond the age of compulsory school attendance in the State in which the institution is located and *who have the ability to benefit from the training offered by the institution*." (emphasis added) 20 U.S.C. 1088(b), 1088(c) and 1141(a).

In order to satisfy the statutory and regulatory requirements, an institution must develop and consistently apply criteria for determining whether students without a high school diploma or its equivalent have the ability to benefit from the education or training offered. An institution may, but is not required to, keep documentation that each such student was determined to meet the ability to benefit criteria in his or her student financial aid or admissions file. It was this point that the preamble to the existing regulations published on December 31, 1980 did not fully explain.

Therefore, the requirement has been modified in these proposed regulations to clarify that an institution must be able to demonstrate, upon request of the Secretary, that is has developed criteria for determining ability to benefit and consistently applies that criteria. For example, if an institution's ability to benefit determination is based on student's admission test scores, it may demonstrate by means of a centrally maintained printout or listing of students' test scores that it applies its criteria.

Section 668.7—Definition of an independent student. The definition of an "independent student" for purposes of all the Title IV, HEA programs (except the SSIG Program) is codified as § 668.1a of the Student Assistance General Provisions regulations. The definition has been redesignated as § 668.7 in these proposed regulations but with no substantive changes.

Civil rights requirements and criminal penalties. Section 668.9 of the current regulations includes a table of the civil rights statutes and regulations that apply to institutions participating in the Title IV, HEA programs. This table and section is deleted in the proposed regulations because the Secretary believes that institutions are otherwise aware of the civil rights statutes and regulations to which they are subject. The Secretary is also deleting § 668.10 of the current regulations which merely repeat the statutory provisions of section 490 of the HEA concerning criminal penalties.

II. Subpart B—Standards for Participation in Title IV, HEA Programs

This subpart has been revised to provide a more logical organization for ease of location and consistent groupings of subjects.

Section 668.12—Institutional participation agreement. Section 668.12 (redesignated § 668.11(d) of the current regulations) concerning the written agreement which institutions must enter into with the Secretary to participate in the Title IV, HEA programs (except the SSIG Program) is modified in these proposed regulations for clarity.

Section 668.14—Standards of administrative capability. Section 668.16 of the current regulations is redesignated as § 668.14 in these proposed regulations with two substantive amendments.

(1) Section 668.16(e) was published as a final rule in the **Federal Register** on October 6, 1983, to provide parameters for institutions to use in establishing their specific standards of satisfactory progress for the purposes of the receipt of Title IV, HEA program assistance.

As discussed in the preamble to the regulations published on October 6, 1983, the concept of a time frame in which the student must complete his or her educational objective, degree or certificate was expanded in an effort to more adequately measure quantitative progress. Thus, § 668.16(e)(3)(ii) of those regulations requires an institution to establish a maximum time frame in which the student must complete his or her educational objective, degree, or certificate, and then divide that time frame into increments. At the end of each increment, § 668.16(e) requires the institution to determine whether the student has successfully completed a minimum percentage of work. The length of the maximum time frame and the length of the increment (not to exceed one academic year) is determined by the institution.

That section then sets out a specific method of determining the minimum percentage of work to be completed. It requires that the minimum percentage of work be the number of increments completed by the student compared to the maximum time frame set by the institution. For example, a baccalaureate degree granting institution with a maximum time frame of six academic years might choose one academic year as the length of its increment for determining work completed. A full-time student would then have to successfully complete at least one-sixth of the work required for his or her degree by the end of the first academic year, and so on to be maintaining satisfactory progress. This specific method of determining the minimum percentage of work completed was developed as a reasonable one for measuring a student's consistent quantitative progress toward his or her goal.

Since publication of the final regulations, a large number of requests have been received to reevaluate this method for determining the minimum percentage of work completed. These commenters pointed out that although the institution has discretion in establishing the maximum time frame and, to a lesser extent, the length of the increment, flexibility in establishing the minimum percentage of work completed is also critical. They feel that this flexibility is especially critical for institutions that deal with greatly diverse students and programs. The commenters particularly objected to the fact that the lack of discretion in the final regulations prohibits an institution from establishing a quantitative satisfactory progress standard under which work could be successfully completed at a lower rate during a student's early years in postsecondary school since that time serves as a crucial period of adjustment for many students.

In response to these commenters, § 668.16(e)(3)(ii) of the regulations has been reevaluated. The Secretary agrees with the commenters that an institution should have the discretion to establish the minimum percentage of work completed when establishing its standards of satisfactory progress in order to best take into account its student body and programs offered.

Therefore, the Secretary is proposing, in § 668.14(e)(3) of these regulations, revisions to § 668.16(e)(3). The Secretary is revising that section so that the institution will be required to establish a schedule designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment in order to complete the educational objective, degree or certification within the established maximum time frame. At the end of each increment, the institution would then be required to determine that the student had successfully completed at least the appropriate percentage or amount of work according

to the schedule. For example, an institution with a maximum time frame of six academic years and an increment length of one academic year might choose to establish the following full-time schedule for its baccalaureate degree program which requires 120 credits for completion:

Academic years completed	1	2	3	4	5	6
Numbers of credits successfully completed	15	30	51	72	96	120

Such a schedule would permit a student to complete less work during the early adjustment increments than would be required in the later academic years and still maintain satisfactory progress. Of course, an institution may require a student to complete an equal amount of work in each increment.

It should be noted that these revisions were discussed in a "Dear Colleague" letter sent to all institutions participating in the Title IV, HEA programs in December 1983.

(2) The Secretary is concerned with preventing fraud and abuse in the Title IV, HEA program. To that end, he has instituted the verification procedures in the Pell Grant Program and has included, in the current Student Assistance General Provisions regulations, the requirement that an institution develop an adequate system to verify the consistency of all the information it receives about a student's application for Title IV, HEA program funds. In furtherance of this concern, the Secretary is proposing to add a provision to the factors used in determining whether an institution has administrative capability. Section § 668.14(g) in these regulations requires an institution to refer any instance in which the institution has reason to believe that an applicant has applied for Title IV, HEA program funds under false pretenses to State or local law enforcement agencies for investigation. That section also requires the reporting of such referrals to the Secretary.

Section 668.15—Additional factors for evaluating administrative capability and financial responsibility. Currently, the Secretary considers that an institution's default rate on loans made under the GSL, PLUS and NDSL Programs may be an indication of the institution's impaired capability of properly administering the Title IV, HEA programs. The reference to the default rates on GSL and PLUS loans in connection with an institution's administrative capability is deleted from § 668.16 (redesignated § 668.17) of these proposed regulations. Unlike the loans it makes under the NDSL Program, an institution does not (unless it is also the lender) have the responsibility for servicing GSL and PLUS loans received for attendance at the institution. Because of this lack of direct responsibility and control, the default rate on GSL and PLUS loans is proposed to be deleted as a possible indication of an institution's impaired administrative capability.

Section 668.18—Written agreements between an eligible institution and an ineligible entity. This section (redesignated § 668.19—Contracting for educational programs or courses) is modified in these proposed regulations to clarify existing policy. That is, the eligible institution must take into account all courses taken by the student at both the eligible institution and the ineligible entity (that are covered under the written agreement) when determining the student's enrollment status and cost of attendance and must maintain all records regarding the student's eligibility for and receipt of Title IV, HEA program assistance.

Section 668.19—Financial aid transcript. The provisions concerning the financial aid transcript requirement (redesignated § 668.14) are reorganized and modified for clarity in § 668.19 of these proposed regulations.

Several amendments to the financial aid transcript requirement are included in these proposed regulations:

(1) Currently, an institution may disburse Title IV, HEA program funds (other than GSL checks where the institution is not the lender) for only one payment period unless it receives a financial aid transcript or a written notice that the transcript will not be sent from the institution(s) that the student previously attended. One amendment in these proposed regulations prohibits an institution which participates in the Pell Grant Program under the Alternate Disbursement System (ADS) from certifying the institutional portion of the transfer student's Pell Grant Request for Payment (ED Form 304) before receiving the transcript or notice. This amendment reflects current policy that has not previously appeared in regulations. Because ADS institutions are not directly involved in the disbursement of Pell Grant awards, the option to disburse Pell Grant funds for one payment period before receiving the transcript or notice is not applicable to these institutions.

(2) A new provision in these proposed regulations prohibits an institution from certifying the institutional portion of the loan application under the GSL and PLUS Programs before receiving the transcript or notice. A related amendment requires information as to the amount of and period covered by each GSL and PLUS Loan received by the student or from which the student benefited to be included on the transcript. When originally published in the **Federal Register** on September 28, 1979 (44 FR 56282), the financial aid transcript requirement prohibited the disbursement of a GSL before receipt of the transcript or notice and also called for the inclusion of GSL information on the transcript. Both of these provisions were revoked when the financial aid transcript requirements was amended in the **Federal Register** on June 24, 1980 (45 FR 42576). They were revoked because of the administrative problems affecting the lender and guarantee agency when a check was issued but never released for lack of a transcript or notice and because it was hoped that attempted borrowing in excess of statutory GSL Loan limits and previous borrower defaults would be discovered during guarantee agency processing.

However, in recent years, a serious abuse has been discovered in the GSL Program concerning the receipt by students of loan amounts in excess of the statutory maximums. This greatly increases program costs. This problem occurs because each guarantee agency maintains its own individual records and no national data base exists to monitor statutory annual and aggregate GSL and PLUS Loan limits. Excessive indebtedness on the part of students also contributes to a high default rate which adds additional program costs to the Federal government. The proposed reporting of GSL and PLUS Loan information on the transcript and the prohibition against institutional certification of the application until receipt of the transcript or notice will help alleviate the excessive loan problem and reduce program costs by providing an institution with the transfer student's GSL and PLUS Loan history *before* he or she receives additional loans. By prohibiting the *certification* of the GSL and PLUS application prior to receipt of the transcript or notice rather than the release of a check already issued (as in the original requirement published in 1979), any administrative problems for the lender and guarantee agency are eliminated.

Under current regulations, since a student may receive a GSL and PLUS Loan in a single disbursement covering an entire academic period, a student can receive the full amount of his or her GSL and PLUS Loan regardless of whether the institution subsequently receives a notice that the student is in default or overpayment status and is ineligible to receive other Title IV, HEA program

funds. The provisions proposed in these regulations provide greater consistency among the Title IV, HEA programs in packaging aid for transfer students. Also, in light of the current emphasis on the collection of debts to the Federal government, the financial aid transcript can help to prevent further indebtedness by students already in default and gives such students an impetus to repay defaulted loans and overpayments at previous institutions.

(3) Two new provisions are proposed in § 668.19 to reduce institutional administrative burden as the result of comments from the postsecondary education community. These provisions allow the institution to disburse Title IV, HEA program funds to a student for more than one payment period, and to certify the institutional portion of the Pell Grant Request for Payment (ED Form 304) and loan application under the GSL and PLUS Programs, without the receipt of a financial aid transcript or written notice that it will not be sent if—(A) The institution that the student previously attended is not located in a State; or (B) The institution that the student previously attended is closed and the information concerning the receipt of Title IV, HEA program assistance at that institution is not available.

(4) Under these regulations, it is proposed that institutions need only report on the finacial aid transcript the total amount of NKSL funds advanced to the student for attendance at the institution rather than the amount advanced for each award year as currently required. As noted in comments by the postsecondary education community, this change reflects the delection of statutory NDSL award year limits in the Education Amendments of 1980 and reduces institutional adminstrative burden.

Section 668.20—Limitation on the amount of remedial coursework that is eligible for Title IV, HEA program assistance. A new section (§668.20) is proposed in these regulations limiting the amount of remedial coursework that may be included when an institution is determining a student's enrollement status and cost of attendance under the Title IV, HEA programs. The Secretary believes that a student who has been admitted to a postsecondary instituion should be sufficiently prepared for postsecondary coursework after completing remedial coursework that equals one academic year of study. Therefore, it is proposed that students will be limited to one academic year of non-credit or reduced credit remedial work except for courses that are a part of a program of English as a Second Language Program.

In a strictly literal sense, every program offered by an institution of higher education, no matter how basic, elementary or far removed from the educational level of an eligible postsecondary course of study, can be viewed as remedial program which is "designed to increase the ability of the student to pursue an undergraduate course of study leading to that certificate or degree." Theoretically, a student enrolled in any type of "remedial" program of whatever length could be viewed as eligible to receive assistance under the Title IV, HEA programs. However, the Secretary does not believe that the statutory scheme of the Title IV, HEA programs permits such an interpretaion.

The Title IV, HEA programs were designed to provide financial assistance to students pursuing postsecondary education. Thus, to receive such aid, a student must attend an eligible institution of higher education. One of the criteria defining such an institution is the type of student it admits as a regular student. Such a student must be a high school graduate, a GED recipient or recipient of a similar degree, or must be above the age of compulsory school attendace and with the exception of GSL or PLUS Programs, have the ability to benefit from the education or training offered by the institution in its degree or certificate programs. A remedial program that becomes part of an eligible program must be viewed in this context.

A remedial program, by design, offers instruction on less than a postsecondary level. However, the purpose of the remedial program is to provided a student, who is a high schoool graduate or who has the ability to benefit from the postsecondary education program provided by the institution, with the background and skills to successfully complete that postsecondary program. Presumably because the student is a high school graduate or has the ability to benefit from the postsecondary program, the remedial program, if it is to be considered part of an eligible postsecondary program, must have a reasonale relationship to the eligible postsecondary program both in terms of the level or instruction provided and the length of the program. Therefore, the Secretary is proposing to limit eligiblity for remedial work to one academic year.

An exception to the one year limitation is being proposed for courses in English as a second language (ESL) because ESL students often have complete mastery of logical thinking, communication, and reading, as well as math skills in their own language. However, these students do not have the ability to express this knowledge in English. The difficulty of ESL courses is often comparable to the courses taken by students who enroll in French or German language courses. ESL courses are not designed to develop or improve elementary and secondary educational skills, but instead are designed to permit a student who already has those skills to pursue a postsecondary education through a second language. These students would still be subject to the one-year limitation for any other courses that are remedial in nature.

The cost of attendance under the Pell Grant Program always represents full-time costs for a full academic year as described in program regulations (34 CFR Part 690, Subpart E). For example, a student who has already completed remedial coursework equal to one academic year of study enrolls in two courses for credit (six credits) and two non-credit remedial courses (equivalent to six credits). The institution may only consider such a student's enrollment status to be half-time. The six equivalent credits of the non-credit remedial courses which are beyond one academic year of study for this student may not be included in his or her enrollment status. In addition, the costs for those courses may not be included in determining this student's cost of attendance under the Campus-Based, GSL and PLUS Programs. Under the Pell Grant Program, the institution would determine the student's cost of attendance according to the program regulations and then calculate the student's expected disbursement from the Half-time Disbursement Schedule.

This section also proposes to codify existing policy under the Title IV, HEA programs for determining the equivalency of non-credit or reduced credit remedial coursework in credit or clock hours and for treating non-credit or reduced credit remedial courses for which a student is receiving credit toward a high school diploma or the recognized equivalent of a high school diploma.

Section 668.21—Treatment of Pell Grant, SEOG and NDSL Program funds if recipient withdraws, drops out or is expelled before his or her first day of class. Under the Pell Grant, SEOG and NDSL Programs, an institution has the option of disbursing funds to students who have registered but have not yet begun attending classes. A new section is proposed in these regulations which represents the existing policy for the treatment of such funds if the student never begins attending classes. If a

student officially withdraws, drops out or is expelled before his or her first day of class of a payment period, this section requires that all funds disbursed to the student by check or by credit to his or her account under the Pell Grant, SEOG and NDSL Programs for that payment period be considered an overpayment. The institution must return the overpayment to the appropriate programs since the student who withdraws, drops out or is expelled prior to attending classes never actually becomes eligible for those funds. A student is considered to have dropped out before the first day of class if the institution is unable to document the student's attendance at any class during the payment period regardless of whether the student was registered. The new section will replace § 690.78(c) of the Pell Grant Program regulations (34 CFR Part 690) and codify a policy under the SEOG and NDSL Programs which has not previously appeared in regulations.

Section 668.22—Distribution formula for institutional refunds and for repayments of disbursements made to the student for non-institutional costs. The provisions concerning the distribution of refunds and repayments (redesignated § 668.21) are reorganized and modified for clarify in these proposed regulations.

As a result of comments and inquiries from the postsecondary education community, five new provisions are included in this section for greater clarity. A sixth proposed provision is intended to reduce costs and potential abuse of the Title IV, HEA programs. Although the first five of the following provisions have not previously appeared in regulations, they do represent existing policy.

(1) Proposed paragraph (a)(2) of § 668.22 set out a definition of "institutional refund" for purposes of this section. This provision is included in response to inquiries for the postsecondary education community to clarify that the term "refund" as used in this section does not differ from its common everyday usage. An institutional refund means the amount paid for institutional charges by financial aid and/or cash payments minus the amount retained by the institution for the student's actual period of enrollment upon which the refund is based. The amount retained by the institution for the student's actual period of enrollment is, of course, calculated according to the institution's refund policy.

For example, $1,000 has been paid for institutional charges ($250 by financial aid and $750 by a cash payment from the student) and, according to the institution's refund policy, $500 is the amount to be retained by the institution for the student's actual period of enrollment. The refund amount to which the distribution formula in § 668.22 would be applied is $500 ($1,000 paid—$500 retained). However, if only the $250 of financial aid had been paid for institutional charges and, according to the institution's refund policy, $500 is the amount to be retained by the institution for the student's actual period of enrollment, there is *no* refund amount since the student still owes $250 to the institution. Section § 668.22 would not be applicable in this situation.

(2) Proposed paragraphs (a)(3), (a)(4) and (b)(3) are included in § 668.22 of these proposed regulations to clarify that the portion of the institutional refund or overpayment repaid by the student that the institution must return to the Title IV, HEA programs is the *lesser* of either the amount of assistance received under the Title IV, HEA program(s) for the payment period or the amount obtained by multiplying the refund or the repayment by the appropriate fraction in the regulations. This provision ensures that the total amount of the institutional refund or the repayment returned to the Title IV, HEA programs is never more than the student received from those programs.

