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# Federal Register

Friday  
January 16, 1987

**Briefings on How To Use the Federal Register—**  
For information on briefings in Washington, DC, Portland, OR,  
Los Angeles, CA, and San Diego, CA, see announcement on the  
inside cover of this issue.



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## THE FEDERAL REGISTER WHAT IT IS AND HOW TO USE IT

- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** The Office of the Federal Register.
- WHAT:** Free public briefings (approximately 2 1/2 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### WASHINGTON, DC

- WHEN:** January 29; at 9 am.
- WHERE:** Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC.
- RESERVATIONS:** Mildred Isler 202-523-3517

### PORTLAND, OR

- WHEN:** February 17; at 9 am.
- WHERE:** Bonneville Power Administration Auditorium, 1002 N.E. Holladay Street, Portland, OR.
- RESERVATIONS:** Call the Portland Federal Information Center on the following local numbers:
- |          |              |
|----------|--------------|
| Portland | 503-221-2222 |
| Seattle  | 206-442-0570 |
| Tacoma   | 206-383-5230 |

### LOS ANGELES, CA

- WHEN:** February 18; at 1:30 pm.
- WHERE:** Room 8544, Federal Building, 300 N. Los Angeles Street, Los Angeles, CA.
- RESERVATIONS:** Call the Los Angeles Federal Information Center, 213-894-3800

### SAN DIEGO, CA

- WHEN:** February 20; at 9 am.
- WHERE:** Room 2S31, Federal Building, 880 Front Street, San Diego, CA.
- RESERVATIONS:** Call the San Diego Federal Information Center, 619-293-6030

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# Presidential Documents

Title 3—

The President

Proclamation 5598 of January 13, 1987

Shays' Rebellion Week and Day, 1987

By the President of the United States of America

## A Proclamation

This year, Americans celebrate the bicentennial of many events relating to the drafting of our Constitution. One of those events was Shays' Rebellion.

After the War of Independence, Americans continued to live under the Articles of Confederation. Problems of economic recovery and sluggish international trade clouded the horizon. In this climate of economic difficulties and the recent memory of a bitter struggle for freedom, Shays' Rebellion took place.

Unlike many other States, Massachusetts had not passed debt relief laws. In the fall of 1786, some Massachusetts debtors tried to stop court-ordered confiscation of land and property by using force to prevent the courts from sitting. Governor Bowdoin responded by calling out the State militia and asking other States for help.

Although the Continental Congress lacked the power and resources to assist, the uprising eventually was suppressed. On January 25, 1787, Daniel Shays, a captain during the Revolution, led a group of debtors who sought to stop the State Supreme Court from meeting. They attacked the courthouse at Springfield and the Federal arsenal. The State militia repelled this assault, and soon the uprising was over. A new State legislature granted some of the insurgents' demands and pardoned or gave lenient sentences to their leaders. This judicious policy and the return of prosperity soon restored harmony in Massachusetts.

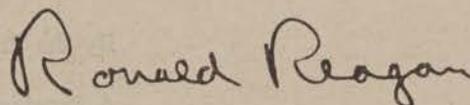
Thomas Jefferson believed that the rebels' activities were motivated by "ignorance, not wickedness." He pointed out that the majority of the people of Massachusetts had sided with the government, and he concluded that "the good sense of the people will always be found to be the best army." Although many Americans were satisfied with the Articles of Confederation and were wary of a strong central government, Shays' Rebellion did give impetus to the Federalists' call for the establishment of what George Washington termed "a more efficient general government."

At the Annapolis Convention of 1786, Federalists had publicized commercial disputes among the States. Now they cited the insurgency to bolster their claim that a Federal charter was needed in place of the Articles of Confederation. On February 21, 1787, the Continental Congress called for a Constitutional Convention in Philadelphia in May to amend the Articles. Fresh in the minds of the assembled delegates, Shays' Rebellion was to have a profound and lasting effect on the framing of our Constitution and on our subsequent history.

To recognize the influence of Shays' Rebellion on the movement for our Federal Constitution, the Congress, by Public Law 99-629, has designated the week beginning January 19, 1987, as "Shays' Rebellion Week" and Sunday, January 25, 1987, the two hundredth anniversary of the defense of Springfield, as "Shays' Rebellion Day" and authorized and requested the President to issue a proclamation in observance of this event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the week beginning January 19, 1987, as Shays' Rebellion Week and Sunday, January 25, 1987, as Shays' Rebellion Day. I call upon all Americans to observe these occasions with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of January, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and eleventh.



[FR Doc. 87-1069

Filed 1-14-87; 10:52 am]

Billing code 3195-01-M

# Rules and Regulations

Federal Register

Vol. 52, No. 11

Friday, January 16, 1987

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 Parts 906, 910, 912, 913, 927, 929, 931, 946, 966, 982, 984, and 989

### Expenses and Assessment Rates for Specified Marketing Orders

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule authorizes expenditures and establishes assessment rates under Marketing Orders 906, 910, 912, 913, 927, 931, 946, 966, 982, 984, and 989 for the respective 1986-87 fiscal year for each order. Marketing Order 929 expenses are amended for the 1985-86 fiscal year. Funds to administer these programs are derived from assessments on handlers.

**EFFECTIVE DATES:** August 1, 1986-July 31, 1987 (§§ 906.226, 910.224, 912.226, 913.222, 966.224, 984.338, 989.337); July 1, 1986-June 30, 1987 (§§ 927.226, 931.221, 946.239, 982.331); September 1, 1985-August 31, 1986 (amended § 929.226).

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone (202) 447-5698.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of

business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

It is estimated that approximately 106 handlers of Texas Valley Citrus, 85 handlers of California Lemons, 48 handlers of Florida Indian River Grapefruit, 82 handlers of Florida Interior Grapefruit, 96 handlers of Oregon, Washington, and California Winter Pears, 27 handlers of Cranberries grown in ten States, 78 handlers of Oregon and Washington Pears, 60 handlers of Washington Potatoes, 103 handlers of Florida Tomatoes, 12 handlers of Oregon and Washington Filberts/Hazelnuts, 56 handlers of California Walnuts, and 23 handlers of California Raisins will be subject to regulation during the course of the respective season and that the great majority of these firms may be classified as small entities.

Each marketing order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year.

An annual budget of expenses is prepared by each administrative committee and submitted to the Department of Agriculture for approval. The members of administrative committees are handlers and producers of the regulated commodities. This is appropriate because they are familiar with the committees' needs and with the costs for goods, services and personnel in their local area and are thus in a position to formulate an appropriate budget. The budgets are formulated and discussed in public meetings, thus all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is a derived figure. It is merely applying a rate per unit of the commodity (e.g. per pound, ton, box, carton, etc.), to the estimated production in order to produce income sufficient to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually acted upon by

committees shortly before a season starts and expenses are incurred on a continuous basis, therefore budget and assessment rate approval must be expedited in order that the committee will have funds to pay their expenses.

Based on the foregoing, the Secretary finds that it is impractical and unnecessary to give preliminary notice, engage in public rulemaking procedure and that good cause exists for not postponing the effective date under 30 days after publication in the Federal Register (4 U.S.C. 553).

**List of Subjects in 7 CFR Parts 906, 910, 912, 913, 927, 929, 931, 946, 966, 982, 984 and 989**

Marketing agreements and orders, Expenses and rates of assessment.

1. The authority citation for 7 CFR Parts 906, 910, 912, 913, 927, 929, 931, 946, 966, 982, 984, and 989 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. New §§ 906.226, 910.224, 912.226, 913.222, 927.226, 931.221, 946.239, 966.224, 982.331, 984.338, 989.337, are added, and § 929.226 is amended by changing the amount "\$102,130", to read "\$138,130." (the following sections prescribe the annual expenses and assessment rates and will not be published in the Code of Federal Regulations):

### PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

#### § 906.226 Expenses and assessment rate.

Expenses of \$436,170 by the Texas Valley Citrus Committee are authorized, and an assessment rate of \$0.10 per  $\frac{1}{10}$  bushel carton of oranges or grapefruit is established for the fiscal period ending July 31, 1987.

### PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

#### § 910.224 Expenses and assessment rate.

Expenses of \$648,000 by the Lemon Administrative Committee are authorized and an assessment rate of \$0.045 per carton of lemons is established for the fiscal year ending July 31, 1987. Unexpended funds may be carried over as a reserve.

**PART 912—GRAPEFRUIT GROWN IN THE INDIAN RIVER DISTRICT IN FLORIDA**

**§ 912.226 Expenses.**

Expenses of \$3,245 by the Indian River Grapefruit Committee are authorized for the fiscal period ending July 31, 1987. Unexpended funds from the fiscal period ending July 31, 1986, may be carried over as a reserve to fund such expenses.

**PART 913—GRAPEFRUIT GROWN IN THE INTERIOR DISTRICT IN FLORIDA**

**§ 913.222 Expenses and assessment rate.**

Expenses of \$4,120 by the Interior Grapefruit Marketing Committee are authorized and an assessment rate of \$0.0005 per 1/4 bushel carton of grapefruit is established for the fiscal year ending July 31, 1987. Unexpended funds may be carried over as a reserve.

**PART 927—BEURRE D'ANJOU, BEURRE BOSCH, WINTER NELIS, DOYENNE DU COMICE, BEURRE EASTER, AND BEURRE CLAIRGEAU VARIETIES OF PEARS GROWN IN OREGON, WASHINGTON, AND CALIFORNIA**

**§ 927.226 Expenses and assessment rate.**

Expenses of \$2,149,613 by the Control Committee are authorized and an assessment rate of \$0.28 per Western Standard pear box, or equivalent, is established for the fiscal period ending June 30, 1987. Unexpended funds may be carried over as a reserve.

**PART 931—FRESH BARTLETT PEARS GROWN IN OREGON AND WASHINGTON**

**§ 931.221 Expenses and assessment rate.**

Expenses of \$52,223 by the Northwest Fresh Bartlett Pear Marketing Committee are authorized and an assessment rate of \$0.02 per Western Standard pear box, or equivalent, is established for the fiscal year ending June 30, 1987. Unexpended funds may be carried over as a reserve.

**PART 946—IRISH POTATOES GROWN IN WASHINGTON**

**§ 946.239 Expenses and assessment rate.**

Expenses of \$26,500 by the State of Washington Potato Committee are authorized, and an assessment rate of \$0.002 per hundredweight of potatoes is established for the fiscal period ending June 30, 1987. Unexpended funds may be carried over as a reserve.

**PART 966—TOMATOES GROWN IN FLORIDA**

**§ 966.224 Expenses and assessment rate.**

Expenses of \$712,500 by the Florida Tomato Committee are authorized and an assessment rate of \$0.015 per 25-pound container of tomatoes is established for the fiscal period ending July 31, 1987. Unexpended funds may be carried over as a reserve.

**PART 982—FILBERTS/HAZELNUTS GROWN IN OREGON AND WASHINGTON**

**§ 982.331 Expenses, assessment rate, and operating reserve.**

Expenses of \$190,470 by the Filbert/Hazelnut Marketing Board are authorized, and an assessment rate payable by each handler in accordance with § 982.61 is fixed at \$0.007 per pound of assessable filberts for the 1986-87 marketing year ending June 30, 1987. Unexpended funds may be carried over as a reserve.

**PART 984—WALNUTS GROWN IN CALIFORNIA**

**§ 984.338 Expenses and assessment rate.**

Expenses of \$1,177,700 by the Walnut Marketing Board are authorized and an assessment rate payable by each handler in accordance with § 984.69 is fixed at \$0.008 per kernelweight pound of merchantable walnuts for the marketing year ending July 31, 1987. Unexpended funds may be used temporarily during the first five months of the subsequent marketing year, but must be made available to the handlers from whom collected within that period.

**PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA**

**§ 989.337 Expenses and assessment rate.**

Expenses of \$331,250 by the Raisin Administrative Committee are authorized, and an assessment rate payable by each handler in accordance with § 989.80 of \$1.25 per ton of assessable raisins is established for the crop year ending July 31, 1987. Any unexpended funds from that crop year shall be credited or refunded to the handler from whom collected.

Dated: January 12, 1987.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 87-926 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-02-M

**7 CFR Part 907**

[Navel Orange Regulation 643]

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

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** Regulations 643 establishes the quantity of California-Arizona navel oranges that may be shipped to market during the period January 16, 1987, through January 22, 1987. Such action is needed to balance the supply of fresh navel oranges with the demand for such period, due to the marketing situation confronting the orange industry.

**DATE:** Regulation 643 (§ 907.943) is effective for the period January 16, 1987, through January 22, 1987.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone: 202-447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their behalf. Thus, both statutes have small entity orientation and compatibility.

This rule is issued under Order No. 907, as amended (7 CFR Part 907), regulating the handling of navel oranges grown in Arizona and designated part of California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation and information submitted by the Navel Orange Administrative Committee and upon other available information. It is found

that this action will tend to effectuate the declared policy of the act.

This action is consistent with the marketing policy for 1986-87 adopted by the Navel Orange Administrative Committee. The committee met publicly on January 13, 1987, in Bakersfield, California, to consider the current and prospective conditions of supply and demand and recommended, by a vote of 6 to 5, a quantity of navel oranges deemed advisable to be handled during the specified week. The committee reports that the market for navel oranges remains strong.

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 is based and the effective date necessary to effectuate the declared policy of the act. To effectuate the declared purposes of the act, it is necessary to make this regulatory provision effective as specified, and handlers have been apprised of such provision and the effective time.

#### List of Subjects in 7 CFR Part 907

Marketing agreements and orders, California, Arizona, Oranges (navel).

1. The authority citation for 7 CFR Part 907 continues to read:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 907.943 Navel Orange Regulation 643 is added to read as follows:

#### § 907.943 Navel Orange Regulation 643.

The quantities of navel oranges grown in California and Arizona which may be handled during the period January 16, 1987, through January 22, 1987, are established as follows:

- (a) District 1: 1,600,000 cartons;
- (b) District 2: Unlimited cartons;
- (c) District 3: Unlimited cartons;
- (d) District 4: Unlimited cartons.

Dated: January 14, 1987.