(3) For purposes of this section only, a definition of a "payment period" under the GSL and PLUS Programs is included in § 668.22(c) of these proposed regulations. Generally, the term "payment period" is not used in connection with the GSL and PLUS Programs since most loans are made and disbursed for an entire academic period to be covered by the loan. However, for simplicity and consistency in determining the amount of the GSL or PLUS loan to be used in the numerator and denominator of the refund distribution fraction, the same definition of a payment period used under the Campus-Based Programs (34 CFR Parts 674, 675 and 676) is proposed, as under existing policy, for use under the GSL and PLUS Programs. That is, a payment period under the GSL and PLUS Programs is defined in these proposed regulations to be a semester, trimester or quarter or at institutions not using such academic periods, the period between the beginning and the mid-point or between the midpoint and the end of the academic year. For purposes of the refund distribution fraction then, the amount of the GSL or PLUS loan considered to be awarded for the payment period and used in the fraction is that proportionate amount of the loan corresponding to the number of payment periods. For example, if the academic period for which a GSL or PLUS Loan is received by a student is three quarters, one-third of the total loan amount is considered to have been awarded for each payment period and should be used in the numerator and denominator of the refund distribution fraction.

(4) Proposed paragraph (d)(1) of § 668.22 clarified that no amount of the Title IV, HEA program portion of the refund or the overpayment may be allocated to the CWS Program.

(5) Proposed paragraph (d)(2) of § 668.22 clarifies that no amount of the Title IV, HEA program portion of the overpayment may be allocated to the GSL or PLUS Program.

(6) Currently, under GSL and PLUS Program regulations (34 CFR Parts 682 and 683), the institution must return the amount of the Title IV, HEA program portion of the refund allocated to those programs to the borrower's lender within 40 days of the date that the student withdraws, drops out or is expelled. It it proposed in paragraph (d)(5) of § 668.22 that the institution must return the amount of the Title IV, HEA program portion of the refund allocated to the Title IV, HEA programs other than the CWS, GSL and PLUS Programs to the appropriate program account(s) within 30 days of the date that the student withdraws, drops out or is expelled. It is also proposed in paragraph (d)(6) of this section that the institution must return the amount of the Title IV, HEA program portion of the overpayment allocated to the Title IV, HEA programs other than the CWS, GSL and PLUS Programs to the appropriate program account(s) within 30 days of the date that the student repays the overpayment. These two proposed provisions are intended to reduce potential abuse of Title IV, HEA program funds, allow for the prompt reawarding of returned SEOG and NDSL funds to other eligible students and provide consistent treatment of such funds among all the Title IV, HEA programs. The time in which funds allocable to the GSL and PLUS Programs must be returned to the borrower's lender with be reduced from 40 days to 30 days when the GSL and PLUS Program regulations are republished.

Section 668.23—Audits, records and examination. Several amendments are made in § 668.23 (redesignated § 668.12) of these proposed regulations for the purposes of consolidation and clarification. Parallel requirements concerning access to records for Federal audits, biennial non-Federal audits, and the submission of audit reports are currently in the individual Title IV, HEA

program regulations. These requirements are consolidated in § 668.23 of these proposed regulations. These requirements will be deleted from the individual program regulations when they are republished.

Section 668.24—Audit exceptions and repayments. The time in which an institution must repay improperly spent funds changed in § 668.24 (redesignated § 668.13) of these proposed regulations from 60 days to 30 days to conform to the instructions in the revised Office of Management and Budget (OMB) Circular A-50 issued on September 29, 1982. Paragraph (c) of this section is a reiteration of the recently published Notice of Proposed Rulemaking implementing the interest assessment provisions of the Debt Collection Act of 1982 (Pub. L. 97-365) and the revised OMB Circular A-50.

Section 688.25—Loss of institutional eligibility. The provisions concerning the loss of institutional eligibility (redesignated § 668.20) are modified in § 688.25 of these proposed regulations to clarify their applicability to an institution's loss of eligibility for any reason. In addition, the definition of the term "commitment" in reference to an institution's loss of eligibility has been transferred from Subpart G to this section to clarify its use when an institution loses its eligibility for any reason, including termination under Subpart G.

III. Subpart C—Statement of Educational Purpose and Selective Service Registration Requirements

Because of their specific applicability to student eligibility for all the Title IV, HEA programs, a separate subpart was established in these proposed regulations for the provisions under which a student must file a Statement of Educational Purpose and a Statement of Registration Compliance, as well as verify his registration with Selective Service, if required. The provisions relating to student consumer information requirements are included in these proposed regulations as Subpart D.

Section 668.32—Statement of Educational purpose. To eliminate redundancy in the program regulations, the provision that a student must file a Statement of Educational Purpose to be eligible for any Title IV, HEA program assistance was published in the **Federal Register** as § 668.23 of the Student Assistance General Provisions regulations on April 11, 1983. This provision has been redesignated as § 668.32 in these proposed regulations with a clarification that, under the GSL or PLUS Program, the statement must be filed with the student's lender. This provision will be deleted from the individual program regulations when they are republished.

Section 668.33—Statement of registration compliance, through § 668.37—Record retention requirements. An amendment to the Military Selective Service Act mandates that any student who is required to be registered with Selective Service and fails to register is ineligible for Title IV, HEA program assistance. Provisions implementing this requirement were published in the **Federal Register** as §§ 668.23 through 668.28 of the Student Assistance General Provisions regulations on April 11, 1983. These provisions have been redesignated as §§ 668.33 through 668.37 in these proposed regulations with minor clarifications but without substantive changes.

In the preamble to the Student Assistance General Provisions regulations published in the **Federal Register** of April 11, 1983, 48 FR 15578, the Secretary postponed to award year 1985-86, the requirement that an institution verify a student's statement that he registered with the Selective Service. Moreover, the Secretary indicated that the education Department would, through site visits at institutions, verify a student's registration status. The Secretary further stated:

> The Secretary plans to evaluate the results of this method of verification of registration during the 1984-85 academic year. Should the Secretary and the Director find that college students are in compliance with the registration requirements of the Military Selective Service Act, the Secretary and the Director will review the compliance process set forth in § 668.26. If the Secretary and the Director determine that the requirements are not necessary, the Secretary, with the concurrence of the Director, may amend or revoke § 668.26.

As a result of this evaluation, the Secretary found an extremely high degree of compliance with the registration requirement. Therefore, the Secretary seeks comments on the following proposal that is not included in the text of the proposed regulation:

Eliminate the requirement that students who state that they have registered with Selective Service on their Statement of Registration Compliance, document and verify that registration.

After the publication of the Student Assistance General Provisions regulation in the **Federal Register** of April 11, 1983, the Secretary received comments from student financial assistance administrators at various institutions questioning the need for a student to sign a Statement of Registration Compliance if the administrator can determine that the student is not required to register, e.g., the student is a woman. The administrators also questioned whether it is necessary for a student to sign a Statement of Registration Compliance each year at an institution if the institution already had that student's Statement on file from a previous year. In response to these comments, the Secretary seeks comments on the following two proposals that are not included in the text of the proposed regulations:

1. Modify the requirement that all students must sign the Statement of Registration Compliance to permit an institution the option of not requiring a student to sign that Statement if the institution can determine that the student is exempt from registration (for example, if the student is female or out of the age range for registration). However, if the institution does not require a student to sign the Statement because it determined that the student was exempt from the registration requirement and the institution is incorrect in its determination, the institution will become liable for any Title IV, HEA program funds paid to the student.

2. Modify the requirement that a registered student file a Statement of Registration Compliance each award year to permit an institution the option of collecting the Statement once from that student when he first receives Title IV, HEA program funds at that institution.

IV. Subpart D—Student Consumer Information Services

The provisions relating to student consumer information requirements are included in these proposed regulations as Subpart D, which is currently reserved. Section numbers of these provisions have been redesignated to accommodate their transfer to Subpart D from Subpart C.

Section 668.44—Institutional information. There is no requirement in Section 485 of the Higher Education Act that an institution's consumer information provide a discussion of whether instructional or other physical facilities are readily accessible for handicapped students. Therefore, the requirement to provide such information has been deleted from this section (redesignated § 668.35) as recommended by the postsecondary education community in comments.

V. Subpart F—Misrepresentation

Subpart F in these proposed regulations concerning institutional misrepresentation is reorganized for greater clarity but without substantive revisions. In addition, some section numbers are redesignated to accommodate this reorganization.

VI. Subpart G—Fine, Limitation, Suspension and Termination Proceedings

Final Student Assistance General Provisions regulations were published in the **Federal Register** on October 6, 1983, which corrected procedural deficiencies and emphasized fairness, efficiency, and participant satisfaction in actions to fine, limit, suspend and terminate postsecondary institutions. Although some section numbers have been redesignated, there are no substantive changes in these proposed regulations from the regulations published on October 6, 1983.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291.

They are classified as non-major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities.

These proposed regulations are being issued as a result of a review by the Department to anlayze regulatory burdens and identify opportunities for deregulation. They clarify or delete provisions in the previous Student Assistance General Provisions regulations which created excessive administrative burden for participating postsecondary institutions. To ease confusion, these proposed regulations also consolidate certain definitions and provisions common to all the Title IV, HEA programs that were previously contained in individual program regulations. Some additional provisions are included in response to comments from the postsecondary education community and program experience. Although small entities participating in the Title IV, HEA programs will be affected by the revised regulations, the revisions will not have a significant economic impact on the small entities affected.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. Written comments and recommendations may be sent to the address given at the beginning of this document. All comments submitted on or before February 11, 1985 will be considered before the Secretary issues final regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 4318, ROB–3, 7th and D Streets SW., Washington, D.C. 20202, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act, and their overall requirements of reducing regulatory burden, public comment is especially invited on further opportunity to reduce regulatory burden in these proposed regulations.

Paperwork Reduction Act

The information collection requirements contained in these proposed regulations in Section 34 CFR 668.6, 668.11, 668.14, 668.15 will be sent to OMB for review under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511).

Comments concerning information collection requirements only should be addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, 17th and Pennsylvania Avenue, NW., Washington, D.C. 20503. Attention: Desk Officer for the U.S. Department of Education.

All other comments regarding these proposed regulations should be sent to the Department of Education at the address given at the beginning of this preamble.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Student aid.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

Dated: December 6, 1984.

T.H. Bell,

Secretary of Education.

(Catalogue of Federal Domestic Assistance Numbers: Supplemental Educational Opportunity Grant Program, 84.007; Guaranteed Student Loan Program, 84.032; PLUS Program, 84.032; College Work-Study Program, 84.033; National Direct Student Loan Program, 84.038; Pell Grant Program, 84.063; State Student Incentive Grant Program, 84.069)

The Secretary proposes to revise Part 668 of Title 34 of the Code of Federal Regulations to read as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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Authority: Sections 435, 481, 485, 487 and 1201 of the Higher Education Act of 1965, as amended; 20 U.S.C. 1085, 1088, 1091, 1092, 1094 and 1141.

Subpart A—General

§ 668.1 Scope.

(a) This part establishes general rules that apply to an institution that participates in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA program).

(b) As used in this part, an "institution" includes—

(1) A public or private nonprofit institution of higher education as defined in § 668.3;

(2) A proprietary institution of higher education as defined in § 668.4;

(3) A postsecondary vocational institution as defined in § 668.5; and

(4) A vocational school as defined in § 668.6.

(c) The Title IV, HEA programs include—

(1) The Pell Grant Program (20 U.S.C. 1070a; 34 CFR Part 690);

(2) The Supplemental Educational Opportunity Grant Program (SEOG) (20 U.S.C. 1070b; *et seq.;* 34 CFR Part 676);

(3) The State Student Incentive Grant Program (SSIG) (20 U.S.C. 1070c *et seq.;* 34 CFR Part 692);

(4) The Guaranteed Student Loan Program (GSL) (20 U.S.C. 1071 *et seq.;* 34 CFR Part 682);

(5) The PLUS Program (20 U.S.C. 1078–2; 34 CFR Part 683);

(6) The College Work-Study Program (CWS) (42 U.S.C. 2751 *et seq.;* 34 CFR Part 675); and

(7) The National Direct Student Loan Program (NDSL) (20 U.S.C. 1087aa *et seq.;* 34 CFR Part 674).

(20 U.S.C. 1070 *et seq.*)

§ 668.2 General definitions.

The following definitions apply to all Title IV, HEA programs:

Academic year: (a) A period of time in which a full-time student is expected to complete the equivalent of at least two semesters, two trimesters or three quarters at an institution which measures academic progress in credit hours and uses a semester, trimester or quarter system;

(b) A period of time in which a full-time student is expected to complete at least 24 semester hours or 36 quarter hours at an institution which measures academic progress in credit hours but does not use a semester, trimester or quarter system; or

(c) At least 900 clock hours at an institution which measures academic progress in clock hours.

(20 U.S.C. 1088)

Act: Title IV of the Higher Education Act (HEA) of 1965, as amended.

Award year: The period of time from July 1 of one year through June 30 of the following year.

Campus-Based Programs: (a) The National Direct Student Loan Program (NDSL) (34 CFR Part 674);

(b) The College Work-Study Program (CWS) 34 CFR Part 675); and

(c) The Supplemental Educational Opportunity Grant Program (SEOG) (34 CFR Part 676).

Clock hour: The equivalent of—

(a) A 50 to 60 minute class, lecture or recitation;

(b) A 50 to 60 minute faculty supervised laboratory, shop training, or internship; or

(c) 60 minutes of preparation in a program of study by correspondence.

College Work-Study Program (CWS): The part-time employment program for students authorized by Title IV–C of the HEA.

(42 U.S.C. 2751–2756b)

Defense loan: A loan made before July 1, 1972, under Title II of the National Defense Education Act.

(20 U.S.C. 421–429)

Dependent student: Any student who does not qualify as an independent student as defined in § 668.7

Direct loan: A loan made after June 30, 1972, under Title IV–E of the Act.

(20 U.S.C. 1087aa *et seq.*)

Enrolled: The status of a student who—

(a) Has completed the registration requirements at the institution he or she is attending and has begun attending classes; or

(b) Has been admitted into a correspondence study program and has submitted one lesson, completed by him or her after acceptance for enrollment and without the help of a representative of the school.

Guaranteed Student Loan Program (GSL): The student loan program authorized by Title IV–B of the HEA.

(20 U.S.C. 1071 *et seq.*)

National Defense Student Loan Program: The student loan program authorized by Title II of the National Defense Education Act of 1958.

(20 U.S.C. 421–429)

National Direct Student Loan Program (NDSL): The student loan program authorized by Title IV–E of the HEA.

(20 U.S.C. 1087aa–1087ii)

National of the United States: (a) A citizen of the United States; or

(b) As defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(22), a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(8 U.S.C. 1101)

One year training program: A program which is at least—

(a) 24 semester or trimester hours or units, or 36 quarter hours or units at an institution using credit hours or units to measure academic progress;

(b) 900 clock hours of supervised training at an institution using clock hours to measure academic progress; or

(c) 900 clock hours in a correspondence program.

(20 U.S.C. 1141(a))

Parent: A student's natural or adoptive mother or father. A parent also

includes a student's legal guardian who has been appointed by a court and who is specifically required by the court to use his or her own resources to support the student.

Pell Grant Program: The grant program authorized by Title IV–A–1 of the HEA.

(20 U.S.C. 1070a)

PLUS Program: The loan program authorized by Title IV–B of the HEA.

(20 U.S.C. 1078–2)

Recognized equivalent of a high school diploma: (a) A General Education Development (GED) Certificate; or

(b) A State certificate received by a student after the student has passed a State authorized examination which the State recognizes as the equivalent of a high school diploma.

(20 U.S.C. 1141(a))

Regular student: A person who is enrolled or accepted for enrollment in an eligible program at an institution for the purpose of obtaining a degree or certificate.

Secretary: The Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Six month training program: (a) A program which is at least—

(1) 16 semester or trimester hours or units, or 24 quarter hours or units, at an institution using credit hours or units to measure academic progress;

(2) 600 clock hours of supervised training at an institution using clock hours to measure academic progress; or

(3) 600 clock hours in a correspondence program.

(b) A program which the Secretary determines is at least a six month training program on the basis of—

(1) A certification by the nationally recognized accrediting association that accredits the institution that the program offered by the institution is equal in course content and student workload to the comparable clock or credit hour program described in paragraphs (a)(1) through (a)(3) of this definition; and

(2) The Secretary's ratification of that accrediting agency's determination.

(20 U.S.C. 1088)

State: The States of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands.

(20 U.S.C. 1141(b); 20 U.S.C. 1088(a))

State Student Incentive Grant Program (SSIG): The grant program authorized by Title IV–A–3 of the HEA.

(20 U.S.C. 1070c *et seq.*)

Supplemental Educational Opportunity Grant Program (SEOG): The grant program authorized by Title IV–A–2 of the HEA.

(20 U.S.C. 1070b *et seq.*)

(20 U.S.C. 1070 *et seq.* unless otherwise noted)

§ 668.3 Public or private nonprofit institution of higher education.

(a) A public or private nonprofit institution of higher education is a public or private nonprofit educational institution which—

(1) Is in a State;

(2) Admits as regular students only persons who—

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is located and, if the institution seeks to participate in a Title IV, HEA program other than the GSL or PLUS Program, have the ability to benefit from the training offered;

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(4) Provides—

(i) An educational program for which it awards an associate, baccalaureate, graduate, or professional degree;

(ii) At least a two year program which is acceptable for full credit toward a baccalaureate degree; or

(iii) At least a one year training program which leads to a certificate or degree and prepares students for gainful employment in a recognized occupation; and

(5) Is—

(i) Accredited by a nationally recognized accrediting agency or association;

(ii) Approved by a State agency recognized by the Secretary as a reliable authority on the quality of public postsecondary vocational education in its State, if the institution is a public postsecondary vocational educational institution;

(iii) An institution which has satisfactorily assured the Secretary that it will meet the accreditation standards of an approved agency or association within a reasonable time, considering the resources available to the institution, the period of time it has operated and its efforts to meet accreditation standards; or

(iv) An institution whose credits are determined by the Secretary to be accepted on transfer by at least three accredited institutions on the same basis as transfer credits from fully accredited institutions.

(b) For the purposes of this section, the Secretary publishes a list of nationally recognized accrediting agencies or associations and State approval agencies that the Secretary has determined to be reliable authorities as to the quality of education or training offered.

(c)(1) An institution that admits as regular students, persons who do not have a high school diploma or the recognized equivalent of a high school diploma and who are beyond the age of compulsory school attendance in the State in which the institution is located, shall develop and consistently apply criteria for determining whether these students have the ability to benefit from the education or training offered.

(2) An institution must be able to demonstrate, upon request of the Secretary, that it has developed and consistently applied its criteria for determining such persons admitted as regular students have the ability to benefit.