Joseph A. Gribbin,  
Director, Fruit and Vegetable Division,  
Agricultural Marketing Service.  
[FR Doc. 87-1151 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 910

##### [Lemon Regulation 544]

#### Lemons Grown in California and Arizona; Limitation of Handling

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** Regulation 544 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 285,000 cartons during the period January 18-24, 1987. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

**DATES:** Regulation 544 (§ 910.844) is effective for the period January 18-24, 1987.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone: (202) 447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small business will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their behalf. Thus, both statutes have small entity orientation and compatibility.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR Part 910) regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation and information submitted by the Lemon Administration Committee and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the marketing policy for 1986-87. The committee met publicly on January 13, 1987, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended, by a vote of 12 to 1, a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that demand is good and prices are steady.

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 is based and the effective date necessary to effectuate the declared purposes of the act. Interested persons were given an opportunity to submit information and views on the regulation at an opening meeting. It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, handlers have been apprised of such provisions and the effective time.

#### List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

1. The authority citation for 7 CFR Part 910 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.844 is added to read as follows:

#### § 910.844 Lemon Regulation 544.

The quantity of lemons grown in California and Arizona which may be handled during the period January 18 through January 24, 1987, is established at 285,000 cartons.

Dated: January 14, 1987.

Joseph A. Gribbin,  
Director, Fruit and Vegetable Division,  
Agricultural Marketing Service.  
[FR Doc. 87-1150 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-02-M

#### DEPARTMENT OF ENERGY

##### 10 CFR Parts 1040 and 1041

#### Enforcement of Nondiscrimination of the Basis of Handicap in Programs or Activities Conducted by the Department of Energy

**AGENCY:** Department of Energy.

**ACTION:** Final rule, correction.

**SUMMARY:** At 51 FR 4574, February 5, 1986, regulations were published amending 10 CFR Part 1040 by adding Subpart D (§§ 1040.101 through 1040.999) relating to nondiscrimination on the basis of handicap in programs or activities conducted by the Department of Energy (DOE). In Part 1040, a Subpart D (§§ 1040.61 through 1040.74), relating to nondiscrimination on the basis of handicap in Federally assisted programs, already existed. Moreover, §§ 1040.101 through 1040.131 already existed in Subparts G and H, relating to monitoring and enforcement of nondiscrimination in DOE Federally assisted programs. Therefore, it is necessary to redesignate the regulations published at 51 FR 4574, February 5, 1986, as Part 1041.

**EFFECTIVE DATE:** April 7, 1986.

**FOR FURTHER INFORMATION CONTACT:** Barry Haley, Manager of Federally Assisted Programs, Complaints and Investigations Division, Office of Equal Opportunity, U.S. Department of Energy, 1000 Independence Avenue SW., Room 4B-088, Washington, DC 20585, Voice: (202) 586-2254, TTD: (202) 586-9777.

#### List of Subjects in 10 CFR Parts 1040 and 1041

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal Employment Opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

Title 10 of the Code of Federal Regulations is amended as follows:

#### PART 1040—[REMOVED]

1. The provisions of Subpart D of Part 1040, §§ 1040.101 through 1040.999, Title 10 of the Code of Federal Regulations, as published at 51 FR 4574, February 5, 1986, are hereby removed.

2. Part 1041 is added and its table of contents is set forth below. The text of the rule appears in the common rule document beginning on page 4579 in the Federal Register of February 5, 1986.

#### PART 1041—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY DEPARTMENT OF ENERGY

Sec.	
1041.101	Purpose.
1041.102	Application.
1041.103	Definitions.
1041.104-1041.109	[Reserved]
1041.110	Self-evaluation.
1041.111	Notice.

Sec.	
1041.112-1041.129	[Reserved]
1041.130	General prohibitions against discrimination.
1041.131-1041.139	[Reserved]
1041.140	Employment.
1041.141-1041.148	[Reserved]
1041.149	Program accessibility: Discrimination prohibited.
1041.150	Program accessibility: Existing facilities.
1041.151	Program accessibility: New construction and alterations.
1041.152-1041.159	[Reserved]
1041.160	Communications.
1041.161-1041.169	[Reserved]
1041.170	Compliance procedures.
1041.171-1041.999	[Reserved]

**Authority:** 29 U.S.C. 794.

3. Part 1041 is further amended by revising paragraph (c) in § 1041.170 to read as follows:

#### § 1041.170 Compliance procedures.

(c) The Manager of Federally Assisted Programs shall be responsible for coordinating implementing of this section. Complaints may be sent to Director of Equal Opportunity, U.S. Department of Energy, Room 4B-112, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-2218.

Harry L. Peebles,  
*Acting Assistant Secretary, Management and Administration.*  
[FR Doc. 87-934 Filed 1-15-87; 8:45 am]  
BILLING CODE 6450-01-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Food and Drug Administration

#### 21 CFR Part 74

[Docket No. 84N-01501]

#### Confirmation of Effective Date for D&C Green No. 6; Uniform Specifications

**AGENCY:** Food and Drug Administration.  
**ACTION:** Final rule; confirmation of effective date.

**SUMMARY:** The Food and Drug Administration (FDA) is confirming the effective date of November 28, 1986, for the final rule that amended the color additive regulations by establishing a single set of specifications for all regulated uses of D&C Green No. 6.

**EFFECTIVE DATE:** Effective date confirmed: November 28, 1986.

**FOR FURTHER INFORMATION CONTACT:** Rudolph Harris, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C Street

SW., Washington, DC 20204, 202-472-5690.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of October 27, 1986 (51 FR 37908), FDA amended 21 CFR Part 74 of the color additive regulations in 21 CFR 74.3206(b)(2) by establishing a uniform set of specifications for D&C Green No. 6 for all of its regulated uses by rescinding the specifications before April 1982 for the use of this color additive in sutures, and by making that use subject to the specifications established for all other uses. This regulation also rescinded the provision in the medical device regulation that bars migration of D&C Green No. 6 from a suture to the surrounding tissues.

FDA gave interested persons until November 26, 1986, to file objections or requests for a hearing. The agency received no objections or requests for a hearing on the final rule. Therefore, FDA has concluded that the final rule published in the Federal Register of October 27, 1986, should be confirmed.

#### List of Subjects in 21 CFR Part 74

Color additives, Cosmetics, Drugs, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 701, 706, 52 Stat. 1055-1056 as amended, 74 Stat. 399-407 as amended (21 U.S.C. 371, 376)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), notice is given that no objections or requests for a hearing were filed in response to the October 27, 1986, final rule. Accordingly, the amendments promulgated thereby became effective November 28, 1986.

Dated: January 12, 1987.

John M. Taylor,  
*Associate Commissioner for Regulatory Affairs.*

[FR Doc. 87-1003 Filed 1-15-87; 8:45 am]  
BILLING CODE 4160-01-M

#### 21 CFR Part 522

#### Implantation or Injectable Dosage Form New Animal Drugs Not Subject to Certification; Sterile Triamcinolone Acetonide Suspension

**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 new animal drug application (NADA) filed by Med-Tech, Inc., providing for safe and effective use of triamcinolone acetonide injection as

an anti-inflammatory agent in dogs, cats, and horses.

**EFFECTIVE DATE:** January 16, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Marcia K. Larkins, Center for Veterinary Medicine (HFV-112), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3430.