(20 U.S.C. 1085, 1094(b)(3) and 1141(a))

§ 668.4 Proprietary institution of higher education.

(a) A proprietary institution of higher education is an educational institution which—

(1) Is not a public or private nonprofit educational institution;

(2) Is in a State;

(3) Admits as regular students only persons who—

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is located and have the ability to benefit from the training offered;

(4) Is legally authorized to provide postsecondary education in the State in which it is physically located;

(5) Provides at least a six month program of training to prepare students for gainful employment in a recognized occupation;

(6) Is accredited by a nationally recognized accrediting agency or association; and

(7) Has been in existence for at least two years. The Secretary considers a school to have been in existence for two years if it has been legally authorized to provide, and has provided, a continuous training program to prepare students for

gainful employment in a recognized occupation during the 24 months (except for normal vacation periods) preceding the date of application for eligibility.

(b) For the purposes of this section, the Secretary publishes a list of nationally recognized accrediting agencies or associations and State approval agencies that the Secretary has determined to be reliable authorities as to the quality of education or training offered.

(c)(1) An institution that admits as regular students, persons who do not have a high school diploma or the recognized equivalent of a high school diploma and who are beyond the age of compulsory school attendance in the State in which the institution is located, shall develop and consistently apply criteria for determining whether these students have the ability to benefit from the education or training offered.

(2) An institution must be able to demonstrate, upon request of the Secretary, that it has developed and consistently applied its criteria for determining such persons admitted as regular students have the ability to benefit.

(20 U.S.C. 1088(b), 1094(b)(3) and 1141(a))

§ 668.5 Postsecondary vocational institution.

(a) A postsecondary vocational institution is a public or private non-profit educational institution which—

(1) Is in a State;

(2) Admits as regular students only persons who—

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is located and have the ability to benefit from the training offered.

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(4) Provides at least a six month program of training to prepare students for gainful employment in a recognized occupation;

(5) Is—

(i) Accredited by a nationally recognized accrediting agency or association;

(ii) Approved by a State agency recognized by the Secretary as a reliable authority on the quality of public postsecondary vocational education in its State, if the institution is a public postsecondary vocational educational institution;

(iii) An institution which has satisfactorily assured the Secretary that it will meet the accreditation standards of an approved agency or association within a reasonable time, considering the resources available to the institution, the period of time it has operated and its efforts to meet accreditation standards; or

(iv) An institution whose credits are determined by the Secretary to be accepted on transfer by at least three accredited institutions on the same basis as transfer credits from fully accredited institutions.

(6) Has been in existence for at least two years. The Secretary considers an institution to have been in existence for two years if it has been legally authorized to provide, and has provided, a training program on a continuous basis to prepare students for gainful employment in a recognized occupation during the 24 months (except for normal vacation periods) preceding the date of application for eligibility.

(b) For the purposes of this section, the Secretary publishes a list of nationally recognized accrediting agencies or associations and State approval agencies that the Secretary has determined to be reliable authorities as to the quality of education or training offered.

(c)(1) An institution that admits as regular students, persons who do not have a high school diploma or the recognized equivalent of a high school diploma and who are beyond the age of compulsory school attendance in the State in which the institution is located, shall develop and consistently apply criteria for determining whether these students have the ability to benefit from the education or training offered.

(2) An institution must be able to demonstrate, upon request of the Secretary, that it has developed and consistently applied its criteria for determining such persons admitted as regular students have the ability to benefit.

(20 U.S.C. 1088, 1094(b)(3) and 1141(a))

§ 668.6 Vocational school.

(a) A vocational school is a business or trade school, or technical institution, or other technical or vocational school which—

(1) Is in a State;

(2) Admits as regular students only persons who—

(i) Have completed or left elementary or secondary school; and

(ii) Have the ability to benefit from the training offered.

(3) Is legally authorized in the State in which it is physically located to provide, and provides within that State, a program of postsecondary vocational or technical education that—

(i) Is designed to provide occupational skills more advanced than those generally offered at the high school level and to fit individuals for useful employment in recognized occupations;

(ii) Is no less than—

(A) 300 clock hours of supervised training at institutions using clock hours to measure academic progress; or

(B) Eight semester or trimester hours or units or 12 quarter hours or units at institutions using credit hours or units to measure academic progress;

(iii) In the case of a program of study by correspondence, requires not less than an average of 12 hours of preparation per week over each 12-week period and completion in not less than six months; and

(iv) In the case of a flight school program, maintains current valid certification by the Federal Aviation Administration;

(4) Has been in existence for two years or has been specially determined by the Secretary to be a school meeting the other requirements of this section and to be eligible to participate in the GSL or PLUS programs; and

(5)(i) Is accredited by a nationally recognized accrediting agency or association recognized by the Secretary for this purpose; or

(ii) In the case of a public institution offering postsecondary vocational education, is approved by a State approval agency recognized by the Secretary for this purpose.

(b) For the purposes of this section, the Secretary published a list of nationally recognized accrediting agencies or associations and State approval agencies that the Secretary has determined to be reliable authorities as to the quality of education or training offered.

(c)(1) An institution that admits as regular students, persons who do not have a high school diploma or the recognized equivalent of a high school diploma and who have completed or left elementary or secondary school, shall develop and consistently apply criteria for determining whether these students have the ability to benefit from the education or training offered.

(2) An institution must be able to demonstrate, upon request of the Secretary, that it has developed and consistently applied its criteria for determining such persons admitted as regular students have the ability to benefit.

(20 U.S.C. 1085 and 1094)

§ 668.7 Definition of an independent student.

(a) An independent student is a student whom the Secretary considers to be independent of his or her parent(s) for purposes of the Pell Grant, Supplemental Educational Opportunity Grant, College Work-Study, National Direct Student Loan, Guaranteed Student Loan, and PLUS Programs. The determination of whether the student is independent is based on the criteria set forth in paragraphs (b) through (d) of this section.

(b) Subject to the provisions of paragraphs (c) and (d) of this section, a student qualifies as an independent student for an award year if the student—

(1) Does not, during any of the relevant years described in paragraph (c) of this section, live for more than six weeks in the home of his or her parent(s) for whom income must be reported;

(2) Is not, for any of the relevant years described in paragraph (c) of the section, claimed as a dependent for Federal income tax purposes by such parent(s); and

(3) Does not, during any of the relevant years described in paragraph (c) of this section, receive financial assistance of more than $750 from such parent(s).

(c) Except as provided in paragraph (d) of this section, to qualify as an independent student for any award year—

(1) An unmarried student must satisfy the criteria set forth in paragraph (b) of this section for the first calendar year of an award year and the preceding calendar year; and

(2) A married student must satisfy the criteria set forth in paragraph (b) of this section for the first calendar year of the award year.

(d) The Secretary considers any student to be an independent student if, before the end of the award year—

(1) The student's parents die; or

(2) The student is declared a ward of a court.

(e) The following definition applies to this section:

Parent(s) for whom income must be reported: A parent for whom income must be reported under § 690.33 of the Pell Grant Program regulations, 34 CFR 690.33. For this purpose, the references in § 690.33(d) to the date of the student's application shall be considered to be references to the date the student applies for a loan under the Guaranteed Student Loan or PLUS Program or applies to have his expected family contribution determined under the Pell Grant, Supplemental Educational Opportunity Grant, College Work-Study, or National Direct Student Loan Program.

(20 U.S.C. 1089(c)(2) and section 5 of Pub. L. 97–301 as amended by section 4 of Pub. L. 98–79)

Subpart B—Standards for Participation in Title IV, HEA Programs

§ 668.11 Scope.

(a) This subpart establishes standards that an institution must meet in order to participate in any Title IV, HEA program.

(b) Noncompliance with these standards by an institution already participating in any Title IV, HEA program may subject the institution to proceedings under Subpart G. These proceedings may lead to a fine, or a limitation, suspension, or termination of the institution's eligibility to participate in any or all of the Title IV, HEA programs.

(20 U.S.C. 1094)

§ 668.12 Institutional participation agreement.

(a) If the Secretary determines that an institution meets the standards established in this subpart, the institution may enter into a written participation agreement with the Secretary, on a form approved by the Secretary, in order to participate in any of the Title IV, HEA programs other than the State Student Incentive Grant Program.

(b) A participation agreement conditions the initial and continued eligibility of the institution to participate in any Title IV, HEA program upon compliance with the provisions of this part and the individual program regulations.

(c)(1) A participation agreement becomes effective on the date executed by the Secretary.

(2) A participation agreement supersedes any prior participation agreement between the Secretary and the institution.

(d)(1) Except as provided in paragraph (e) of this section, the Secretary may terminate a participation agreement through procedures set forth in Subpart G.

(2) An institution may also terminate a participation agreement under an applicable individual program regulation.

(3) If the Secretary or the institution terminates a participation agreement under this paragraph, the Secretary establishes the termination date.

(e) An institution's participation agreement automatically terminates on the date the institution changes ownership that results in a change in control.

(20 U.S.C. 1094)

§ 668.13 Factors of financial responsibility.

(a) To participate in a Title IV, HEA program, an institution must be financially responsible. The Secretary may consider an institution to be financially responsible if it is able to—

(1) Provide the educational services described in its official publications and statements;

(2) Provide the administrative resources necessary to comply with the requirements of this subpart; and

(3) Meet all its financial obligations including—

(i) Refunds of institutional charges; and

(ii) Repayments to the Secretary for liabilities incurred administering programs authorized by the Higher Education Act of 1965, as amended.

(b) The Secretary considers that an institution is not financially responsible if—

(1) Under a cash or accrual system of accounting, it—

(i) Has a history of operating losses; or

(ii) Had, for its latest fiscal year, a deficit net worth. A deficit net worth occurs when the institution's liabilities exceed its assets;

(2) Under an accrual system of accounting, it had, at the end of its latest fiscal year, a ratio of current assets to current liabilities of less than 1:1; or

(3) Under a fund accounting system, its unrestricted current or operating fund reflects a history of sustained material deficits.

(c) The Secretary determines whether an institution is financially responsible in accordance with paragraphs (a) and (b) of this section by evaluating documents submitted by the institution. Upon request of the Secretary, the institution must submit for its *latest* complete fiscal year—

(1) A profit and loss statement and a balance sheet for an institution on a cash or accrual accounting system, or a fund statement for an institution on a fund accounting system; or

(2) A financial audit report of the institution. The audit shall be conducted by an independent auditor in accordance with the general standards for auditors in the U.S. General Accounting Office publication, *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.*

(d) The Secretary may determine that an institution is financially responsible

even though it does not appear to be so under paragraphs (a), (b) and (c) of this section. To enable the Secretary to make this determination, the Secretary may request the institution to submit for its *current* fiscal year—

(1)(i) A profit and loss statement and a balance sheet for in institution on a cash or accrual accounting system, or a fund statement for an institution on a fund accounting system; or

(ii) A financial audit report of the institution. The audit shall be conducted by an independent auditor in accordance with the general standards for auditors in the U.S. General Accounting Office publication, *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.*

(2) Other appropriate documents that will demonstrate to the Secretary that it has sufficient financial responsibility and capability to begin or to continue to particpate in a Title IV, HEA program in spite of its inability to meet the requirements of paragraphs (a), (b) and (c) of this section.

(e)(1) The Secretary may require that the profit and loss statement, balance sheet and fund statement referred to in paragraphs (c)(1) and (d)(1) of this section be audited and certified by a certified public accountant.

(2) If the Secretary requires an institution to submit a profit and loss statement, a balance sheet, a fund statement or an audit report under paragraphs (c) and (d) of this section, the Secretary may also require the institution to submit the accountant's work papers.

(f)(1) An otherwise eligible institution shall obtain and keep current adequate fidelity bond coverage in order to protect the Government's interest in the Title IV, HEA program funds it receives as a trustee. A fidelity bond indemnifies the holder against losses resulting from fraud or lack of integrity, honesty, or fidelity of one or more of its employees or officers.

(2) However, a public institution that is bonded by the State against the type of losses described in paragraph (f)(1) of this section does not have to obtain additional fidelity bond coverage.

(3) Any bond required under this paragraph shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR Part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

(20 U.S.C. 1094 and Section 4 of Pub.L. 95–452)

§ 668.14 Standards of administrative capability.

To participate in a Title IV, HEA program, an institution must be able to adequately administer that program. The Secretary considers an institution to have that capability if it establishes and maintains required student and financial records and if it—

(a) Designates a capable individual to be responsible for—

(1) Administering all the Title IV, HEA programs in which it participates; and

(2) Coordinating the Title IV, HEA programs with the institution's other Federal and non-Federal programs of student financial assistance;

(b) Communicates to the individual designated to be responsible for administering Title IV, HEA programs, all the information received by any institutional office that bears on a student's eligibility for Title IV, HEA program assistance;

(c) Uses an adequate number of qualified persons to administer the Title IV, HEA programs. In determining whether an institution uses an adequate number of qualified persons, the Secretary considers the number of students aided, the number and types of programs in which the institution participates, the number of applications evaluated, the amount of funds administered, and the financial aid delivery system used by the institution;

(d)(1) Administers Title IV, HEA programs with adequate checks and balances in its system of internal controls; and

(2) Divides the functions of authorizing payments and disbursing funds so that no office has responsibility for both functions with respect to any particular student aided under the programs;

(e) Establishes, publishes, and applies reasonable standards for measuring whether a student, who is otherwise eligible for aid under any Title IV, HEA program, is maintaining satisfactory progress in his or her course of study. The Secretary considers an institution's standards to be reasonable if the standards—

(1) Conform with the standards of satisfactory progress of the nationally recognized accrediting agency that accredits the institution, if the institution is accredited by such an agency, and if the agency has such standards;

(2) For a student enrolled in an eligible program who is to receive assistance under a Title IV, HEA program, are the same as or stricter than the institution's standards for a student enrolled in the same academic program who is not receiving assistance under a Title IV, HEA program; and

(3) Include the following elements:

(i) Grades, work projects completed, or comparable factors which are measurable against a norm;

(ii) A maximum time frame in which the student must complete his or her educational objective, degree, or certificate. The time frame shall be—

(A) Determined by the institution;

(B) Based on the student's enrollment status; and

(C) Divided into increments, not to exceed one academic year.

(iii) A schedule established by the institution designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment in order to complete the educational objective, degree or certificate within the maximum time frame;

(iv) A determination at the end of each increment by the institution whether the student has successfully completed the appropriate percentage or amount of work according to the established schedule;

(v) Consistent application of standards to all student within categories of students, e.g., full-time, part-time, and undergraduates, graduate students, and programs established by the institution;

(vi) Specific policies defining the effect of course incompletes, withdrawals, repetitions, and noncredit remedial courses on satisfactory progress;

(vii) Specific appeal procedures of a determination that a student is not making satisfactory progress; and

(viii) Specific procedures for reinstatement of aid;

(f) Develops and applies an adequate system to verify the consistency of the information it receives from different sources with respect to a student's application for financial aid under Title IV, HEA programs. If any discrepancies are discovered, the institution shall take appropriate action to correct the information. In determining whether the institution has an adequate verification system, the Secretary considers whether the institution reviews—

(1) All student aid applications, need analysis documents, Statements of Educational Purpose, Statements of Registration Compliance, and eligibility notification documents presented by or on behalf of each applicant;

(2) Any documents, including any copies of State and Federal income tax returns, that are normally collected by the institution to verify information received from other sources; and

(3) Any other information normally available to the institution regarding a

student's citizenship, previous educational experience or other factors relating to the student's eligibility for Title IV, HEA program funds; and

(g)(1) Refers any instance in which the institution has reason to believe that an applicant has applied for Title IV, HEA program funds under false pretenses to State or local law enforcement agencies for investigation; and

(2) Reports the referral of that instance to the Secretary; and

(h) Provides adequate financial aid counseling to eligible students who apply for Title IV, HEA program assistance. In determining whether an institution provides adequate counseling, the Secretary considers whether its counseling includes information regarding—

(1) The source and amount of each type of aid offered;

(2) The method by which aid is determined and disbursed or applied to a student's account; and

(3) The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid. This information includes the institution's refund policy, its standards of satisfactory progress, and other conditions that may alter the student's aid package.

(20 U.S.C. 1094)

§ 668.15 Additional factors for evaluating administrative capability and financial responsibility.

(a) The Secretary considers that the institutional default rate on National Direct Student Loans and the institution's student withdrawal rate may be an indication of an institutions impaired capability of properly administering Title IV, HEA programs if—

(1) The default rate on National Direct Student Loans made to students for attendance at that institution exceed 20 percent of the principal of all those loans that have reached the repayment period; or

(2) For an institution that has a common academic year for a majority of its students, more than 33 percent of the regular students who are enrolled at the beginning of an academic year withdraw from enrollment at that institution during the academic year; or

(3) For an institution which does not have a common academic year for a majority of its students, more than 33 percent of the regular students enrolled at the beginning of any eight month period withdraw during that period.

(b)(1) If the default or withdrawal rate for an institution is as high or higher than the rates set forth in paragraph (a) of this section and the Secretary believes that these rates are an indication of the institution's impaired administrative capability, the Secretary may require the institution to submit for its *latest complete* fiscal year a profit and loss statement, a balance sheet, or a financial audit report of the institution. The audit shall be conducted by an independent auditor in accordance with the general standards for auditors in the U.S. General Accounting Office publication, *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.*

(2) The date of the statement's preparation shall be within 12 months of the date of the Secretary's request.

(c) The Secretary may require that the profit and loss statement and balance sheet referred to in paragraph (b)(1) of this section be audited and certified by a certified public accountant.

(d)(1) If the Secretary determines that the default or withdrawal rate for an institution indicate its impaired capability to administer any Title IV, HEA program, the Secretary requires the institution to take reasonable and appropriate measures to alleviate those conditions as a requirement for its continued participation in those programs.

(2) Before initiating that action, the Secretary informs the institution of the findings and provides it at least 35 days to respond.

(3) The institution may respond by—

(i) Demonstrating that the conditions do not have an adverse effect on the administration of the program; or

(ii) Submitting a plan of the action it will take to alleviate those conditions.

(20 U.S.C. 1094 and section 4 of Pub.L. 94-452)

§ 668.16 Federal interest in Title IV, HEA program funds.

Funds received under the Pell Grant, Supplemental Educational Opportunity Grant, College Work-Study, and National Direct Student Loan Programs, except those funds received for the administrative cost allowance, are held in trust for the intended student beneficiaries. The institution, as a trustee of Federal funds, may not use or hypothecate (i.e., use as collateral) Title IV, HEA program funds for any other purpose.