**SUPPLEMENTARY INFORMATION:** Med-Tech, Inc., P.O. Box 338, Elwood, KS 66024, filed NADA 138-869 for certain injectable uses of sterile aqueous suspensions containing 2 or 6 milligrams per milliliter of triamcinolone acetonide for treatment of inflammation and related disorders in dogs, cats, and horses, and management and treatment of acute arthritis and allergic and dermatologic disorders in dogs and cats. The NADA approved and 21 CFR 522.2483(b) is 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 agency has determined under 21 CFR 25.24(d)(1)(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

**List of Subjects in 21 CFR Part 522**

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Part 522 is amended as follows:

**PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION**

1. The authority citation for 21 CFR Part 522 continues to read as follows:

Authority: Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)); 21 CFR 5.10 and 5.83.

**§ 522.2483 [Amended]**

2. Section 522.2483 *Sterile triamcinolone acetonide suspension* is amended in paragraph (b) by removing

"No." and inserting in its place "013983 and".

Dated: January 12, 1987.

Gerald B. Guest,

Director, Center for Veterinary Medicine.

[FR Doc. 87-1002 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-01-M

**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

**21 CFR Part 1306**

**Refilling of Prescription for Controlled Substances in Schedules III and IV**

**AGENCY:** Drug Enforcement Administration, Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends 21 CFR 1306.22 to allow additional refills of an original prescription authorized by the prescribing practitioner, as long as the number of refills, including those authorized on the original prescription, do not exceed the five refill limitation nor extend beyond six months from the date of issue of the original prescription.

**EFFECTIVE DATE:** February 17, 1987.

**FOR FURTHER INFORMATION CONTACT:**

G. Thomas Gitchel, Chief, State and Industry Section, Office of Diversion Control, Drug Enforcement Administration, 1405 I Street NW., Washington, DC 20537 (202-633-1216).

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking was published in the *Federal Register* on June 16, 1986 (51 FR 21773) to amend 21 CFR 1306.22. This proposed rulemaking provided opportunity for interested parties to submit comments or objections in writing on or before August 15, 1986.

Eleven comments were received in response to the notice of proposed rulemaking. A letter dated August 8, 1986 from the American Medical Association stated that the AMA supports the proposed change, but strongly recommended that the impact of the proposed change be monitored closely to ensure that it does not result in increased illicit diversion. The comments dated June 27, 1986 from the National Association of Chain Drug Stores, Inc. and July 10, 1986 from the Retired Persons Services, Inc., AARP Pharmacy Service were in support of the proposal. Comments dated June 26, 1986 from the Georgia Pharmaceutical Association, Inc. support the proposal and the concept of allowing refill information to be maintained on the back of the prescription or "on another appropriate document." Additional

support for the proposal was received in comments dated July 8, 1986 from the South Carolina Board of Pharmacy which noted that the change will save the pharmacist and the patient valuable time. Comments of July 7, 1986 from Jack Eckerd Corporation support the proposal, noting that it is in keeping with safe pharmaceutical practice for non-controlled substances and will permit pharmacists to provide more efficient care to their patients.

Comments of July 1, 1986 from Pay Less Northwest Drug Stores, Inc. support the proposal, indicating that the real benefit of the proposed amendment would be to establish a single source reference to monitor refill activity, which better detects possible abuse or too frequent refill activity. Super X Drug Stores in their comments of July 2, 1986 support the proposal, as well as La Verdier's Super Drug Stores comments on August 21, 1986 which stated that in addition to saving time, it would make for a much more efficient patient reference system.

The only negative comments received were from the State of New Jersey Department of Health, Division of Narcotic and Drug Abuse Control dated July 3, 1986 and from the State of New Jersey Department of Law and Public Safety, Division of Consumer Affairs, State Board of Pharmacy dated August 8, 1986. They expressed concern that the new regulation on the refilling of prescriptions for Schedule III and IV controlled substances would not have any significant impact upon the reduction in paperwork for a pharmacist. They also stated that the educational process of instructing pharmacists about the new regulations would not be cost effective.

It is the opinion of the DEA that the revision will reduce the paperwork required of dispensing pharmacists since they will not be required to prepare a new prescription for each additional refill authorized by the prescribing practitioner. The pharmacist will be permitted to record the refill authorization on the reverse of the original prescription. The new regulation reduces the number of records to which a pharmacist must refer when dispensing a controlled substance to an individual patient. It also establishes a single source document from which to monitor refill activity, thereby more easily detecting abuse and/or frequent refilling. DEA has an instructional booklet available for pharmacists that will be updated to inform them about the new regulations.

States are not obliged to change their requirements. If they which to maintain more stringent requirements to address

their particular concerns, it is certainly within their purview. When both Federal and state laws and regulations address the same area of concern, the more stringent requirements will apply.

The Deputy Assistant Administrator hereby certifies that this final rule will have no significant impact upon small businesses whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. It will in fact reduce records required by a dispensing pharmacy.

Pursuant to section 3(c)(3) and 3(e)(2)(B) of the Executive Order 12291, this action has been submitted for review by the Office of Management and Budget, and approval of that Office has been requested pursuant to the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq.

Therefore, pursuant to the authority vested in the Attorney General by 21 U.S.C. 821 and 871(b) as delegated to the Administrator of the Drug Enforcement Administration and redelegated to the Deputy Assistant Administrator of the Office of Diversion Control by 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator hereby orders that Part 1306 of Title 21, Code of Federal Regulations be amended as follows:

#### List of Subjects in 21 CFR Part 1306

Drug traffic control, Prescription requirements.

#### PART 1306—[AMENDED]

1. The authority for Part 1306 continues to read as follows:

Authority: 21 U.S.C. 821, 829, and 871(b).

2. Section 1306.22 is amended by revising paragraph (a) to read as follows:

#### § 1306.22 Refilling of prescriptions.

(a) No prescription for a controlled substance listed in Schedule III or IV shall be filled or refilled more than six months after the date on which such prescription was issued and no such prescription authorized to be refilled may be refilled more than five times. Each refilling of a prescription shall be entered on the back of the prescription or on another appropriate document. If entered on another document, such as a medication record, the document must be uniformly maintained and readily retrievable. The following information must be retrievable by the prescription number consisting of the name and dosage form of the controlled substance, the date filled or refilled, the quantity dispensed, initials of the dispensing pharmacist for each refill, and the total number of refills for that prescription. If the pharmacist merely initials and dates

the back of the prescription it shall be deemed that the full face amount of the prescription has been dispensed. The prescribing practitioner may authorize additional refills of Schedule III or IV controlled substances on the original prescription through an oral refill authorization transmitted to the pharmacist provided the following conditions are met:

(1) The total quantity authorized, including the amount of the original prescription, does not exceed five refills nor extend beyond six months from the date of issue of the original prescription.

(2) The pharmacist obtaining the oral authorization records on the reverse of the original prescription the date, quantity of refill, number of additional refills authorized, and initials the prescription showing who received the authorization from the prescribing practitioner who issued the original prescription.

(3) The quantity of each additional refill authorized is equal to or less than the quantity authorized for the initial filling of the original prescription.

(4) The prescribing practitioner must execute a new and separate prescription for any additional quantities beyond the five refill, six-month limitation.

\* \* \* \* \*

Dated: January 9, 1987.

Gene R. Haislip,

Deputy Assistant Administrator Office of Diversion Control Drug Enforcement Administration.

[FR Doc. 87-999 Filed 1-15-87; 8:45 am]

BILLING CODE 4410-09-M

#### VETERANS ADMINISTRATION

##### 38 CFR Part 1

#### Salary Offset, Federal Claims Collection

AGENCY: Veterans Administration.

ACTION: Final regulations.

**SUMMARY:** The Veterans Administration (VA) hereby promulgates new regulations to govern the collection of debts owed to the United States from Federal employees. These regulations are intended to implement the Debt Collection Act of 1982 (Pub. L. 97-365) which permits Federal agencies to collect debts by means of offset from current Federal salaries without an employee's consent, provided the employee is properly notified and given the opportunity to exercise certain administrative rights.

**EFFECTIVE DATE:** February 17, 1987.

**FOR FURTHER INFORMATION CONTACT:** Peter Mulhern, Special Assistant, Fiscal

Systems, Office of Budget and Finance (Controller), Veterans Administration, 810 Vermont Avenue NW, Washington, DC 20420 (202) 233-3405.

**SUPPLEMENTARY INFORMATION:** On pages 15013 through 15017 of the Federal Register of April 22, 1986, the VA published proposed regulations to establish policy and procedures for the offset of debts owed to the United States from the salaries of indebted Federal employees. Two comments were received from the President of the National Federation of Federal Employees. The first comment concerned our proposed use of the Board of Veterans Appeals (BVA) to conduct the hearings required by Pub. L. 97-365 on benefit debts. This comment stated the BVA does not have jurisdiction to render decisions concerning employees' debts because 38 U.S.C. 211(a) is not applicable to the salary offset provisions of 5 U.S.C. 5514. 38 U.S.C. 211(a) states that the decisions of the VA providing benefits for veterans and their dependents and survivors shall be final and conclusive and no other official or any court of the U.S. shall have power or jurisdiction to review such decisions. The comment also states that 38 U.S.C. 4001(a) specifically provides for BVA to be under the administrative control of a Chairperson directly responsible to the Administrator. Thus, the use of BVA for decisions on debts that could lead to salary offset under 5 U.S.C. 5514 cannot be done because § 5514 requires the use of an administrative law judge or someone not under the control of the creditor agency to conduct required hearings before the initiation of salary offset.

As we stated in the preamble to the proposed regulations, we do not believe Congress intended its amendment of 5 U.S.C. 5514 to override 38 U.S.C. 211(a). Thus, if the VA renders a decision on any aspect of an indebtedness arising out of participation in VA benefits program, such a decision cannot be reviewed by an administrative law judge or an official outside the VA. Construing the two statutes together, we believe reliance on the hearing procedures of the BVA, the functions of which are largely independent of the VA despite the language of 38 U.S.C. 4001(a), will fully satisfy this agency's obligations under section 5 of the Debt Collection Act while preserving the finality of VA decisions. The BVA's procedures found in 38 CFR 19.1 through 19.200 provide adequate due process protection for those employees who have debts which arise out of participation in a benefits program

administered under title 38 of the United States Code.

The second comment from the National Federation of Federal Employees states that a VA employee attending a hearing as either the debtor, representative, or witness should receive administrative leave in order to attend the hearing. The agency policy granting administrative leave for employees to attend such hearings is already set forth in a VA manual (MP-5, Part I, Ch. 630, para. 20k) which is available to the public. We do not see the need to specify this in these regulations.

We have made only two changes to the proposed version of the regulations in preparation for final publication. The first change is found in § 1.981(a) where we expanded on the definition of "Agency". This change conforms with the latest Office of Personnel Management definition. The other change is found in § 1.985(b) where we specify that the VA will not bear the cost of an employee's attendance at an oral hearing.

The Administrator hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, because they only concern individual Federal employees indebted to the U.S. Government. Pursuant to 5 U.S.C. 605(b), these regulations are therefore exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

These regulations have also been reviewed under E.O. 12291 and have been determined to be nonmajor because they will not have a \$100 million annual effect on the economy and will not have any adverse impact on, or increase costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions.

There is no Catalog of Federal Domestic Assistance number.

#### List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Claims, Veterans.

Approved: December 19, 1986.

Thomas K. Turnage,  
Administrator.

#### PART 1—[AMENDED]

38 CFR Part 1, General, is amended by adding new §§ 1.980 through 1.994 to read as follows:

#### Salary Offset Provisions

Sec.

- 1.980 Scope.
- 1.981 Definitions.
- 1.982 Salary offsets of debts involving benefits under the laws administered by the VA.
- 1.983 Notice requirements before salary offsets of debts not involving benefits under the laws administered by the VA.
- 1.984 Request for a hearing.
- 1.985 Form, notice of, and conduct of hearing.
- 1.986 Result if employee fails to meet deadlines.
- 1.987 Review by hearing official or administrative law judge.
- 1.988 Written decision following a hearing requested under § 1.984.
- 1.989 Review of VA records related to the Debt.
- 1.990 Written agreement to repay debt as alternative to salary offset.
- 1.991 Procedures for salary offset: when deductions may begin.
- 1.992 Procedures for salary offset.
- 1.993 Non-waiver of rights.
- 1.994 Refunds.

#### Salary Offset Provisions

##### § 1.980 Scope.

(a) The provisions set forth in §§ 1.980 through 1.994 implement the VA's (Veterans Administration's) authority for the use of salary offset to satisfy certain debts owed to the government.

(b) These regulations apply to offsets by the VA from the salaries of current employees of the VA or any other agency who owe debts to the VA. Offsets by the VA from salaries of current employees of the VA who owe debts to other agencies shall be processed under 5 CFR 550.1108.

(c) These regulations do not apply to debts or claims arising under the Internal Revenue Code of 1954, as amended, the Social Security Act, the tariff laws of the United States, or to any case where collection of a debt by salary offset is explicitly provided for (e.g. travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108) or prohibited by another statute.

(d) These regulations do not preclude an employee from requesting waiver of an overpayment under 38 U.S.C. 3102, 5 U.S.C. 5584, or any other similar provision of law, or in any way questioning the amount or validity of a debt not involving benefits under the laws administered by the VA by submitting a subsequent claim to the General Accounting Office in accordance with procedures prescribed by that office.

(e) These regulations do not apply to any adjustment to pay arising out of an employee's election of coverage or a

change in coverage under a Federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(f) These regulations do not preclude the compromise, suspension, or termination of collection actions where appropriate under the standards implementing the Federal Claims Collection Act (31 U.S.C. 3711 et seq., 4 CFR Parts 101-105, 38 CFR 1.1900 et seq.).

(g) The procedures and requirements of these regulations do not apply to salary offset used to recoup a Federal employee's debt where a judgment has been obtained against the employee for the debt.

(5 U.S.C. 5514)

#### § 1.981 Definitions.

(a) "Agency" means:

(1) An executive agency as defined in 5 U.S.C. 105, including the U.S. Postal Service, and the U.S. Postal Rate Commission, and

(2) A military department as defined in 5 U.S.C. 102.