(20 U.S.C. 1070 *et seq.*)

§ 668.17 Change in ownership resulting in a change in control.

(a) An eligible institution, or a previously eligible institution that participated in any Title IV, HEA program, that changes ownership resulting in a change in control is not considered by the Secretary to be the same institution unless—

(1) The new owner agrees to be liable, or the old and new owners agree to be jointly and severally liable, for all improperly spent Title IV, HEA program funds provided to the institution before the effective date of the change;

(2) The new owner agrees—

(i) To abide by the institution's refund policy in effect before the effective date of the change for students who are enrolled before the effective date; and

(ii) To honor all student enrollment contracts that were signed by the institution before the effective date of the change;

(3) The institution submits individual statements for both new and former owners listing their assets, liabilities, and new worth, and either—

(i) A profit and loss statement and balance sheet for the institution's *latest complete* fiscal year; or

(ii) An audit report for the institution's *latest complete* fiscal year prepared by a certified or licensed public accountant; and

(4) The institution submits additional financial documents if requested by the Secretary because the financial information provided in paragraph (a)(3) of this section is insufficient.

(b) The Secretary may require that the statements provided in paragraph (a)(3) of this section be audited and certified by a certified public accountant.

(c) If the Secretary considers the institution to be the same institution, the new owner must enter into a new participation agreement with the Secretary, to participate in the Title IV, HEA programs.

(d) For purposes of this part, a change in ownership of an institution that results in a change in control means any action by which a person or corporation obtains authority to control the actions of that institution. These actions may include, but are not limited to—

(1) The sale of the institution;

(2) The transfer of the controlling interest of stock of an institution to its parent corporation;

(3) The merger of two or more institutions;

(4) The division of one institution into two or more institutions;

(5) The transfer of the assets of an institution to its parent corporation.

(20 U.S.C. 1088(b) and 1094)

§ 668.18 Written agreements between an eligible institution and an ineligible entity.

(a) An institution may, without losing its eligibility to participate in any Title IV, HEA program, enter into a written agreement to have a portion of its educational program(s) provided for some or all of its students by an

institution, school, or organization that is not eligible to participate in Title IV, HEA programs.

(b)(1) An eligible student may receive Title IV, HEA program assistance under such an agreement if the eligible institution gives credit to students in the portion of the program provided by the ineligible institution(s), school(s), or organization(s) on the same basis as if it provided the portion of the program itself; and

(2)(i) The portion of the program provided by the ineligible institution(s), school(s), or organization(s) does not exceed 25 percent of the student's total program of study; or

(ii) The eligible institution's nationally recognized accrediting agency, or State agency for the approval of public postsecondary vocational education, determines that its agreement meets the agency's standards for contracting for educational services.

(c) The eligible institution shall take into account all courses taken by the student at the eligible institution and ineligible institution(s), school(s), or organization(s) that are covered by the written agreement when determining the student's enrollment status and cost of attendance.

(d) The eligible institution shall maintain all records regarding the student's eligibility for and receipt of the Title IV, HEA program assistance.

(20 U.S.C. 1094)

§ 668.19 Financial aid transcript.

(a)(1) If an institution is aware that a student who is applying for assistance under any Title IV, HEA program attended another eligible institution on at least a half-time basis, the institution or the transfer student shall request the institution that the student previously attended to provide a financial aid transcript.

(2) An institution may not disburse Title IV, HEA program funds to the student for more than one payment period, certify the institutional portion of the borrower's application under the Guaranteed Student Loan or PLUS Program, or certify the institutional portion of the student's Pell Grant Request for Payment (ED Form 304) unless or until:

(i) The institution receives a financial aid transcript from the institution(s) that the student previously attended;

(ii) The institution receives a written notice from the institution(s) that the student previously attended indicating that a financial aid transcript is not required to be sent under paragraphs (b)(2)(iii) through (b)(2)(v) of this section;

(iii) The institution that the student previously attended is not located in a State; or

(iv) The institution that the student previously attended is closed and the information concerning the student's receipt of Title IV, HEA program assistance at that institution is not available.

(b)(1) Except as provided in paragraph (b)(2) of this section, upon request, an eligible institution shall provide to another eligible institution a financial aid transcript for any student who, for attendance at that institution, received or benefited from—

(i) A Pell Grant during the award year in which the financial aid transcript is requested;

(ii) A Supplemental Educational Opportunity Grant;

(iii) A National Direct Student Loan;

(iv) A Guaranteed Student Loan; or

(v) A PLUS Loan.

(2) An eligible institution is not required to provide a financial aid transcript for a student if—

(i) The student is in default on a loan made or received for attendance at that institution under the National Direct Student Loan, Guaranteed Student Loan, or PLUS Program;

(ii) The student owes a refund on a grant received for attendance at that institution under the Pell Grant, Supplemental Educational Oppportunity Grant, or State Student Incentive Grant Program;

(iii) The student did *not*, for attendance at that institution, receive or benefit from—

(A) A Pell Grant during the award year in which the financial aid transcript is requested;

(B) A Supplemental Educational Opportunity Grant;

(C) A National Direct Student Loan;

(D) A Guaranteed Student Loan; or

(E) A PLUS Loan.

(iv) The student never received or benefited from a Supplemental Educational Opportunity Grant, a National Direct Student Loan, a Guaranteed Student Loan or a PLUS Loan for attendance at that institution and the institution participates in the Pell Grant Program under the Alternate Disbursement System; or

(v) The financial aid transcript would only include information from records that the institution is no longer required to keep.

(3)(i) If the institution is required to provide a financial aid transcript under paragraph (b)(1) of this section, it shall forward the transcript to the institution that the student attends or plans to attend in a timely manner.

(ii) If the institution is not required to provide a financial aid transcript under paragraph (b)(2) of this section, it shall notify the institution that the student attends or plans to attend in writing that the transcript will not be sent. The institution shall forward the notification in a timely manner and specify the reason that the transcript will not be sent.

(c) A transcript shall be signed by an official authorized by the institution to disclose information in connection with Title IV, HEA programs and shall include, for any year that the institution is required to keep the student's records, at least the following:

(1) The student's name and social security number;

(2) The student's Selective Service registration number, if known;

(3) Whether the student received a Supplemental Educational Opportunity Grant in any award year;

(4) For the award year in which the financial aid transcript is requested—

(i) The amount of Supplemental Educational Opportunity Grant funds disbursed to the student; and

(ii) The student's Scheduled Pell Grant and the amount of Pell Grant funds disbursed to the student;

(5) The total amount of National Direct Student Loans advanced to the student;

(6) The amount of and period covered by each Guaranteed Student Loan or PLUS Loan received by the student;

(7) The amount of and period covered by each PLUS Loan from which the student benefited;

(8) Whether the student is in default on—

(i) A National Direct Student Loan made by the institution; or

(ii) A Guaranteed Student Loan or PLUS Loan received by the student for attendance at the institution, if the institution is aware of the default status; and

(9) Whether the student owes a repayment on—

(i) A Pell Grant or Supplemental Educational Opportunity Grant received for attendance at the institution; or

(ii) A State Student Incentive grant received for attendance at the institution, if the institution is aware that the student owes a refund.

(20 U.S.C. 1091 and 1094)

§ 668.20 Limitation on the amount of remedial coursework that is eligible for Title IV, HEA program assistance.

(a) A non-credit or reduced credit remedial course is a course of study designed to increase the ability of a

student to pursue a course of study leading to a certificate or degree.

(1) A non-credit remedial course is one for which no credit is given toward a certificte or degree; and

(2) A reduced credit remedial course is one for which reduced credit is given toward a certificate or degree.

(b) Except as provided in paragraphs (c) and (d) of this section, in determining a student's enrollment status and cost of attendance, an institution shall include any non-credit or reduced credit remedial course in which the student is enrolled. The institution shall attribute the number of credit or clock hours to a non-credit or reduced credit remedial course by:

(1) Calculating the number of classroom and homework hours required for that course;

(2) Comparing those hours with the hours required for non-remedial courses in a similar subject; and

(3) Giving the remedial course the same number of credit or clock hours it gives the non-remedial course with the most comparable classroom and homework requirements.

(c) An institution may not take into account any non-credit or reduced credit remedial course in a program of instruction leading to a high school diploma or the recognized equivalent of a high school diploma, even if the course if necessary to enact the student to complete a degree or certificate program, when determining—

(1) A student's enrollment status under the Title IV, HEA programs; and

(2) A student's cost of attendance under the Campus-Based, Guaranteed Student Loan and PLUS Programs.

(d) Except as set forth in paragraph (f) of this section, an institution may not take into account more than one academic year's worth of non-credit or reduced credit remedial coursework when determining—

(1) A student's enrollment status under the Title IV, HEA programs; and

(2) A student's cost of attendance under the Campus-Based, Guaranteed Student Loan and PLUS Programs.

(e) One academic year's worth of non-credit or reduced credit remedial coursework is equivalent to—

(1) 30 semester or 45 quarter hours, or

(2) 900 clock hours.

(f) Courses in English as a second language do not count against the one year academic limitation contained in paragraph (d) of this section.

(20 U.S.C. 1094)

§ 668.21 Treatment of Pell Grant, SEOG and NDSL Program funds if the recipient withdraws, drops out or is expelled before his or her first day of class.

(a)(1) If a student officially withdraws, drops out or is expelled before his or her first day of class of a payment period, all funds paid to the student for that payment period for institutional or non-institutional costs under the Pell Grant, Supplemental Educational Opportunity Grant and National Direct Student Loan Programs are an overpayment.

(2) The institution shall return that overpayment to the respective Title IV, HEA programs in the amount that the student received from each program.

(b) For purposes of this section, the Secretary considers that a student drops out before his or her first day of class of a payment period if the institution is unable to document the student's attendance at any class during the payment period.

(20 U.S.C. 1094)

§ 668.22 Distribution formula for institutional refunds and for repayments of disbursements made to the student for non-institutional costs.

(a) *Institutional refunds returned to Title IV, HEA programs.* (1) An institution shall return a portion of a refund owed to a student to the Title IV, HEA programs if—

(i) The student officially withdraws, drops out or is expelled from the institution on or after his or her first day of class of a payment period; and

(ii) The student received assistance under any Title IV, HEA program other than the College Work-Study Program.

(2) For purposes of this section, an institutional refund means the amount paid for institutional charges by financial aid and/or cash payments minus the amount retained by the institution for the period that the student was actually enrolled at the institution The amount retained by the institution for the student's actual period of enrollment is calculated according to the institution's refund policy.

(3) If the student has not received Pell Grant funds at an institution participating in the Pell Grant Program under the Alternate Disbursement System, the portion of the refund that the institution shall return to the Title IV, HEA program(s) shall be the lesser of—

(i) The amount of assistance received under the Title IV, HEA programs other than under the College Work-Study Program for the payment period; or

(ii) The amount obtained by multiplying the institutional refund by the following fraction:

Total amount ot Title IV, HEA program assistance (exclusive of College Work-Study earnings) awarded for the payment period

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Total amount of assistance (exclusive of all work earnings) awarded for the payment period.

(4)(i) If a student has received Pell Grant funds at an institution participating in the Pell Grant Program under the Alternate Disbursement System, the portion of the refund that the institution shall return to the Title IV, HEA program(s) other than the Pell Grant Program shall be the lesser of—

(A) The amount of assistance received under the Title IV, HEA programs other than the Pell Grant or College Work-Study Program for the payment period; or

(B) The amount obtained by multiplying the institutional rfund by the following fraction:

Total amount of Title IV, HEA program assistance (exclusive of College Work-Study earnings and Pell Grant funds) awarded for the payment period

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Total amount of assistance (exclusive of all work earnings and Pell Grant funds) awarded for the payment period.

(ii) The institution shall notify the Secretary of the amount that it is returning to the Title IV, HEA program(s) according to paragraph (a)(4)(i) of this section.

(b) *Repayments of disbursements made to the student for non-institutional costs to the Title IV, HEA program.* (1) If a student officially withdraws, drops out or is expelled on or after his or her first day of class of the payment period, the institution shall determine what portion, if any, of the Title IV, HEA program assistance (other than from the College Work-Study, Guaranteed Student Loan or PLUS Program) received for that payment period by the student for non-institutional costs is an overpayment that must be repaid by the student. The institution shall make every reasonable effort to contact the student and recover the overpayment in accordance with program regulations (34 CFR Parts 674, 675, 676, and 690).

(2)(i) To determine any of the Title IV, HEA, program assistance received by the student for non-institutional costs constitutes an overpayment, the institution shall subtract the non-institutional costs incurred by the student for that portion of the payment period during which the students was enrolled from the amount of assistance disbursed to the student.

(ii) Non-institutional costs may include, but are not limited to, room and board for which the student does not contract with the institution, books, supplies, transportation, and miscellaneous expenses.

(3) The portion of the overpayment as determined according to paragraph (b)(2) of this section that the institution shall return to the Title IV, HEA program(s) shall be the lesser of—

(i) The amount of assistance received under the Title IV, HEA programs other than the College Work-Study, Guaranteed Student Loan or PLUS Program for the payment period; or

(ii) The amount obtained by multiplying the overpayment by the following fraction:

Total amount of Title IV, HEA program assistance (exclusive of College Work-Study and GSL and PLUS Loans) awarded for the payment period.

Total amount of assistance (exclusive of all work earnings and GSL and PLUS Loans) awarded for the payment period.

(c) *Payment period.* For purposes of this section—

(1) A payment period under the Guaranteed Student Loan and PLUS Programs is a semester, trimester or quarter. At an institution not using those academic periods, it is the period between the beginning and the midpoint or between the midpoint and the end of the academic year; and

(2) The amount of a loan made under the Guaranteed Student Loan or PLUS Program is considered to be awarded in proportionate amounts corresponding to the number of payment periods calculated according to paragraph (c)(1) of this section.

(d) *Drop out date.* For purposes of this section, a student is considered to have dropped out on the last recorded date of class attendance by the student as documents by the institution.

(e) *Distribution among the Title IV, HEA programs.* An institution shall develop a written policy allocating the Title IV, HEA program portion of the refund determined under paragraph (a) of this section and the Title IV, HEA program portion of the overpayment determined under paragraph (b) of this section among the Title IV, HEA program(s) from which the student received aid. This allocation policy shall be applied consistently to all students who have received Title IV, HEA program assistance and shall conform to the following:

(1) No amount of the Title IV, HEA program portion of the refund or of the overpayment may be allocated to the College Work-Study Program;

(2) No amount of the Title IV, HEA program portion of the overpayment may be allocated to the Guaranteed Student Loan or PLUS Program;

(3) The amount of the Title IV, HEA program portion of the refund or of the overpayment allocated to a specific Title IV, HEA program may not exceed the amount that the student received from that program;

(4) The amount of the Title IV, HEA program portion of the refund allocated to the Guaranteed Student Loan and PLUS Programs shall be returned to the borrower's lender by the institution in accordance with program regulations (34 CFR Parts 682 and 683);

(5) The amount of the Title IV, HEA program portion of the refund allocated to the Title IV, HEA programs other than the College Work-Study, Guaranteed Student Loan and PLUS Programs shall be returned to the appropriate program account(s) by the Institution within 30 days of the date that the student withdraws, drops out or is expelled; and

(6) The amount of the Title IV, HEA program portion of the overpayment allocated to the Title IV, HEA programs other than the College Work-Study, Guaranteed Student Loan and PLUS Programs shall be returned to the appropiate program account(s) within 30 days of the date of that the student makes the repayment.

(20 U.S.C. 1094)

§ 668.23 Audits, records and examination.

(a) An institution which participates in the National Direct Student Loan (34 CFR Part 674), College Work-Study (34 CFR Part 675), Supplemental Educational Opportunity Grant (34 CFR Part 676), Guaranteed Student Loan (34 CFR Part 682), PLUS (34 CFR Part 683), or Pell Grant (34 CFR Part 690) Program shall comply with the regulations for those programs concerning—

(1) Fiscal and accounting systems;

(2) Program and fiscal recordkeeping; and

(3) Record retention.

(b) For purposes of audit and examination, an institution which participates in any Title IV, HEA program shall give the Secretary, the Comptroller General of the United States or their duly authorized representatives access to the records required by the program regulations and this part and to any other pertinent books, documents, papers and records.

(c)(1) An institution which participates in the National Direct Student Loan, College Work-Study Supplemental Education Opportunity Grant, Guaranteed Student Loan, or PLUS Program or the Pell Grant Program under the Regular Disbursement System shall have a financial and compliance audit of its Title IV, HEA programs. The audit shall be conducted by an independent auditor in accordance with the general standards and the standards for financial and compliance audits in the U.S. General Accounting Office's (GAO's) *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.*

(2) Procedures for audits are contained in audit guides developed by, and available from, the Education Department's Office of the Inspector General. These audit guides do not impose any requirements beyond those imposed under applicable statutes and regulations, and GAO's *Standards.*

(3) The institution shall have an audit performed at least once every two years. Each audit must cover the institution's activities for the entire period of time since the preceding audit.

(4) The institution shall submit audit reports within nine months of the end of the audit period to its local regional office of the Education Department's Office of the Inspector General Audit Agency.

(5) The institution shall—

(i) Give the Secretary and the Inspector General access to records or other documents necessary to the audit's review; and

(ii) Include in any arrangement with an individual or firm conducting an audit described in this section that the individual or firm shall give the Secretary and the Inspector General access to records or other documents necessary to the audit's review.

(d) Upon written request, an institution shall give the Secretary access to all Title IV, HEA program and fiscal records, including records reflecting transactions with any financial institution with which it deposits or has deposited any Title IV, HEA program funds.

(e)(1) In addition to the records required under appropriate program regulations and this part for each recipient of Title IV, HEA program assistance, and institution shall establish and maintain on a current basis, records regarding—

(i) The student's admission to, and enrollment status at, the institution;

(ii) The program and courses in which the student is enrolled;

(iii) Whether the student is maintaining satisfactory progress in his or her course of study;

(iv) Any refunds due or paid to the student, the Title IV, HEA program account(s) and the student's lender under the Guaranteed Student Loan and PLUS programs;

(v) The student's placement by the institution in a job if the institution provides a placement service and the student uses that service, and

(vi) The student's prior receipt of financial aid (see § 668.19).

(vii) The verification of student aid application data.

(2)(i) An institution shall establish and maintain records regarding the educational qualifications of each regular student it admits, whether or not the student receives Title IV, HEA assistance, which are relevant to the institution's admission standards.