(3) An agency or court of the judicial branch, including a court as defined in 38 U.S.C. 610, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation;

(4) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(5) Other independent establishments that are entities of the Federal Government.

(b) "Debt" means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources.

(c) "Disposable pay" means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Excluded from this definition are deductions described in 5 CFR 581.105(b) through (f).

(d) "Employee" means a current employee of the VA or other Federal agency including a current member of the Armed Forces or a Reserve of the Armed Forces (Reserves).

(e) "Salary offset" means an attempt to collect a debt under 5 U.S.C. 5514 by

deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

(f) "Waiver" means the cancellation, remission, forgiveness, or non-recovery of a debt owed by an employee to the VA or another Federal agency as permitted or required by 5 U.S.C. 5584 or 38 U.S.C. 3102, or other similar statutes.

(g) "Extreme hardship to an employee" means an employee's inability to provide himself or herself and his or her dependents with the necessities of life such as food, housing, clothing, transportation, and medical care.

(5 U.S.C. 5514)

**§ 1.982 Salary offsets of debts involving benefits under the laws administered by the VA.**

(a) The VA will not collect a debt involving benefits under the laws administered by the VA by salary offset unless the Administrator or designee provides the employee with written notice.

(b) If the employee has not previously appealed the amount or existence of the debt under §§ 19.1 through 19.200 of this title and time for pursuing such an appeal has not expired (§ 19.129), the Administrator or designee will provide the employee with written notice of the debt. The written notice will state that the employee may appeal the amount and existence of the debt in accordance with the procedures set forth in §§ 19.1 through 19.200 of this title and will contain the determination and information required by § 1.983(b) (1)-(5), (7), (9), (10), and (12)-(14). The notice will also state that the employee may request a hearing on the offset schedule under the procedures set forth in § 1.984 and such a request will stay the commencement of salary offset.

(c) If the employee previously appealed the amount or existence of the debt and the Board of Veterans Appeals decided the appeal on the merits or if the employee failed to pursue an appeal within the time provided by regulations, the Administrator or designee shall provide the employee with written notice prior to collecting the debt by salary offset. The notice will state:

(1) The determinations and information required by § 1.983(b) (1)-(5), (7), and (12)-(14);

(2) That the employee's appeal of the existence or amount of the debt was determined on the merits or that the employee failed to pursue an appeal within the time provided, and the VA's decision is final except as otherwise provided in agency regulations;

(3) That the employee may request a waiver of the debt pursuant to § 1.911a(c)(2) subject to the time limits of 38 U.S.C. 3102;

(4) That the employee may request an oral or paper hearing on the offset schedule and receive a decision within 60 days of such request under the procedures and time limit set forth in § 1.984 and that such a request will stay the commencement of salary offset.

(d) If the employee has appealed the existence or amount of the debt and the Board of Veterans Appeals has not decided the appeal on the merits, collection of the debt by salary offset will be suspended until the appeal is decided or the employee ceases to pursue the appeal.

(5 U.S.C. 5514)

**§ 1.983 Notice requirements before salary offsets of debts not involving benefits under the laws administered by the VA.**

(a) For a debt not involving benefits under the laws administered by the VA, the Administrator or designee will review the records relating to the debt to assure that it is owed prior to providing the employee with a notice of the debt.

(b) Except as provided in § 1.980(e), salary offset of debts not involving benefits under the laws administered by the VA will not be made unless the Administrator or designee first provides the employee with a minimum of 30 calendar days written notice. This notice will state:

(1) The Administrator or designee's determination that a debt is owed;

(2) The amount of the debt owed and the facts giving rise to the debt;

(3) The Administrator or designee's intention to collect the debt by means of deduction from the employee's current disposable pay account until the debt and all accumulated interest and associated costs are paid in full;

(4) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(5) An explanation of the VA's requirements concerning interest, administrative costs, and penalties;

(6) The employee's right to inspect and copy VA records relating to the debt or, if the employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records;

(7) The employee's right to enter into a written agreement with the Administrator or designee for a repayment schedule differing from that proposed by the Administrator or designee, so long as the terms of the repayment schedule proposed by the employee are agreeable to the Administrator or designee;

(8) The employee's right to request an oral or paper hearing, conducted by an administrative law judge or a hearing official of the VA or another agency, on the Administrator or designee's determination of the existence of the debt, the amount of the debt, or the percentage of disposable pay to be deducted each pay period, so long as a request is filed by the employee as prescribed by the Administrator;

(9) The method and time period for requesting a hearing;

(10) That the timely filing of a request for a hearing (oral or paper) will stay the commencement of salary offset;

(11) That a final decision after the hearing will be issued at the earliest practical date, but no later than 60 calendar days after the filing of the request for the hearing, unless the employee requests and the hearing officer grants a delay in the proceedings;

(12) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under 5 U.S.C. ch. 75, 5 CFR Part 752, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, 31 U.S.C. 3729-3731, or any other applicable statutory authority; or

(iii) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or any other applicable statutory authority.

(13) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(14) Unless there are applicable contractual or statutory provisions to the contrary, that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(5 U.S.C. 5514)

**§ 1.984 Request for a hearing.**

(a) Except as provided in paragraph (b) of this section and in § 1.982, an employee wishing a hearing on the existence or amount of the debt or on the proposed offset schedule must send such a request to the office which sent the notice of the debt. The employee must also specify whether an oral or paper hearing is requested. If an oral hearing is requested, the request should explain why the matter cannot be resolved by review of the documentary evidence. The request must be received by the office which sent the notice of the debt not later than 20 calendar days from the date of the notice.

(b) If the employee files a request for a hearing after the expiration of the 20 day

period provided for in paragraph (a) of this section, the VA may accept the request if the employee shows that the delay was because of circumstances beyond his or her control or because of failure to receive the written notice of the filing deadline (unless the employee has actual notice of the filing deadline). (5 U.S.C. 5514)

**§ 1.985 Form, notice of, and conduct of hearing.**

(a) After an employee requests a hearing, the hearing official or administrative law judge shall notify the employee of the form of the hearing to be provided. If the hearing will be oral, the notice shall set forth the date, time, and location for the hearing. If the hearing will be paper, the employee shall be notified that he or she should submit his or her position and arguments in writing to the hearing official or administrative law judge by a specified date after which the record shall be closed. This date shall give the employee reasonable time to submit this information.

(b) An employee who requests an oral hearing shall be provided an oral hearing if the hearing official or administrative law judge determines that the matter cannot be resolved by review of documentary evidence, for example, when an issue of credibility or veracity is involved. If a determination is made to provide an oral hearing, the hearing official or administrative law judge may offer the employee the opportunity for a hearing by telephone conference call. If this offer is rejected or if the hearing official or administrative law judge declines to offer a telephone conference call hearing, the employee shall be provided an oral hearing permitting the personal appearance of the employee, his or her personal representative, and witnesses. A record or transcript of every oral hearing shall be made. Witnesses shall testify under oath or affirmation. The VA shall not be responsible for the payment of any expenses incident to attendance at the hearing which are incurred by either the employee, his or her representative or Counsel, or witnesses.

(c) In all other cases where an employee requests a hearing, a paper hearing shall be provided. A paper hearing shall consist of a review of the written evidence of record by the administrative law judge or hearing official.

(d) In any hearing under this section, the administrative law judge or hearing official may exclude from consideration evidence or testimony which is

irrelevant, immaterial, or unduly repetitious.

(5 U.S.C. 5514).

**§ 1.986 Result if employee fails to meet deadlines.**

An employee waives the right to a hearing, and will have his or her disposable pay offset in accordance with the offset schedule, if the employee:

(a) Fails to file a request for a hearing as prescribed in §§ 1.982, 1.984, or 19.1 through 19.200, whichever is applicable, unless such failure is excused as provided in § 1.984(b); or

(b) Fails to appear at an oral hearing of which he or she had been notified unless the administrative law judge or hearing official determines that failure to appear was due to circumstances beyond the employee's control.

(5 U.S.C. 5514)

**§ 1.987 Review by the hearing official or administrative law judge.**

(a) The hearing official or administrative law judge shall uphold the VA's determination to the existence and amount of the debt unless determined to be erroneous by a preponderance of the evidence.

(b) The hearing official or administrative law judge shall uphold the VA's offset schedule unless the schedule would result in extreme hardship to the employee.

(5 U.S.C. 5514)

**§ 1.988 Written decision following a hearing requested under § 1.984.**

(a) The hearing official or administrative law judge must issue a written decision not later than 60 days after the employee files a request for the hearing.

(b) Written decisions provided after a hearing requested under § 1.984 will include:

(1) A statement of the facts presented to support the nature and origin of the alleged debt;

(2) The hearing official or administrative law judge's analysis, findings and conclusions concerning as applicable:

(i) The employee's or VA's grounds;

(ii) The amount and validity of the alleged debt; and

(iii) The repayment schedule.

(c) The decision in a case where a paper hearing was provided shall be based upon a review of the written record. The decision in a case where an oral hearing was provided shall be based upon the hearing and the written record.

(5 U.S.C. 5514)

**§ 1.989 Review of VA records related to the debt.**

(a) *Notification by employee.* An employee who intends to inspect or copy VA records related to the debt as permitted by a notice provided under § 1.983 must send a letter to the office which sent the notice of the debt stating his or her intention. The letter must be received by that office within 20 calendar days of the date of the notice.

(b) *VA response.* In response to timely notice submitted by the debtor as described in paragraph (a) of this section, the VA will notify the employee of the location and time when the employee may inspect and copy records related to the debt.

(5 U.S.C. 5514)

**§ 1.990 Written agreement to repay debt as alternative to salary offset.**

(a) *Notification by employee.* The employee may propose, in response to a notice under § 1.983, a written agreement to repay the debt as an alternative to salary offset. Any employee who wishes to do this must submit a proposed written agreement to repay the debt which is received by the office which sent the notice of the debt within 20 calendar days of the date of the notice.

(b) *VA response.* In response to timely notice by the debtor as described in paragraph (a) of this section, the VA will notify the employee whether the employee's proposed written agreement for repayment is acceptable. It is within the VA's discretion to accept a repayment agreement instead of proceeding by offset. In making this determination, the VA will balance its interest in collecting the debt against the hardship to the employee. The VA will accept a repayment agreement instead of offset only if the employee is able to establish that offset would result in extreme hardship.

(5 U.S.C. 5514)

**§ 1.991 Procedures for salary offset: when deductions may begin.**

(a) Deductions to liquidate an employee's debt will be by the method and in the amount stated in the notice to collect from the employee's current pay as modified by a written decision issued under §§ 1.982, 19.1 through 19.200 or § 1.988 or by written agreement between the employee and the VA under § 1.990.

(b) If the employee filed a request for a hearing as provided by § 1.984 before the expiration of the period provided for in that section, deductions will not begin until after the hearing official or administrative law judge has provided

the employee with a hearing, and has rendered a final written decision.

(c) If the employee failed to file a timely request for a hearing, deductions will begin on the date specified in the notice of intention to offset, unless a hearing is granted pursuant to § 1.984(b).

(d) If an employee retires or resigns or his or her employment ends before collection of the amount of the indebtedness is completed, the remaining indebtedness will be collected according to procedures for administrative offset (see 4 CFR 101.1 through 105.5 and 5 CFR 831.1801 through 831.1807).

(5 U.S.C. 5514)

#### § 1.992 Procedures for salary offset.

(a) *Types of collection.* A debt will be collected in a lump-sum or in installments. Collection will be in a lump-sum unless the employee is financially unable to pay in one lump-sum, or if the amount of the debt exceeds 15 percent of the employee's disposable pay. In these cases, deduction will be by installments.

##### (b) *Installment deductions.*

(1) A debt to be collected in installments will be deducted at officially established pay intervals from an employee's current pay account unless the employee and the Administrator agree to alternative arrangements for repayment. The alternative arrangement must be in writing and signed by both the employee and Administrator or designee.

(2) Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in three years. Installment payments of less than \$25 per pay period or \$50 a month will be acceptable only in the most unusual circumstances.

(c) Imposition of interests, penalties, and administrative costs. Interest, penalties, and administrative costs will be charged in accordance with § 1.919 and 4 CFR 102.13.

(5 U.S.C. 5514)

#### § 1.993 Non-waiver of rights.

So long as there are not statutory or contractual provisions to the contrary,

an employee's involuntary payment (of all or a portion of a debt) under these regulations will not be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514.

(5 U.S.C. 5514)

#### § 1.994 Refunds.

The VA will refund promptly to the appropriate individual amounts offset under these regulations when:

(a) A debt is waived or otherwise found not owed the United States (unless expressly prohibited by statute or regulation); or

(b) The VA is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

(5 U.S.C. 5514)

[FR Doc. 87-975 Filed 1-15-87; 8:45 am]

BILLING CODE 8320-01-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[A-8-FRL-3138-2]

#### Call for State Implementation Plan Revision for Greeley, CO; Information Notice

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of State Implementation Plan (SIP) Inadequacy and Call for SIP Revision for Greeley—Information Notice.

**SUMMARY:** EPA here gives notice that it has notified the Governor of Colorado on October 6, 1986, that the Colorado State Implementation Plan (SIP) for carbon monoxide (CO) for Greeley, Colorado (Weld County) is substantially inadequate to assure attainment and maintenance of the CO national ambient air quality standards (NAAQS). The State has one year to submit a plan which will provide for attainment of the CO standard as expeditiously as practicable.

**DATES:** SIP revisions are due within one year of the date EPA notified the State.

**FOR FURTHER INFORMATION CONTACT:** Dale Wells, Air Programs Branch, Environmental Protection Agency, 999 18th Street, Suite 500, Denver, Colorado 80202-2405, (303) 293-1773.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The 1970 Clean Air Act Amendments established deadlines for attainment of the primary NAAQS and required States

to adopt SIPs providing for attainment within the deadlines. In many areas of the country the first SIPs failed to bring about timely attainment. In 1976, EPA found these plans inadequate under section 110(a)(2)(H), 42 U.S.C. 7410(a)(2)(H), and called for SIP revisions under section 110(c)(1)(C), 42 U.S.C. 7410(c)(1)(C). See e.g., 41 FR 28842 (July 13, 1976).