(ii) An institution at which only certain programs have been determined eligible shall establish and maintain records regarding the admissions requirements and educational qualifications of each regular student enrolled in the eligible program(s), whether or not the student received Title IV, HEA assistance.

(3) Records shall be—

(i) Systematically organized; and

(ii) Readily available for review by the Secretary at the geographical location where the student will receive his or her degree or certificate of program or course completion.

(20 U.S.C. 1088, 1094, 1141 and section 4 of Pub. L. 95-452)

§ 668.24 Audit exceptions and repayments.

(a)(1) If, as a result of a Federal audit or an audit performed at the direction of the institution, the Education Department's Inspector General questions an expenditure or the institution's compliance with an applicable requirement (including the lack of proper documentation), the Inspector General notifies the Secretary and the institution of the questioned expenditure or procedure.

(2) If the institution believes that the questioned expenditure or procedure was proper, it shall notify the Secretary in writing of its position and the reasons for its position.

(3) The institution's response must be received by the Secretary within 35 days of the date of the Inspector's General's notification to the institution.

(b)(1) Based on the audit finding and the institution's response, the Secretary determines the amount of funds improperly spent, if any, and instructs the institution as to the manner of repayment.

(2) The institution shall repay those funds within 30 days of the date of the Secretary's notification, unless the Secretary permits a longer repayment period.

(c) The Secretary charges interest on outstanding debts resulting from audits or other reviews in accordance with 34 CFR 75.909.

(20 U.S.C. 1094)

§ 668.25 Loss of institutional eligibility.

(a) When an institution loses its eligibility or ceases to provide educational instruction, it shall—

(1) Immediately notify the Secretary of that fact;

(2) Refund to the Federal government, or otherwise dispose of by instructions from the Secretary, any unobligated Title IV, HEA program funds and any Guaranteed Student Loan or PLUS Loan checks it has received, except—

(i) Those funds for which it has made a commitment but not yet paid to students in that payment period; and

(ii) Its administrative allowance, if applicable;

(3) Submit to the Secretary within 45 days after the effective date of closing or loss of eligibility—

(i) All financial, performance and other reports required by each appropriate Title IV, HEA program regulation; and

(ii) A letter of engagement for an audit or an audit report of all Title IV, HEA program funds it received;

(4) Inform the Secretary of the arrangements it has made for the proper retention and storage for a minimum of five years of all records concerning the administration of the Title IV, HEA programs;

(5) Inform the Secretary of how it will provide for the collection of any outstanding Title IV, HEA loans; and

(6) Distribute refunds of unearned tuition and fees according to § 668.21.

(b) For the purposes of this section—

(1) A commitment under the Pell Grant Program occurs after a student is enrolled and attending the institution and has submitted a valid student aid report to the institution, or to the Secretary if the student is attending an institution which participates under the Alternate Disbursement System;

(2) A commitment under the Campus-Based Programs occurs when the student is enrolled and attending the institution and has received an award letter from the institution.

(20 U.S.C. 1094)

Subpart C—Statement of Educational Purpose and Selective Service Registration Requirements

§ 668.31 Scope.

This subpart establishes rules by which an otherwise eligible student files a Statement of Educational Purpose, files a Statement of Registration Compliance and, if required, verifies his registration with Selective Service in order to receive assistance under any Title IV, HEA program.

(20 U.S.C. 1091 and 50 U.S.C. App. 462)

§ 668.32 Statement of educational purpose.

Before receiving any funds under any Title IV, HEA program, a student shall file a Statement of Educational Purpose with the institution or, under the Guaranteed Student Loan or PLUS Program, with the lender. In this statement, the student certifies that he or she will use any funds received under these programs solely for educational expenses connected with attendance at the institution at which the student is enrolled or accepted for enrollment.

(20 U.S.C. 1091)

§ 668.33 Statement of registration compliance.

(a)(1) Except as provided in paragraph (c) of this section, until a student who is applying for Title IV, HEA program assistance, or under the PLUS Program, who will benefit from the loan, files a Statement of Registration Compliance with the institution, an institution may not, for any period of instruction—

(i) Disburse funds to the student under any Title IV, HEA program;

(ii) Certify the institution portion of the application under the Guaranteed Student Loan or PLUS Program; or

(iii) Certify the institutional portion of the Pell Grant Request for Payment (ED Form 304).

(2) In the Statement of Registration Compliance, the student must certify either that he is registered with Selective Service or that, for a specified reason, he or she is not required to be registered.

(b) A student shall file a Statement of Registration Compliance once for each award year. If the student's status under registration law changes during the award year after he has completed the Statement of Registration Compliance, the student is not required to file a new statement for that award year.

(c) The requirements set forth in paragraph (a) of this section and § 668.35 do not apply to students who are—

(1) Enrolled in an officer procurement program, the curriculum of which has been approved by the Secretary of Defense at the following institutions:

(i) The Citadel, Charleston, South Carolina;

(ii) North Georgia College, Dahlonega, Georgia;

(iii) Norwich University, Northfield, Vermont; or

(iv) Virginia Military Institute, Lexington, Virginia; or

(2) Unable to present themselves for registration for reasons beyond their control such as being hospitalized, incarcerated, or institutionalized.

(50 U.S.C. App. 462)

§ 668.34 Model statement of educational purpose and registration compliance.

The Secretary considers the following statement as satisfying the requirements of §§ 668.32 and 668.33(a) and the notification requirement of § 668.35(a):

Statement of Educational Purpose/ Registration Compliance

I certify that I will use any money I receive under any Title IV, HEA program only for expenses related to attendance at (insert name of school) ———————; and (check as appropriate)

——— I am a female.

——— I am in the armed services on active duty. (Note: Members of the Reserves and National Guard are not considered on active duty.)

——— I have not reached my 18th birthday.

——— I was born before 1960.

——— I am a permanent resident of the Trust Territory of the Pacific Islands or the Northern Mariana Islands.

——— I certify that I am registered with Selective Service.

Signature ———————————

Date: ———————————

Notice: You will not receive Title IV, HEA program assistance unless you complete this statement and, if required, give proof to your school of your registration compliance. If you purposely state falsely that you are registered or that you are within one of the categories of persons not required to register, you may be subject to fine or imprisonment, or both. The Title IV, HEA programs includes the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grant, College Work-Study, National Direct Student Loan, Guaranteed Student Loan and PLUS Programs.

(20 U.S.C. 1091 and 50 U.S.C. App. 462)

§ 668.35 Verification of registration compliance for academic years beginning on or after July 1, 1985.

(a) Except as provided in paragraph (a)(2) of this section, for each academic year or period of instruction beginning on or after July 1, 1985—

(1) A student who has certified that he is registered with Selective Service on the Statement of Registration Compliance according to the requirement of § 668.33 shall verify that registration by submitting to the institution appropriate documentation described in paragraph (b) of this section.

(2) A student is not required to submit verification documentation if—

(i) The student has previously received Title IV, HEA program assistance for attendance at that institution; or

(ii) The student has verified his registration compliance in a previous academic year or period of instruction.

(b)(1) The following documents may be used to verify a student's registration compliance:

(i) A copy of the student's Registration Acknowledgement Letter (SSS Form 3A or 3A–S);

(ii) A financial aid transcript received by the institution bearing the student's Selective Service number;

(iii) Other documentation from the Selective Service, if approved by the Secretary and the Director of the Selective Service System; or

(iv) A notarized affidavit in which the student affirms that he—

(A) Has registered with the Selective Service; and

(B) Does not have his Registration Acknowledgement Letter.

(2) The Secretary considers the following affidavit as satisfying the requirment of paragraph (b)(1)(iv) of this section:

Affidavit of Registration Compliance

I affirm under penalty of perjury that I am registered with Selective Service and that I do not have my Registration Acknowledgement Letter from Selective Service. I understand that if this information is false, I could be subject to either a fine or imprisonment, or both. I also understand that I must provide proof from the Selective Service or my registration to my school within 120 days of the date of this affidavit, and that if I do not provide such proof I must repay any Title IV, HEA program assistance I have received for this school period and that I forfeit the right to receive the benefits of any loan made under the Guaranteed Student Loan or PLUS Program as well as the right to payment of interest benefits on the loan.

Signature: ———————————

Date: ———————————

Notary Public: ———————————

(c)(1) If the student must verify his registration compliance and the institution has not received appropriate documentation verifying that registration, it may not—

(i) Disburse funds to the student under any Title IV, HEA assistance programs;

(ii) Certify the institutional portion of his application under the Guaranteed Student Loan or PLUS Program; or

(iii) Certify the institutional portion of his Pell Grant Request for Payment (ED Form 304).

(2) If a student temporarily verifies his registration by submitting to the institution the notarized affidavit described in paragraph (b)(2) of this section, an institution shall—

(i) Disburse the student's Title IV, HEA program funds for not more than one payment period;

(ii) Certify the institutional portion of his application under the Guaranteed Student Loan or PLUS Program; and

(iii) Certify the institutional portion of his Pell Grant Request for Payment (ED Form 304).

(3) A student who has filed an affidavit under paragraph (b)(2) of this section shall submit to the institution the documentation described in paragraph (b)(1) of this section to verify his registration within one hundred and twenty (120) days from the date of the affidavit.

(4) If the student who submits an affidavit does not submit the required documentation within one hundred and twenty (120) days from the date of the affidavit—

(i) Title IV, HEA program funds received by the student for the payment period in question constitute an unauthorized payment which the student must repay;

(ii) The institution shall make no further disbursements of Title IV, HEA program funds; and

(iii) The institution shall provide the Secretary with the student's name, amount of unauthorized payment, Social Security number, and other relevant information.

(iv) The Secretary takes necessary steps to recover this unauthorized payment, including litigation, as necessary.

(5) If the institution certifies the institutional portion of an application under the Guaranteed Student Loan or PLUS Program for a student who fails to submit the required documentation within one hundred and twenty (120) days from the date of the affidavit, the institution shall notify the lender and the Secretary.

(6) A student who fails to submit the required documentation within one hundred and twenty (120) days forfeits the right to receive the benefits of the loan made to or for the student under the Guaranteed Student Loan or PLUS Program, as well as the right to payment of interest benfits on the loan. The borrower shall, if demanded by the lender, immediately repay the disbursement.

(20 U.S.C. 1097 and 50 U.S.C. App. 462)

§ 668.36 Notification and administrative review.

(a) (1) An institution shall provide general written notice to any student seeking aid under any Title IV, HEA program that he or she must submit a Statement of Registration Compliance to the institution as a condition for receipt of such aid. Further, the institution shall provide a notice to male students that they may be required to verify their registration with the Selective Service.

(2) Before denying aid to any student under any Title IV, HEA program for failure to register with the Selective Service, for failure to file the Statement of Registration Compliance in accordance with § 668.33 or for failure to verify his registration with Selective Service in accordance with § 668.35, the institution shall inform that student in writing that he or she will be denied Title IV, HEA program assistance.

(b) (1) A student who was notified under paragraph (a)(2) of this section and has not registered although required to do so may establish his eligibility for Title IV, HEA program assistance for the payment period in which he was notified under paragraph (a)(2) of this section by registering, filing a Statement of Registration Compliance, and, if required, verifying that he is registered with Selective Service in accordance with §668.35 within 30 days of the receipt of the notice or before the end of the same payment period, whichever is later.

(2) A student, who was notified under paragraph (a)(2) of this section and who has registered with Selective Service or is not required to register with Selective Service but failed to file a Statement of Registration Compliance, or to verify that he is registered with Selective Service, may establish his or her eligibility for Title IV, HEA program assistance for the payment period in which he was notified under paragraph (a)(2) of this section by filing a Statement of Registration Compliance and, if required, verifying that he is registered with Selective Service in accordance with § 668.35 within 30 days of the receipt of the notice or the end of the same payment period, whichever is later.

(3) If a student does not file a Statement of Registration Compliance, or verify that he is registered with Selective Service in accordance with § 668.35, within thirty days of the receipt of the notification under paragraph (a)(2) of this section or before the end of that payment period, whichever is later, he or she may not receive Title IV, HEA program assistance retroactively for that payment period or prior payment periods for which the student had not filed a Statement of Registration Compliance or verified that he is registered with Selective Service.

(c) (1) A student who has been denied Title IV, HEA program assistance because he has not verified his registration with the Selective Service, may seek a hearing from the Secretary by filing a request in writing with the Secretary. The student must submit with that request—

(i) A statement that he is in compliance with registration requirements;

(ii) A concise statement of the reasons why he has not been able to verify that he is in compliance with those requirements; and

(iii) Copies of all material that he has already supplied to the institution to verify his compliance.

(2) The Secretary provides an opportunity for a hearing to a student who—

(i) Asserts that he is in compliance with registration requirements; and

(ii) Files a written request for a hearing in accordance with paragraph (c)(1) of this section within the award year for which he was denied Title IV, HEA program assistance or within 30 days following the end of the payment period, whichever is later.

(3) An official designated by the Secretary shall conduct any hearing held under paragraph (c)(2) of this section. The sole purpose of this hearing is the determination of compliance with registration requirements. At this hearing, the student retains the burden of proving compliance, by credible evidence, with the requirements of the Military Selective Service Act. The designated official shall not consider challenges based on constitutional or other grounds to the requirements that a student state and verify, if required, compliance with registration requirements, or to those registration requirements themselves.

(d) Any determination of compliance made under this section shall be final unless reopened by the Secretary and revised on the basis of additional evidence.

(e) Any determination of compliance made under this section shall be binding only for purposes of determining eligibility for Title IV, HEA program assistance.

(50 U.S.C. App. 462)

§ 668.37 Record retention requirements.

An institution shall include in each student's record, in accordance with the record retention provisions in each of the Title IV, HEA program regulations, the following:

(a) The signed Statement of Educational Purpose/Registration Compliance; and

(b) The documentation described in § 668.34 verifying the student's registration compliance.

(20 U.S.C. 1097 and 50 U.S.C. App. 462)

Subpart D—Student Consumer Information Services

§ 668.41 Scope and special definition.

(a) Each institution participating in any Title IV, HEA program shall disseminate to all enrolled students, and to prospective students upon request, through appropriate publications and mailing, information concerning—

(1) The institution (see § 668.44); and

(2) Any student financial assistance available to students enrolled in the institution (see § 668.43).

(b) The following definition applies to this subpart: *Prospective student:* An individual who has contacted an institution participating in any Title IV, HEA program for the purpose of requesting information concerning admission to the institution.

(20 U.S.C. 1092)

§ 668.42 Preparation and dissemination of materials.

For each award year in which it participates in any Title IV, HEA program, an institution shall—

(a) If necessary, prepare and publish materials covering the topics set forth in § 668.43 and §668.44; and

(b) Make such material available through appropriate publications and mailings to—

(1) All currently enrolled students; and

(2) Any prospective student, upon request of that student.

(20 U.S.C. 1092)

§ 668.43 Financial assistance information.

(a) (1) Information on financial assistance that the institution must publish and make readily available to current and prospective students under this subpart shall include, but is not limited to, a description of all the Federal, State, local, private and institutional student financial assistance programs available to students who enroll at that institution.

(2) These programs include both need-based and non-need-based programs.

(3) The institution may describe its own financial assistance programs by listing them in general categories.

(b) For each program discussed in paragraph (a) of this section, the information provided by the institution shall describe—

(1) The procedures and forms by which students apply for assistance;

(2) The student eligibility requirements;

(3) The criteria for selecting recipients from the group of eligible applicants; and

(4) The criteria for determining the amount of a student's award.

(c) The institution shall describe the rights and responsibilities of students receiving financial assistance and specifically, assistance under the Title IV, HEA programs. This description shall include specific information regarding—

(1) Criteria for continued student eligibility under each program;

(2) (i) Standards which the student must maintain in order to be considered to be making satisfactory progress in his or her course of study for the purpose of receiving financial assistance; and

(ii) Criteria by which the student who has failed to maintain satisfactory progress may re-establish his or her eligibility for financial assistance;

(3) The method by which financial assistance disbursements will be made to the students and the frequency of such disbursements;

(4) The terms of any loan received by a student as part of the student's financial assistance package, a sample loan repayment schedule for sample loans and the necessity for repaying loans; and

(5) The general conditions and terms applicable to any employment provided to a student as part of the student's financial assistance package.

(20 U.S.C. 1092)

§ 668.44 Institutional information.

(a) Institutional information that the institution must publish and make readily available to current and prospective students under this subpart shall include, but is not limited to—

(1) The cost of attending the institution, including—

(i) Tuition and fees charged to full-time and part-time students;

(ii) Estimates of necessary books and supplies;

(iii) Estimates of typical charges for room and board;

(iv) Transportation costs for commuting students or for students living on or off-campus; and

(v) Any additional cost of a program in which the student is enrolled or expresses a specific interest;

(2) A statement of the refund policy of the institution for the return of unearned tuition and fees or other refundable portion of costs paid to the institution;

(3) A statement of the institution's policies regarding the distribution of any refund due to the Title IV, HEA programs as required by § 668.21;

(4) The academic program of the institution, including—

(i) The current degree programs and other educational and training programs;

(ii) The instructional, laboratory, and other physical facilities which relate to the academic program; and

(iii) The institution's faculty and other instructional personnel;

(5) The names of associations, agencies or governmental bodies which accredit, approve or license the institution and its programs and the procedures by which documents describing that activity may be reviewed under paragraph (b) of this section;

(6) A description of any special facilities and services available to handicapped students; and

(7) The titles of persons designated under § 668.45 and information regarding how and where such persons may be contacted.

(b) The institution shall make available for review to any enrolled or prospective student, upon request, a copy of the documents describing the institution's accreditation, approval or licensing.

(20 U.S.C. 1092)

§ 668.45 Availability of employees for information dissemination purposes.

(a) *Availability.* (1) Except as provided in paragraph (b) of this section, each institution shall designate an employee or group of employees who shall be available on a full-time basis to assist enrolled or prospective students in obtaining the information specified in §§ 668.43 and 668.44.

(2) If the institution designates one person, that person shall be available, upon reasonable notice, to any enrolled or prospective student throughout the normal administrative working hours of that institution.

(3) If more than one person is designated, their combined work schedules shall be arranged so that at least one of them is available, upon reasonable notice, throughout the normal administrative working hours of that institution.

(b) *Waiver.* (1) The Secretary may waive the requirement that the employee or group of employees designated under paragraph (a) of this section be available on a full-time basis if the institution's total enrollment, or the portion of the enrollment participating in the Title IV, HEA programs, is too small to necessitate an employee or group of employees being available on a full-time basis.

(2) In determining whether an institution's total enrollment or the number of Title IV, HEA program recipients is too small, the Secretary will consider whether there will be an insufficient demand for information dissemination services among its enrolled or prospective students to necessitate the full-time availability of an employee or group of employees.

(3) To recieve a waiver, the institution must apply to the Secretary at the time and in the manner prescribed by the Secretary.

(c) The granting of a waiver under paragraph (b) of this section does not exempt an institution from designating a specific employee or group of employees to carry out on a part-time basis the information dissemination requirements.

(20 U.S.C. 1092)

Subpart E—[Reserved]

Subpart F—Misrepresentation

§ 668.61 Scope and special definitions.

(a) This subpart establishes the standards and rules by which the secretary may initiate any proceeding under Subpart G against an otherwise eligible institution for any substantial misrepresentation made by that institution regarding the nature of its educational program, its financial charges or the employability of its graduates.

(b) The following definitions apply to this subpart:

Misrepresentation: Any false, erroneous or misleading statement an eligible institution makes to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary. Misrepresentation includes the dissemination of endorsements and testimonials that are given under duress.

Prospective student: Any individual who has contacted an eligible institution for the purpose of requesting information about enrolling at the institution or who has been contacted directly by the institution or indirectly through general advertising about enrolling at the institution.

Substantial misrepresentation: Any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

(20 U.S.C. 1094)

§ 668.62 Nature of educational program.

Misrepresentation by an institution of the nature of its educational program includes, but is not limited to, false,

erroneous or misleading statements concerning—

(a) The particular type(s), specific source(s), nature and extent of its accreditation;

(b) Whether a student may transfer course credits earned at the institution to any other institution;

(c) Whether successful completion of a course of instruction qualifies a student for—

(1) Acceptance into a labor union or similar organization; or

(2) Receipt of a local, State or Federal license or a non-governmental certification required as a precondition for employment or to perform certain functions;

(d) Whether its courses are recommended by—

(1) Vocational counselors, high schools or employment agencies; or

(2) Governmental official for governmental employment;

(e) Its size, location, facilities or equipment;

(f) The availability, frequency and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet;

(g) The nature, age and availability of its training devises or equipment and their appropriateness to the employment objectives that it states its programs and courses are designed to meet;

(h) The number, availability and qualifications, including the training and experience, of its faculty and other personnel;

(i) The availability of part-time employment or other forms of financial assistance;

(j) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide its students before, during or after the completion of a course; or

(k) The nature or extent of any prerequisites established for enrollment in any course.

(20 U.S.C. 1094)

§ 668.63 Nature of financial charges.

Misrepresentation by an institution of the nature of its financial charges includes, but is not limited to, false, erroneous or misleading statements concerning—

(a) Offers of scholarships to pay all or part of a course charge, unless a scholarship is actually used to reduce tuition charges made known to the student in advance. The charges made known to the student in advance are the charges applied to all students not receiving a scholarship; or

(b) Whether a particular charge is the customary charge at the institution for a course.

(20 U.S.C. 1094)

§ 668.64 Employability of graduates.

Misrepresentation by an institution regarding the employability of its graduates includes, but is not limited to, false, erroneous or misleading statements—

(a) That the institution is connected with any organization or is an employment agency or other agency providing authorized training leading directly to employment;

(b) That the institution maintains a placement service for graduates or will otherwise secure or assist its graduates to obtain employment, unless it provides the student with a clear and accurate description of the extent and nature of this service or assistance; or

(c) Concerning government job market statistics in relation to the potential placement of its graduates.

(20 U.S.C. 1094)

§ 668.65 Procedures.

(a) On receipt of a written allegation or complaint from a student enrolled at the institution, a prospective student, the family of a student or prospective student, or a governmental official, the designated department official as defined in §668.71 reviews the allegation or complaint to determine its factual base and seriousness.

(b) If the misrepresentation is minor and can be readily corrected, the designated department official informs the institution and endeavors to obtain an informal, voluntary correction.

(c) If the designated department official finds that the complaint or allegation is a substantial misrepresentation as to the nature of the educational programs, the financial charges of the institution or the employability of its graduates, the official—

(1) Initiates action to fine or to limit, suspend or terminate the institution's eligibility to participate in the Title IV, HEA programs according to the procedures set forth in Subpart G, or

(2) Takes other appropriate action.

(20 U.S.C. 1094)

Subpart G—Fine, Limitation, Suspension and Termination Proceedings

§ 668.71 Scope and special definitions.

(a) This subpart establishes rules for the imposition of a fine upon, or for the suspension, limitation or termination of an otherwise eligible institution's participation in any or all of the Title IV, HEA programs.

(b) These rules apply to an institution which violates any Title IV, HEA program statute, regulation, special arrangement, agreement or limitation prescribed under authority of Title IV of the Higher Education Act of 1965 (HEA), as amended.

(c) This subpart does not apply to a determination that—

(1) An institution of higher education fails to meet the statutory definition set forth in section 435, 481 or 1201 of the HEA;

(2) A vocational school fails to meet the statutory definition set forth in section 435(c) of the HEA; or

(3) An institution fails to qualify for initial certification to participate in any Title IV, HEA program because it does not meet the fiscal and administrative standards set forth in Subpart B of this part.

(d) This subpart does not apply to administrative action by the Department of Education based on any alleged violation of—

Subject	Statute	Regulation
Discrimination on the basis of race, color, or natural origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4).	34 CFR Part 100.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681–1683).	34 CFR Part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (20 U.S.C. 794).	34 CFR Part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	45 CFR Part 90.

(e) The following definitions apply to this subpart:

Designated department official: An official of the Education Department to whom the Secretary has delegated responsibilities indicated in this subpart.

Funds: Any money, commitments to provide money and commitments of insurance or reinsurance provided under any or all Title IV, HEA programs to an institution or to or on behalf of students enrolled and attending an institution.

(20 U.S.C. 1094)

§ 668.72 Standard of conduct.

(a) A participating institution acts in the nature of a fiduciary in its administration of the Title IV, HEA programs.

(b) In the capacity of a fiduciary, the institution is subject to the highest standard of care and diligence in administering the programs and in

accounting to the Government for the funds received under those programs.

(c) An institution's failure to administer the Title IV, HEA programs, or to account for the funds it receives under those programs, in accordance with the highest standard of care and diligence required of a fiduciary, constitutes grounds for the trmination of the eligibility of the institution to participate in those programs.

(d) If the owner of an institution is convicted of a crime involving the unlawful acquisition, use, or expenditure of Title IV, HEA program funds, the Secretary considers that conviction as a violation of the institution's fiduciary duty and as an automatic ground for terminating the institution's eligibility to participate in any Title IV, HEA program.

(20 U.S.C. 1070 *et seq.*)

§ 668.73 Emergency action.

(a) The Secretary through a designated department official may take an emergency action to withhold funds from an institution or its students and to withdraw the authority of an institution to obligate funds under any or all Title IV, HEA programs if the designated department official—

(1) Receives information, determined by the official to be reliable, that the institution is violating applicable laws, regulations, special arrangements, agreements or limitations.

(2) Determines that immediate action is necessary to prevent misuse of Federal funds; and

(3) Determines that the likelihood of loss outweighs the importance of following the procedures set forth in this subpart for suspension, limitation or termination.

(b) The designated department official begins an emergency action by notifying the institution, by certified mail with return receipt requested, of the action and the basis on which it is taken. The effective date of the action is the date on which the notice is received by the institution.

(c) An emergency action shall not exceed 30 days unless a suspension, limitation or termination proceeding is begun under this subpart before the expiration of that period. In such case, the period may be extended until the completion of that proceeding, including any appeal to the Secretary.

(d) If a suspension, limitation or termination proceeding is begun, the Secretary will provide the institution, if it so requests, an opportunity to show cause that the emergency action is unwarranted, pending the outcome of the proceeding.

(20 U.S.C. 1094)

§ 668.74 Fine proceedings.

(a) *Scope and consequences.* The Secretary may impose a fine of up to $25,000 per violation on an institution that—

(1) Violates any provision of Title IV of the Higher Education Act or any regulation or agreement implementing that title; or

(2) Substantially misrepresents the nature of its educational program, its financial charges or the employability of its graduates.

(b) *Procedures.* (1) The designated department official begins a fine proceeding, whether or not a suspension, limitation or termination proceeding has begun under § 668.75 or § 668.76, by sending the institution a notice by certified mail with return receipt requested. This notice must—

(i) Inform the institution of the Secretary's intent to fine the institution and the amount of the fine and identify the alleged violations which constitute the basis for the action;

(ii) Specify the proposed effective date of the fine, which shall be at least 20 days from mailing of the notice of intent;

(iii) Inform the institution that the fine will not be effective on the date specified in the notice if the designated department official receives, at least five days before that date, a written request for a hearing or written material indicating why the fine should not be imposed.

(2) If the institution does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution that—

(i) The fine will not be imposed; or

(ii) The fine is imposed as of a specified date, and in a specified amount.

(3) If the institution requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and the place. The date is at least 15 days after the designated department official receives the request.

(4) An administrative law judge conducts a hearing on the record in accordance with § 668.78.

(c) *Expedited hearings.* With the approval of the administrative law judge and the consent of the designated department official and the institution, any time schedule specified in this section may be shortened.

(20 U.S.C. 1094)

§ 668.75 Suspension proceedings.

(a) *Scope and consequences.* From its effective date, a suspension removes an institution's eligibility to participate in any or all of the Title IV, HEA programs for a period of time not exceeding 60 days unless—

(1) The institution and the designated department official agree to an extension where the institution has not requested a hearing; or

(2) The designated department official begins a limitation or termination proceeding under § 668.76.

(b) Procedures. (1) The designated department official begins a suspension proceeding by sending a notice to an institution by certified mail with return receipt requested. The notice must—

(i) Inform the institution of the intent of the Secretary to suspend the institution's eligibility to participate, cite the consequences of that action and identify the alleged violations which constitute the basis for the action;

(ii) Specify the proposed effective date of the suspension, which shall be at least 20 days after the date of mailing of the notice of intent; and

(iii) Inform the institution that the suspension will not be effective on the date specified in the notice if the designated department official receives, at least five days before that date, a request for a hearing or written material indicating why the suspension should not take place.

(2) If the institution does not request a hearing, but submits written material, the designated department official, after considering that material, notifies the institution that—

(i) The proposed suspension is dismissed; or

(ii) The suspension is effective as of a specified date.

(3) If the institution requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets a date and place for it. The date will be at least 15 days after the designated department official receives the request. No suspension takes place until after a hearing is held.

(4) An administrative law judge conducts a hearing on the record in accordance with § 668.78. (20 U.S.C. 1094)

§ 668.76 Limitation or termination proceedings.

(a) *Scope and consequences.* From its effective date, a limitation or termination shall either—

(1) Result in limitations on an institution's eligibility to participate; or

(2) End the eligibility of an institution to participate in any or all Title IV, HEA programs.

(b) *Procedures.* (1) The designated department official begins a limitation

or termination proceeding whether or not a fine or suspension proceeding has begun under §§ 668.75, by sending an institution a notice by certified mail with return receipt requested. This notice must—

(i) Inform the institution of the intent of the Secretary to limit or terminate the institution's eligibility to participate, cite the consequences of that action, and identify the alleged violations which constitute the basis for the action, and in the case of a limitation proceeding, state the limits to be imposed;

(ii) Specify the proposed effective date of the limitation or termination, which shall be at least 20 days after the date of mailing of the notice of intent; and

(iii) Inform the institution that the limitation or termination will not be effective on the date specified in the notice if the designated department official receives, at least five days before that date, a request for a hearing or written material indicating why the limitation or termination should not take place.

(2) If the institution does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution that—

(i) The proposed action is dismissed;

(ii) Limitations are effective as of a specified date; or

(iii) The termination is effective as of a specified date.

(3) If the institution requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets a date and a place for it. The date will be at least 15 days after the designated department official receives the request. No limitation or termination takes place until after a hearing is held.

(4) An administrative law judge conducts a hearing on the record in accordance with § 668.78.

(c) *Expedited hearing.* With the approval of the administrative law judge and the consent of the designated department official and the institution, any time schedule specified in this section may be shortened.

(20 U.S.C. 1094)

§ 668.77 Pre-hearing conference.

(a) (1) A pre-hearing conference shall be convened by the administrative law judge if he or she thinks that such a conferecne would be useful, or if requested by—

(i) The designated department official; or

(ii) The institution.

(2) The purpose of a pre-hearing conference is to allow the parties to settle or narrow the dispute.

(b) If agreed to by the administrative law judge, the designated department official and the institution, a pre-hearing conference may consist of—

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(20 U.S.C. 1094)

§ 668.78 Hearing on the record.

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an administrative law judge.

(b) The hearing process may be expedited as agreed by the administrative law judge, the designated department official and the institution. Procedures to expedite may include, but are not limited to, the following—

(1) A restriction on the number of length of submissions;

(2) The conduct of the hearing by telephone conference call;

(3) A review limited to the written record; or

(4) A certification by the parties to facts and legal authorities not in dispute.

(c) (1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated department official shall have the burden of persuasion in any fine, suspension, limitation or termination proceeding under this subpart.

(3) There shall be no discovery required as provided for under the Federal Rules of Civil Procedure.

(4) The administrative law judge accepts only evidence that is relevant and material to the proceeding. Parties may object to the admission of evidence that they consider to be irrelevant, immaterial or unduly repetitious.

(d) The designated department official shall make a transcribed record of the proceeding and shall make the record available to the institution upon its request and upon its payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR Part 5).

(20 U.S.C. 1094)

§ 668.79 Authority and responsibilities of the administrative law judge.

(a) The administrative law judge regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) (1) The administrative law judge is not authorized to issue subpoenas.

(2) If requested by the administrative law judge, the Secretary and the institution shall provide available personnel who have knowledge about the matter under review for oral or written examination.

(c) The administrative law judge shall take whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to the following—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(20 U.S.C. 1094)

§ 668.80 Initial and final decisions—Appeals.

(a) (1) The administrative law judge shall issue a written initial decision to the institution and the designated department official within 30 days after—

(i) The last brief is filed;

(ii) The last day of the hearing, if the administrative law judge does not request the parties to submit briefs; or

(iii) The date on which the administrative law judge terminates the hearing in accordance with § 668.79(c).

(2) The administrative law judge's decision shall state whether the imposition of the fine, limitation, suspension or termination sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution, the administrative law judge may, if appropriate, issue a decision to impose one or more limitations on the institution rather than terminating its eligibility to participate.

(3) The administrative law judge shall base findings of fact only on evidence considered at the hearing and on matters given official notice. If a hearing is conducted by written submissions, findings of fact shall be based on the facts stipulated by the parties.

(b) (1) In a suspension proceeding, the Secretary reviews the administrative law judge's initial decision and issues a final decision within 20 days after the initial decision. The Secretary adopts the initial decision unless it is clearly unsupported by the evidence presented at the hearing.

(2) A suspension takes effect upon either the date on which notice of the suspension is received by the institution or the original proposed effective date stated in the designated department official's notice of intent to suspend, whichever is later.

(3) A suspension shall not exceed 60 days unless a limitation or termination

proceeding is begun under this subpart before the expiration of that period. In such case, the period may be extended until the completion of that proceeding, including any appeal to the Secretary.

(c) In a fine, limitation or termination proceeding, the administrative law judge's initial decision automatically becomes the Secretary's final decision 20 days after it is issued unless, within that 20 day period, the institution or the designated department official appeals the decision to the Secretary.

(d) (1) Within a period specified by the Secretary, the party that appeals shall submit a brief or written materials to the Secretary explaining why the initial decision of the administrative law judge should be overturned or modified.

(2) The appealing party may submit proposed findings of fact or conclusions of law. However, the proposed findings of fact must be supported by—

(i) The evidence introduced into the record at hearing;

(ii) Stipulations of the parties if the hearing consisted of written submissions; or

(iii) Matters that may be judicially noticed.

(3) The opposing party shall respond within the time period specified by the Secretary.

(4) Neither party may introduce new evidence on appeal.

(5) Each party shall provide a copy of its brief to the other party.

(e) The initial decision of the administrative law judge imposing a fine or limiting or terminating the eligibility of the institution to participate does not take effect pending the appeal unless the Secretary determines that a stay would provide a serious and adverse effect upon the programs involved.

(f) (1) The Secretary renders a final decision.

(2) In rendering that decision, the Secretary shall consider only evidence introduced into the record at the hearing, stipulations of facts if the hearing consisted of only written submissions and matters that may be judicially noticed.

(3) The Secretary's decision may affirm, modify or reverse the administrative law judge's initial decision and shall include a statement of the reasons for the decision.

(20 U.S.C. 1094)

§ 668.81 Verification of mailing and receipt dates.

(a) Verification of the Department of Education's mailing dates and receipt dates referred to in this subpart is evidenced by the original receipt from the U.S. Postal Service.

(b) If an institution refuses to accept a notice mailed under this subpart, the Secretary considers the notice as being received on the date that the institution refuses to accept the notice.

(20 U.S.C. 1094)

§ 668.82 Fines.

(a) In determining the amount of a fine, the designated department official, administrative law judge and Secretary shall take into account—

(1) (i) The gravity of the institution's violation or failure to carry out the relevant statute, regulation or agreement; or

(ii) The gravity of its misrepresentation; and

(2) The size of the institution.

(b) Upon the request of the institution, the Secretary may compromise the fine.

(20 U.S.C. 1094)

§ 668.83 Limitation.

A limitation may include, as appropriate to the program in question—

(a) A limit on the number or percentage of students enrolled in an institution who may receive Title IV, HEA program funds;

(b) A limit, for a stated period of time, on the percentage of an institution's total receipts from tuition and fees derived from Title IV, HEA program funds;

(c) A requirement that an institution obtain a bond, in a specified amount, to assure its ability to meet its financial obligations to students who receive Title IV, HEA program funds; or

(d) Such other conditions as may be determined to be reasonable and appropriate.

(20 U.S.C. 1094)

§ 668.84 Termination.

(a) A termination—

(1) Ends an institution's eligibility to participate in any or all of the Title IV, HEA programs;

(2) Prohibits an institution or the Secretary from making or increasing Title IV, HEA program awards;

(3) Prohibits an institution from making any other new obligations against Title IV, HEA program funds; and

(4) Prohibits further guarantee commitments by the Secretary under the Guaranteed Student Loan or PLUS Program for loans to students to attend that institution, and prohibits further disbursements by an institution which is a lender under the Guaranteed Student Loan or PLUS Program (whether or not guarantee commitments have been issued by the Secretary or a guarantee agency for such disbursements).

(b) If an institution is terminated during a payment period, any student at the institution who has received an award or to whom a commitment has been made before the effective date of the termination may receive a payment for that payment period.

(c) For purposes of this section, a commitment—

(1) Under the Pell Grant and Campus-based Programs, is defined in § 668.24; and

(2) Under the Guaranteed Student Loan and PLUS Programs, occurs when the Secretary or a guarantee agency advises the lender that the loan will be guaranteed.

(20 U.S.C. 1094)

§ 668.85 Reimbursements, refunds and offsets.

(a) The designated department official, administrative law judge or Secretary may require an institution to take reasonable and appropriate corrective action to remedy a violation of applicable laws, regulations, special arrangements, agreements or limitations

(b) The corrective action may include payment of any funds to the Secretary or to designated recipients, which the institution improperly received, withheld, disbursed or cause to be disbursed. Corrective action may, for example, relate to—

(1) With respect to the Guaranteed Student Loan or PLUS Program—

(i) Ineligible interest benefits, special allowances or other claims paid by the Secretary; and

(ii) Discounts, premiums or excess interest paid in violations of Part 682 or 683 of Title 34 of the Code of Federal Regulations; and

(2) With respect to all Title IV, HEA programs—

(i) Refunds due to students under program regulations; and

(ii) Any grants, work-study assistance or loans made in violation of program regulations.

(c) If any final decision requires an institution to reimburse or make any other payment to the Secretary, the Secretary may offset these claims against any benefits or claims due to the institution.

(20 U.S.C. 1094)

§ 668.86 Reinstatement after termination.

(a) (1) An institution whose eligibility to participate in any or all of the Title IV, HEA programs has been terminated may file a request for reinstatement as a participating eligible institution.

(2) Except for an institution that has been terminated for engaging in substantial misrepresentation

concerning the nature of its educational program, the nature of its financial charges or the employability of its graduates, a request for reinstatement may not be made before the expiration of 18 months after the effective date of the termination.

(3) An institution whose eligibility to participate was terminated because the institution engaged in substantial misrepresentation may not request reinstatement before the expiration of three months after the effective date of the termination.

(b) (1) The reinstatement request must be in writing and must show that the institution has corrected the violation(s) on which its termination was based, including payment in full to the Secretary or to designated recipients of funds that the institution improperly received, withheld, disbursed or caused to be disbursed.

(2) The institution must meet all the qualifications for participation in Title IV, HEA programs, as provided in Subpart B of this part and enter into a new participation agreement with the Secretary.

(c) The Secretary will not grant reinstatement to an institution if it—

(1) Is owned, in whole or in part, by a person who has been convicted of a crime related to the abuse of Title IV, HEA programs; or

(2) Continues to employ an individual in capacity that involves the administration of Title IV, HEA programs or receipt of funds under Title IV, HEA programs who was shown to be an incompetent administrator during the termination proceedings or who was convicted of a crime related to the abuse of Title IV, HEA programs.

(d) The Secretary, within 60 days of receiving the reinstatement request, shall—

(1) Grant the request;

(2) Deny the request; or

(3) Grant the request subject to limitation(s).

(20 U.S.C. 1094)

§ 668.87 Removal of limitation.

(a) An institution whose eligibility to participate in any or all Title IV, HEA programs has been limited may not apply for removal of the limitation of its eligibility to participate before the expiration of 12 months from the effective date of the limitation.

(b) After the minimum limitation period, the institution may request removal of the limitation. The request must be in writing and show that the institution has corrected the violations on which the limitation was based.

(c) No later than 60 days after the receipt of the request, the Secretary shall respond to the institution—

(1) Granting its request;

(2) Denying its request; or

(3) Granting the request subject to other limitation(s).

(d) If the Secretary denies the request or establishes other limitation(s), the institution, upon request, will be granted an opportunity to show cause why its eligibility to participate should be fully reinstated.

(e) The institution's request for a show cause meeting shall not be deemed to waive its right to participate in any or all Title IV, HEA programs if it complies with such continuing limitation(s) pending the outcome of the meeting.

(20 U.S.C. 1094)

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Part VI

Department of Education

34 CFR Part 300

Assistance to States for Education of Handicapped Children; Final Rules

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

34 CFR Part 300

Assistance to States for Education of Handicapped Children

AGENCY: Department of Education.

ACTION: Final Regulations.

SUMMARY: The Secretary issues final regulations under Part B of the Education of the Handicapped Act (EHA–B), as amended. These regulations implement certain provisions of the EHA–B added by the Education of the Handicapped Act Amendments of 1983 relating to: (1) The annual report of children served in programs assisted under this part; and (2) new authority for the Secretary to by-pass the State educational agency to provide services to private school handicapped children, in accordance with the requirements of Section 613(a)(4)(A) of the EHA–B, if the State educational agency is prohibited by law from doing so.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mr. William Tyrrell, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW. (Switzer Building, Room 3526), Washington, D.C. 20202. Telephone: (202) 732–1025.

SUPPLEMENTARY INFORMATION: Pub. L. 98–199, enacted on December 2, 1983, substantially revised certain provisions of Part B of the Education of the Handicapped Act (20 U.S.C. 1401, 1411 *et seq.*). Part B authorizes formula grants to States and, through States, to local educational agencies and intermediate educational units to assist them in the education of handicapped children. The purposes of the Act, according to Section 601(c), are to ensure that a free appropriate public education is made available to all handicapped children; to ensure that the rights of handicapped children and their parents are protected; to assist States and localities to provide for the education of handicapped children; and to assess and ensure the effectiveness of efforts to educate those children. Part B of the Act provides, as well, for services to handicapped children voluntarily enrolled in private schools by their parents.

A notice of proposed rulemaking was published in the **Federal Register** on April 30, 1984 (49 FR 18432). The comments received in response to this notice and the Secretary's response are summarized below:

Procedures for By-Pass

Comment. One commenter felt that the regulations should clarify certain issues. First, the commenter criticized the regulations for not distinguishing between the provision of special education and related services to private school handicapped children. The commenter stated that many States make available related services, including diagnostic services and instructional support services, to private school handicapped children. In these same States, according to the commenter, local educational agencies are prohibited from making available special education (as defined in 34 CFR 300.140 or related services (as defined in 34 CFR 300.13) to handicapped children voluntarily enrolled by their parents in private schools because those public agencies may not: (a) Assign staff to private schools for those purposes; (b) reimburse private schools to employ staff for those purposes; or (c) transfer portions of their Part B allocations to private schools for those purposes. The commenter recommended that the regulations include language that clearly defines the eligibility of private schools to qualify for funding under a by-pass if any of those three conditions exists. The commenter added that the proposed regulations, as well as the recommended modification, would allow certain private school handicapped children to be counted twice for Part B funding—once by the local education agency providing diagnostic and other related services, and again by the private school providing special education classroom instruction and receiving payments from Part B funds.

The commenter also requested that the regulations clearly identify the public agency responsible for counting and paying for services to private school handicapped children who attend schools outside the district or State of residence. The commenter disagreed with the Department's current interpretation that the statute and regulations place that responsibility on the district or State of residence. The commenter recommended that payments be made directly to the private school where a handicapped child is enrolled, based on the count of children in that school rather than the student's district of residence.

Finally, the commenter recommended that the regulations clearly specify: (a) The responsibility of private schools receiving direct funds under a by-pass to comply with the Part B regulations; and (b) provisions for monitoring compliance by the private schools.

Response: No change has been made. The Secretary believes that the following discussion may provide clarification of the issues raised by the commenter.

(1) Each State that receives funds under Part B of the Act is responsible for ensuring that all handicapped children in the State are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. *See* 34 CFR 300.128. This requirement also applies to any State in which the Secretary implements a by-pass arrangement under this part. A State may only count, for purposes of receiving part B funds, those children for whom it is making available special education and related services in conformance with an individualized education program. Children who receive only diagnostic services may not, therefore, be included in a State's child count. In the absence of a handicap that requires special education, a child is not entitled to "related services," as that term is defined under 34 CFR 300.13; however, the term "special education," as defined under 34 CFR 300.14(a)(2), includes speech pathology, or any other related service, if the service meets the definition of "special education" and is considered "special education" rather than a "related service" under State standards. If a by-pass is implemented in a State, then the local educational agencies would not be providing special education and related services to private school handicapped children and, therefore, double-counting would not occur.

(2) Under a by-pass, the funds derived from counting private school handicapped children would be withheld from an affected State's allocation and the Secretary would enter into a service agreement with an appropriate agency, organization, or institution that would provide special education and related services to those children. No payments would be made directly to any private school serving those children.

(3) Section 613(d)(1) of the Act provides that a by-pass may be implemented only in a State where the State educational agency is prohibited by law from providing for the participation of private school handicapped children in public agency special education programs as of the date of enactment of Pub. L. 98–199. No

one way of delivering services to private school handicapped children is required under the EHA–B, either in States subject to a by-pass or States that are not.

Services to private school handicapped children may be provided through the same variety of arrangements as services may be provided under Chapter 1 of the Education Consolidation and Improvement Act of 1981.

Where a private school handicapped child is enrolled in a school outside the district or State of residence, the responsible public agency, or the Secretary, in the case of a by-pass, may choose to provide services under an arrangement with the local educational agency in whose district the school is located.

(4) It is unnecessary to include provisions in these regulations concerning the responsibilities of private schools and the monitoring of these schools since the statute imposes no obligations on private schools where children are voluntarily enrolled by their parents.

Comment. One commenter stated that the regulations should make it clear that the by-pass is used only when a State prohibits *any* participation by private school handicapped children in the Part B program, and that the Secretary is not authorized to use a by-pass solely because of disagreement over the method or site for providing those services.

Response. No change has been made. Section 613(a)(4)(A) of the Act requires that, to the extent consistent with the number and location of handicapped private school children in a State, provision is made for their participation in the Part B program. A by-pass arrangement is allowed, under Section 613(d)(1) of the Act, if a State educational agency is prohibited by State law from meeting the requirement under Section 613(a)(4)(A). The legislative history of Section 613(d) indicates that where State law restrictions allow the provision of services to only a small number of identified private school handicapped children under extremely limited conditions, a by-pass arrangement is appropriate. The Secretary interprets Sections 613(a)(4)(A) and 613(d) as providing specific authority for a determination as to whether private school handicapped children have been afforded a genuine opportunity for equitable participation in accordance with the requirements of Section 613(a)(4)(A) and 34 CFR 300.451–300.452. A State can challenge the Secretary's decision to implement a by-pass through the due process procedures contained in the final regulations.

Comment. One commenter recommended that the regulations state explicitly that the Secretary has no authority to direct the use of State or local funds for private school handicapped children.

Response. No change has been made. The Secretary believes that it is unnecessary to add the language recommended by the commenter, since § 300.481(d) provides that the maximum amount to be spent for services under a by-pass is deducted from the State's allocation of Part B funds. In other words, the by-pass is paid for solely with Federal funds.

Comment. One commenter suggested that the Secretary be required to consult with State educational agency officials as well as with "appropriate public and private school officials."

Response. A change has been made. The Secretary agrees that consultation with State educational agency officials is necessary to determine whether a by-pass is required in a State, and to ensure its effective implementation if that arrangement is needed. Section 300.481(a) has been revised by inserting "State educational agency officials" to make it clear that they will be consulted before a by-pass is implemented.

Comment. One commenter requested that § 300.481(b) be revised to define, or give examples of, "appropriate parties" with whom the Secretary may make service agreements.

Response. No change has been made. The statute does not specify or limit eligible applicants or offerors for consideration as service providers. The Secretary intends to invite proposals by announcing a closing date for transmittal of proposals for awards to provide services under a by-pass.

Comment. One commenter requested that § 300.481(d) include criteria for the Secretary's determination of the amount "necessary to implement a by-pass" as a means of justifying the deduction of money from allotments to local educational agencies.

Response. A change has been made. Criteria for determining the amount necessary to provide benefits to private school handicapped children under the Department's State-administered programs are found in EDGAR, 34 CFR 76.655 (*Level of expenditures for students enrolled in private schools.*). Section 300.481(a)(3) has been revised to make it clear that the EDGAR standards at 34 CFR 76.651–76.662 apply to services provided under a by-pass.

Comment. One commenter recommended that § 300.482(b) (1) and (2) be revised to require the Secretary to document the basis for, and allow the State educational agency to object to, the amount the Secretary intends to include in the by-pass, as well as the rationale for the by-pass itself.

Response. No change has been made. Section 613(d)(1)(B) of the Act authorizes the Secretary to withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of services under a by-pass, thereby making it unnecessary to withhold the State's total allocation until the exact amount to be paid to the service provider can be ascertained. The State educational agency is not precluded, under the statute or these regulations, from requesting a show cause hearing to challenge the Secretary's determination of the amount of funds to be withheld for implementation of a by-pass. *See* § 300.484(b). Under Section 613(d)(3)(A) of the Act, the State educational agency has the burden of showing why the action proposed by the Secretary should not be taken, including the withholding of a specified amont of the State's Part B allocation.

Comment. Two commenters objected to the statement in the preamble that the EHA–B does not create an individual entitlement to services for each private school handicapped child. One commenter felt that State and local educational agencies have "full service responsiblity" for those children and the Federal government should assume the entire duty under a by-pass. The other commenter recommended that the by-pass be implemented in only those localities in a State where a local educational agency has not offered services in a manner that accommodates the scheduling needs of private school handicapped children. This commenter believed that a State-wide by-pass would be inappropriate in a State where the restrictions on services to private school handicapped children do not result in uniform compliance or non-compliance with Federal requirements, but instead encourage a balkanized response in which compliance varies from district to district, thereby necessitating a flexible by-pass approach and criteria for determining when a by-pass is required. The second commenter also recommended that private school handicapped children residing in a by-pass area who are unable to receive services due to the limited amount of funds under the Act continue to receive services from the local educational agency.

Response. No change has been made. The Secretary has the authority to serve

less than the entire population of private school handicapped children. These regulatory provisions are justified on the basis of a comparison of the language of Section 613(a)(4)(A) to other provisions in the EHA–B. Section 612(1) of the EHA–B provides that, in order to qualify for assistance under the Act, a State must demonstrate that it has in effect a policy that assures all handicapped children the right to a free appropriate public education. Section 612(2) of the EHB–B requires States to assure that a free appropriate public education is available to all children in certain age ranges within the State. Unlike Section 612(1) and 612(2), Section 613(a)(4)(A) only imposes an obligation on States to provide for the participation of handicapped private school children in the program carried out pursuant to the EHA–B and does not require that services be provided to each and every private school handicapped child. Moreover, Section 613(a)(4)(A) allows for consideration of the number and location of private school handicapped children in the State in providing services to those children. The Secretary views Section 613(a)(4)(A) as providing States and the Secretary with the discretion to devise, in consultation with private school representatives, the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children. This interpretation has been consistently followed by the Department, and applied to States, under the original regulations for the EHA–B (45 CFR 121a.451–121a.460 (1977)) and under the EDGAR provisions which replaced them in 1980.

In a State where a by-pass is implemented, the Secretary is required by Section 613(d)(1) of the EHA–B to waive that State's obligation to provide special education and related services to private school handicapped children. Therefore, the Secretary does not have the authority to require local educational agencies to serve private school handicapped children that could not be provided for under the by-pass.

The by-pass authority contained in Section 613(d) of the Act requires operation on a State-wide basis. Section 613(d) of the Act, in contrast to Chapter 1 of the Education Consolidation and Improvement Act of 1981, makes no provision for the implementation of a by-pass for only those local educational agencies that have substantially failed to provide for the participation on an equitable basis of private school handicapped children.

Comment. One commenter interpreted § 300.450 to mean that handicapped children unilaterally placed by their parents in private facilities that provide services solely to handicapped children are not eligible for services provided under a by-pass.

Response. No change has been made. Handicapped children in those facilities in States subject to a by-pass are eligible for participation in the EHA–B program to the same extent that they are eligible in States not subject to a by-pass.

Comment. One commenter recommended that §§ 300.705(a) and 300.481(c)(2) be modified to allow the Secretary to determine the maximum amount to be paid to the provider of services, in the first year of a by-pass, based on an estimated count of private school handicapped children, and to hold the estimated allocation in escrow pending the award to the provider of services. The commenter also recommended the addition of provisions for reallocating and distributing the excess funds to States in the event the Secretary should not implement the by-pass.

Response. A change has been made. The procedures recommended by the commenter describe the method by which funds for a by-pass most likely would be allocated and reserved for use in a State subject to a by-pass arrangement. Language has been added to §§ 300.705(a) and 300.481(c)(2) to make it clear that it may be necessary for the Secretary to base the initial year's by-pass allocation on an estimate of the number of eligible handicapped children. The Secretary believes it is necessary to have the authority to use such an estimate in administering the by-pass because there may be an absence of a verified accurate count of children eligible to receive services. A provision for reallocation of excess funds that become available as a result of adjustments in a State's child count is included in the current regulations under 34 CFR 300.703(a), and would apply if a by-pass arrangement is not implemented.

Comment. One commenter suggested that § 300.481 be revised to indicate that the scope and nature of the services required by private school handicapped children, as well as the number to be served, must be determined in compliance with 34 CFR 300.531 and 300.532. The commenter stated that children should not receive services before they have been identified and evaluated by the local educational agency.

Response. No change has been made. The Secretary agrees that the commenter accurately states the requirements of the EHA–B, but these requirements have already been incorporated in the regulations. A "handicapped child," whether enrolled in a public or private school, is defined under § 300.5(a). *See* § 300.481(c)(2). Section 300.5(a) defines the term "handicapped children" to mean those children evaluated in accordance with §§ 300.530–300.534 as having one of the impairments described in § 300.5(b) and who, because of those impairments, need special education and related services.

Comment. One commenter suggested that the Secretary consider a phased-in by-pass in any particular State since it may not be possible to obtain an accurate count of the private school students who would be eligible for services, but who have not yet been identified, located, evaluated, and provided services.

Response. No change has been made. The Secretary agrees that a phased-in implementation of a by-pass arrangement could be the most orderly way to ensure the participation of the maximum number of private school handicapped children in service arrangements. That kind of approach would, however, also result in uncertainty among other States as to the amount of their allocations from year to year, since those allocations could not be determined precisely until an accurate count of private school handicapped children receiving services is available. The Secretary can defer the implementation of a by-pass until information is available on the probable number of children to be served, their locations, and the scope and nature of the services they require. *See* § 300.481(a) (2) and (3).

Comment. On commenter objected to the proposed regulations in their entirety, believing that these regulations would usurp a State's responsibility for the administration of EHA-B requirements, compromise the role of multidisciplinary evaluation and placement teams, undermine existing dual enrollment provisions for private school placement, and require substantial modifications of due process procedures for placing handicapped children in private programs. The commenter expressed concern that the probable effect of the regulations would be to increase paperwork and financial burden upon responsible agencies with minimal benefit to children, and to delay or deny services to children as a result

of the hearing procedures outlined for a State's redress of grievances.

Response. No change has been made. In general, most commenters considered the regulations to be reasonable; several commenters offered specific suggestions that were adopted. For the most part, concerns about the NPRM were based on misconceptions of the EHA–B provisions and current EDGAR regulations that apply to the participation of private school handicapped children in programs assisted under the EHA–B. This commenter's remarks appear to be based on the assumption that these provisions and procedures relating to a by-pass apply to the provision of services to handicapped children who are referred to or placed in private schools or facilities by public agencies in order to provide those children with a free appropriate public education. This assumption is not correct. The by-pass procedures are used only in a State where the State educational agency is prohibited by State law from fulfilling its duty to provide for the participation in EHA–B programs of children for whom a free appropriate public education is available, but whose parents have *voluntarily* enrolled them in private schools at the parents' expense. *See* Sections 613(a)(4)(A) and 613(d)(1) of the Act and 34 CFR 300.450 and 300.480. The due process procedures described in §§ 300.482–300.486 are consistent with the provisions of Section (d)(3) of the Act, procedures used by the Secretary for show cause hearings under Chapter 1 of the Education Consolidation and Improvement Act of 1981, and procedural rules for Department hearings relating to other grant programs. The due process provisions do not impose paperwork or administrative burdens on State or local educational agencies beyond those minimal requirements imposed by the Act which are necessary to ensure a fair hearing and resolve their grievances.

Comment. One commenter recommended that the regulations: (a) Include provision for local educational agencies to recover the costs of conducting after-hours evaluations of private school children; and (b) be strengthened to absolutely limit the costs of providing comparable services to private school children to the level of expenditures in public agency programs. In support of this recommendation, the commenter cited examples of per pupil and administrative costs under by-pass arrangements implemented under other programs.

Response. No change has been made. The Secretary appreciates the concerns expressed by the commenter relative to the restrictions that may be imposed by State law on the manner of meeting a State's responsibility, under Section 612(2)(C) of the Act, to identify, locate, and evaluate *all* handicapped children residing in the State. Unlike the by-pass provisions under other programs, section 613(d)(2)(A) of the EHA–B limits payment to the provider of by-pass services to an amount per child which may not exceed the Federal amount provided per child to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year in which the by-pass is implemented. The legislative history of Pub. L. 98–199 makes it clear that the service provider's administrative costs must be deducted from the *pro rata* share of the affected State's allocation that is reserved for the by-pass. *See* H.R. Rep. No. 410, 98th Cong., 1st Sess. 22 (1983). Because of these fiscal limitations, it is unlikely that service costs or administrative costs under a by-pass will greatly exceed the costs of providing comparable services in public agency programs. A State in which a by-pass is implemented will still receive and allocation based on the number of children reported to be receiving services in the preceding fiscal year. These funds can be used to assist the State and local educational agencies in conducting the evaluations required for all children suspected of having a handicapping condition.

Comment. One commenter recommended that, in accordance with the flexibility provided under §300.481(c)(2), the Secretary use by-pass funds to support child identification and evaluation activities by a by-pass service provider to supplement State and local efforts to determine the number of private school handicapped children.

Response. No change has been made. The Secretary will determine, following consultations with State educational agency officials and public and private school officials, if the service provider will need to conduct child identification and evaluation activities during the initial year of implementation.

Comment. One commenter requested that § 300.484 be revised to require that the hearing be held at a time and place convenient to the State educational agency.

Response. No change has been made. The Secretary believes that the responsibility for designating an appropriate time and place will be exercised in a manner that is equitable to all parties to a show cause hearing and that this requirement is unnecessary.

Comment. One commenter requested that § 300.485 be revised to allow the State educational agency to (a) receive a copy of the designee's written decision when it is sent to the Secretary; and (b) file written arguments with the Secretary for consideration before the Secretary takes final action to adopt, reverse, or modify the designee's decision.

Response. A change has been made. The Secretary agrees that providing parties with the opportunity to comment on the designee's decision may aid in the equitable resolution of the matters considered at the show cause hearing. Section 300.485 (a)(2) and (b) has been revised to require the designee to send copies of the hearing decision to all parties in interest and to give them the opportunity to submit comments on the decision to the Secretary.

Counting and Reporting of Handicapped Children

Section 611(a) of Part B of the Act provides for an annual count of the number of handicapped children ages three through twenty-one in each State who are receiving special education and related services. This information is used to determine each State's allocation of funds under this program and the Incentive Grants program authorized by Section 619. As amended by Pub. L. 98–199, Section 618(b)(1) requires the Secretary to obtain data concerning the number of handicapped children and youth in those States receiving special education and related services by disability category and by four specific age groups (3–5, 6–11, 12–17, and 18–21). A notice of proposed rulemaking was published in the **Federal Register** on April 30, 1984 (49 FR 18432). On May 24, 1984, a notice of intent to collect data was published in the **Federal Register** (49 FR 21979). In the notice of intent to collect data, the Secretary specifically invited comments on an alternative method of reporting ages of handicapped children and youth served under the EHA–B. This alternative method would involve the reporting of individual ages (i.e., three, four, five, six, etc.) of children and youth served. Based on the comments received in response to the proposed regulations and the notice of intent to collect data, the Secretary has decided that reporting the count of handicapped children and youth served by individual ages will be no more burdensome, and will result in more reliable data, than reporting by the age groupings originally proposed in § 300.751(a)(3). Approximately one-half

of the States presently collect child count data by birth date from local educational agencies and intermediate educational units. In those States, the administrative burden associated with this information collection and reporting task will not change significantly, given their use of automated data processing systems. In other States, data collection forms and procedures must be altered, but this is a one-time effort that will not recur. Some of these States had been considering a change to reporting child counts by individual ages prior to the enactment of Pub. L. 98–199.

The information collection forms used for reporting purposes will be designed to allow a State to report the number of handicapped children and youth served within the age groups three through five, six through eleven, twelve through seventeen, and eighteen through twenty-one for fiscal year 1985, if the State does not currently collect this information by individual ages. The final regulations have been revised to be consistent with this information collection method.

The legislative history accompanying Pub. L. 98–199 cites Congressional concerns about the unmet needs of secondary age students, and the inability of current reporting methods to accurately reflect the number of secondary school handicapped students served. These changes in data collection and reporting could result in improved and better-targeted special education programs and services for secondary school students. More precise information about the numbers of secondary age students, as obtained from this regulatory change, may lead to greater coordination between the educational system and other social service agencies to ensure that appropriate services are available to handicapped persons when they leave school. *See* S. Rep. No. 191, 98th Cong., 1st Sess. 12 (1983). In addition, reporting by individual ages is expected to be beneficial by allowing States and local educational agencies to study trends in handicapped children's program entry and exit patterns and thus facilitate long-range program planning.

Services to Private School Handicapped Children

Section 613(d) of Part B, as added by Section 7 of the Education of the Handicapped Act Amendments of 1983, Pub. L. 98–199, requires the Secretary to arrange for the provision of services to handicapped children who are voluntarily enrolled in private schools by their parents, in accordance with Section 613(a)(4)(A) of the Act, if the State educational agency was prohibited by law from doing so on December 2, 1983, the date of enactment of Pub. L. 98–199. These regulations implement the by-pass provisions, including provisions to clarify the due process procedures by which the affected State educational agency may challenge the Secretary's determination that a by-pass must be implemented. Current regulations governing services to private school handicapped children are set out at 34 CFR 300.450–300.452. The Education Department General Administrative Regulations (EDGAR) which govern services to students enrolled in private schools (34 CFR 76.651–76.662) also apply to this program.

A discussion of the regulations follows:

A. Technical Amendment

The regulations include a technical amendment to the language in 34 CFR 300.450 which extends the definition of the term "private school handicapped children" to apply to the by-pass procedures set out at §§ 300.480–300.486 and the child count provision at § 300.705. This definition serves to distinguish the population of children served under a by-pass arrangement from those handicapped children who are referred to or placed in private schools or facilities by a public agency to ensure that they have available a free appropriate public education. *See* 20 U.S.C. 1413(a)(4)(B) and 34 CFR 300.400–300.403.

B. Procedures for By-Pass

The regulations establish provisions which include procedures for the Secretary to implement and operate a by-pass in order to provide services to private school handicapped children. The Secretary interprets Section 613(a)(4)(A) and (d) of the Act as allowing the Secretary to decide, after consultation with the State educational agency and appropriate public and private school officials, which private school handicapped children will receive special education and related services under a by-pass. This determination will be based on the needs of the handicapped private school students in the State. The Secretary does not read Section 613(a)(4)(A) as creating an individual entitlement to services for each private school handicapped child, nor is it likely that the limited amount of funds available under the Act for a by-pass will make it possible to serve all private school handicapped children under a by-pass.

- Section 300.705(a) provides that, for the purpose of determining a State's allocation (from which the by-pass amount is deducted) for the first year of a by-pass, the Secretary includes in the State's child count either the actual number of private school handicapped children who, as of the previous year, had been identified and evaluated in accordance with Part B requirements, or an estimated number of private school handicapped children who have been identified and evaluated, whether or not they received special education and related services. This provision ensures that after the by-pass amount is deducted from the State's allocation, the amount of money remaining for the State to spend on children served by public agencies is approximately the same as it would be in the absence of a by-pass. For succeeding years of a by-pass, the Secretary would, under § 300.705(b), include in the State's child count only those private school handicapped children who had been served in the previous year.
- Section 300.480, consistent with Section 613(d)(1) of the Act, authorizes the Secretary to implement a by-pass where a State is prohibited by law from meeting the requirements under Section 613(a)(4)(A) of the Act.
- Section 300.481(a) implements the requirement of Section 613(d)(2)(A) of the Act that the Secretary consult with appropriate public and private school officials, including officials of the State educational agency, prior to arranging for a bypass. Examples are given of the matters subject to such consultation, including the establishment of policies and procedures to ensure that the State is fulfilling its obligation to identify, locate, and evaluate handicapped children in nonpublic schools and facilities and to ensure that other procedural safeguards for such children are implemented. Discussion of the scope and nature of the services to be provided under the by-pass will assist the Secretary in determining an adequate funding level.
- Section 300.481(b) includes the statutory requirements for implementing services under a by-pass.
- Section 300.481(c) sets out the approach for determining the amount of the by-pass.

Under Section 611(a)(1)(A) and 611(a)(3) of the Act, a State's grant for any fiscal year is based on the number of handicapped children in the State receiving special education and related services as of December 1 of the preceding fiscal year. In a State subject to a by-pass, Section 613(d)(2)(A) directs the Secretary to pay to the service provider an amount per child which may not exceed the amount per child provided by the Secretary under Part B of the Act for the preceding fiscal year. The reason for the by-pass is that the

State cannot serve (and, thus, cannot include in its count) handicapped private school children who are eligible to receive services under Part B. For example, the legislative history for Pub. L. 98–199 states that, as a result of State law restrictions in Missouri, "only 275 of an estimated 3,500 handicapped children enrolled in private schools [are] receiving needed special education and related services." H.R. Rep. No. 410, 98th Cong., 1st Sess. 22 (1983). If the amount of the by-pass is based only on the number of private school handicapped children who actually received special education and related services in the preceding fiscal year, it is unlikely that an adequate amount of money will be available, especially for the first year of a by-pass. The Secretary therefore will base the amount of the by-pass on the number of private school handicapped children who have been identified and evaluated, as determined by the Secretary on the basis of the most satisfactory data available to the Department, and following consultations with State educational agency officials, and public and private school officials, on the scope of services to be provided (including the number of children to be served).

• Section 300.481(d) provides that the Secretary pays the by-pass service providers by deducting the amount of the by-pass from the State's allocation. It also implements the statutory authority that permits the Secretary to withhold the amount needed to implement a by-pass from the State's allocation pending final resolution of any investigation or complaint that may result in a determination to implement a by-pass.

• The statute provides the State with due process protections (written notice, opportunity for a show cause hearing, judicial appeal of an administrative decision) when the Secretary proposes that a by-pass be implemented. Sections 300.482–300.486 describe these protections and provide the following additional requirements:

1. Section 300.482 (*Notice of intent to implement a by-pass*) describes the content of the written notice and the procedures for sending the notice to the State educational agency.

2. Section 300.484 (*Show cause hearing*) states the qualifications of the hearing official, gives examples of the matters to be considered at such a hearing, and describes the scope of authority and the responsibilities of the hearing official.

3. Section 300.485 (*Decision*) provides procedures for reaching and issuing a decision after the show cause hearing.

These provisions are consistent with the due process provisions of the Department's by-pass regulations under Chapter 1 of the Education Consolidation and Improvement Act of 1981. *See* 34 CFR 200.81–200.84. Additional procedures not included in the Chapter 1 regulations are consistent with the Education Appeal Board rules governing show cause hearings (34 CFR 78.27–78.28) and the scope of authority and responsibilities of the official conducting the hearing (34 CFR 78.61(a)). These specific provisions clarify the procedures to be followed, the rights of the parties, and the duties of the hearing official. The Secretary believes that these provisions will help to ensure that show cause hearings under these by-pass provisions are conducted in a manner consistent with the procedures followed by the Department in similar proceedings.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. To the exent that these regulations affect States and State agencies, they will not have an impact on small entities because States and State agencies are not considered small entities affected under the Regulatory Flexibility Act. The small entities affected would be small local educational agencies. The change in reporting the child count affects small entities, which will need to adhere to State procedures for collecting and reporting these data. The economic impact will not be significant since local educational agencies already collect information on the number of handicapped children served. These regulations change the manner in which this information is reported. These provisions would not impose any requirements on small entities if a by-pass is implemented.

Paperwork Reduction Act of 1980

The information collection requirements contained in these regulations (§ 300.751 (a)(3) and (b)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned an OMB control number. The control number appears as a citation at the end of this section.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79 (48 FR 29158; June 24, 1983). The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Department requested comments on whether the proposed regulations required information that is already being gathered by or is available from any other agency or authority of the United States.

Based on the absence of comments on this matter and the Department's own review, it has been determined that the regulations in this document do not require information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 300

Administrative practice and procedures, Education, Education of handicapped, Grant program—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these regulations.

(Catalog of Federal Domestic Assistance Number 84.027; Assistance to States for Education of Handicapped Children)

Dated: December 6, 1984.

T.H. Bell,

Secretary of Education.

The Secretary amends Part 300 of Title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

1. Section 300.751 is amended by revising paragraphs (a)(3) and (b) to read as follows:

§ 300.751 Annual report of children served—information required in the report.

(a) * * *

(3) The number of those handicapped children aged three through twenty-one for each year of age (three, four, five, etc.). For fiscal year 1985, a State educational agency that does not currently collect information in this manner may report the number of those handicapped children within each of the following age groups:

(i) Three through five.

(ii) Six through eleven.

(iii) Twelve through seventeen.

(iv) Eighteen through twenty-one.

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(Approved by the Office of Management and Budget under control number 1820-0043)

2. Section 300.450 is revised to read as follows:

§ 300.450 Definition of "private school handicapped children."

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 300.400–300.402.

(20 U.S.C. 1413(a)(4)(A))

3. Section 300.705 is revised to read as follows:

§ 300.705 Allocation for State in which bypass is implemented for private school handicapped children.

In determining the allocation under §§ 300.700–300.703 of a State in which the Secretary will implement a by-pass for private school handicapped children under §§ 300.451–300.486, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school handicapped children (as defined in §§ 300.5(a) and 300.450 in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school handicapped children who received special education and related services under the by-pass in the preceding year.

(20 U.S.C. 1411(a)(1)(A), 1411(a)(3), 1413(d))

4. New §§ 300.480–300.486 and two new center headings are added to Subpart D to read as follows:

Procedures for By-Pass

§ 300.480 By-pass—general.

(a) The Secretary implements a by-pass if a State educational agency is, and was on December 2, 1983, prohibited by law from providing for the participation of private school handicapped children in the program assisted or carried out under this part, as required by Section 613(a)(4)(A) of the Act and by §§ 300.451–300.452.

(b) The Secretary waives the requirement of Section 613(a)(4)(A) of the Act and of §§ 300.451–300.452 if the Secretary implements a by-pass.

(20 U.S.C. 1413(d)(1))

§ 300.481 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including State educational agency officials, in the affected State to consider matters such as—

(1) The prohibition imposed by State law which results in the need for a by-pass;

(2) The scope and nature of the services required by private school handicapped children in the State, and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school handicapped children receive services consistent with the requirements of Section 613(a)(4)(A) of the Act, §§ 300.451–300.452, and 34 CFR 76.651–76.662.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school handicapped children in the State in a manner consistent with the requirements of Section 613(a)(4)(A) of the Act and §§ 300.451–300.452 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year in which a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount, which may not exceed the amount per child provided by the Secretary under this part for all handicapped children in the State for the preceding fiscal year; by

(2) The number of private school handicapped children (as defined by §§ 300.5(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those handicapped children.

(d) The Secretary deducts from the State's allocation under this part the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(20 U.S.C. 1413(d)(2))

Due Process Procedures

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected State educational agency with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the State educational agency to respond;

(2) Advises the State educational agency that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the State educational agency by certified mail with return receipt requested.

(20 U.S.C. 1413(d)(3)(A))

§ 300.483 Request to show cause.

A State educational agency seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(20 U.S.C. 1413(d)(3)(A))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the State educational agency and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including procedures such as those established in

34 CFR 78.61(a), *Authority and responsibilities of Panels.*

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(20 U.S.C. 1413(d)(3)(A))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) Issues a written decision which includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the State educational agency of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(20 U.S.C. 1413(d)(3)(A))

§ 300.486 Judicial review.

If dissatisfied with the Secretary's final action, the State educational agency may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in Section 613(d)(3)(B)–(D) of the Act.

(20 U.S.C. 1413(d)(3)(B)–(D))

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Note: The President completed his consideration of acts and joint resolutions passed during the second session of the 98th Congress on November 8, 1984.

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The list will be resumed when bills are enacted into public law during the first session of the 99th Congress which convenes on January 3, 1985.