In 1977, Congress amended the Clean Air Act to address the problem of continuing nonattainment of the NAAQS. New section 107(d), 42 U.S.C. 7407(d), required each State to designate immediately all areas as either attaining the NAAQS, not attaining the NAAQS or unclassifiable for lack of data. Section 107(d) further required EPA to review, modify and promulgate these designations by February 1978. New section 110(a)(2)(I), 42 U.S.C. 7410(a)(2)(I), required each State to revise its SIP to prohibit major stationary source construction or modification after July 1, 1979, in any nonattainment area whose SIP did not meet the requirements of Part D of the amended Act. Section 172(a)(1) of that part required each nonattainment area SIP to "provide for" primary NAAQS attainment as soon as practicable, but no later than December 31, 1982. (These were called "Part D plans" because the requirement was in Part D of the amended Clean Air Act.) The 1977 Amendments, however, retained the authority in section 110(a)(2)(H) and 100(c)(1)(C) to issue notices of deficiency and calls for SIP revisions as an additional remedial mechanism.

By July 1, 1979, few of the over 400 nonattainment areas designated by EPA had in effect a SIP meeting the requirements of Part D. As a result, on July 2, 1979 (44 FR 39471), EPA published a regulation inserting the statutory construction ban into SIPs and automatically imposing the ban as of July 1, 1979, in each nonattainment area without an approved or promulgated Part D plan. EPA stated that it would lift the ban when the necessary Part D provisions were in place.

Since 1979, EPA has approved, fully or conditionally, all portions of Part D plans for the majority of nonattainment areas with the 1982 attainment deadline. However, many of those areas continued to experience NAAQS violations after the 1982 deadline.

On February 3, 1982, EPA proposed two sets of findings for Part D plans for nonattainment areas with the 1982 deadline (48 FR 4972). First, EPA proposed to find as a factual matter that many of these SIPs had failed to attain the NAAQS by the end of 1982. Second,

EPA proposed that the legal consequences of such failures should be disapproval of the SIP and the imposition of the section 110(a)(2)(I) construction ban.

After evaluating the comments on these proposals, EPA issued a final policy notice on November 2, 1983. This notice revised the Agency's position on the legal consequences of a failure to meet the 1982 deadline (48 FR 50686). In that policy, EPA agreed with many past commenters that imposition of the section 110(a)(2)(I) ban was not a legal consequence in any case where EPA had previously fully or conditionally approved a State plan.

In that final policy, EPA, however, stated its intent to find inadequate any approved or conditionally approved Part D plan that failed to bring about attainment by 1982. For such inadequate plans pursuant to section 110(a)(2)(H) of the Act, EPA specified it would call for corrective SIP revisions. The Agency would take further actions to impose construction bans under section 173(4) and funding restrictions under section 176(b) in any area that fails to submit a revision in a timely manner.

## II. Finding of Inadequacy

The Greeley CO SIP was approved on December 12, 1983 (48 FR 55284), 40 CFR 52.320(c)(2a) as an extension of the December 31, 1982 CO compliance deadline. Approval was based on monitored CO levels for the year 1981 indicating a second high 8-hour average of 12.4 parts per million (ppm). According to the SIP, by 1987 total CO emissions were expected to decline by 27,269 kilograms per day or 35%. This reduction was to be gained entirely from the current Federal Vehicle Emissions Control Program. Ongoing transportation programs were expected to result in an additional 1% reduction in total CO emissions a day. An Inspection/Maintenance (I/M) program was not required by EPA since the population of Greeley is under 200,000, and the area was expected to be in attainment by the end of 1987 without it.

On July 31, 1986, the Colorado Air Pollution Control Division submitted analyses performed to determine whether Greeley would attain carbon monoxide standard in 1987 with the 1982 SIP. Greeley's attainment status was determined by use of a linear roll back analysis. Estimates of vehicle miles traveled (VMT) were taken from the 1982 SIP for Greeley, and the second maximum 8-hour CO value of 16 ppm recorded for Greeley on December 7, 1984, was used in the calculation. The estimated second maximum 8-hour CO

concentration for 1987 was found to be 14.1 ppm.

Based on the estimated 1987 second maximum 8-hour CO concentration, a reduction of 64% in CO emissions would be required to meet the air quality standards. Additional control measures, such as, an I/M Program that includes anti-tampering measures for new cars will be needed to achieve the December 31, 1987, CO attainment date.

## III. Call for SIP Revision

In a letter dated October 6, 1986, the Governor of Colorado was notified that the Colorado State Implementation (SIP) was substantially inadequate to provide for attainment of the CO national ambient air quality standard for the Greeley area (Weld County).

This finding of inadequacy requires Colorado, pursuant to the provisions of section 110(a)(2)(H), to carry out their SIP obligations and to adopt and submit to EPA for approval whatever additional control measures are necessary to assure timely attainment and maintenance of the CO NAAQS. Under section 110(c), 42 U.S.C. 7410(c), failure to correct the inadequacy may result in sanctions: construction ban under section 173(4) and funding restrictions under section 176 and possibly section 316(b).

## IV. Final Action

In EPA's view, this finding of inadequacy does not constitute final actions that are reviewable inasmuch as they are not ripe for review. The determinations will not be sufficiently concrete for judicial resolution until additional action is taken by EPA in reliance on them. Further, Colorado will not suffer hardship from delaying review, because the findings do not have an immediate, direct and substantial impact. Also, Colorado will have a later opportunity to obtain judicial review of the findings.

The 60-day time period for filing a petition for review under section 307(b) is tolled until EPA makes the findings ripe by taking additional action in reliance on them, such as imposing sanctions or promulgating revisions, because a time limitation on petitions for judicial review can only run against challenges ripe for review.

## List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide.

Authority: Secs. 101, 107, 110, 116, 171-178 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7401, 7407, 7410, 7416, 7501-08, and 7601(a); sec. 129(a) of the Clean Air Act Amendments of 1977 (Pub. L. No. 95-96, 91 Stat. 685 (August 7, 1977)).

Dated: December 12, 1986.

John G. Welles,

Regional Administrator.

[FR Doc. 87-133 Filed 1-15-87; 8:45 am]

BILLING CODE 6570-50-M

## 40 CFR PART 180

[OPP-300144B; FRL 3143-4]

### Tolerance for Daminozide on Apples

AGENCY: Environmental Protection Agency (EPA).

ACTION: Amendment to Tolerance Rule.

**SUMMARY:** This rule reduces the tolerance for residues of the plant growth regulator daminozide (butanedioic acid mono (2,2-dimethylhydrazide)) in or on the raw agricultural commodity apples from 30 ppm to 20 ppm. The reduced tolerance will reduce exposure to daminozide pending receipt of required data. The reduced tolerance will remain in effect until July 31, 1987.

**EFFECTIVE DATE:** Effective on January 16, 1987.

**ADDRESS:** Written objections, identified by the document control number [OPP-300144B] may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Room M-3708, 401 M St., SW., Washington, DC 20460.

#### 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 St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 245, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-1800).

#### SUPPLEMENTARY INFORMATION:

### I. Introduction

In the Federal Register of April 16, 1986 (51 FR 12889), EPA proposed to reduce, on an interim basis, the existing tolerance in 40 CFR 180.246 for residues of the plant growth regulator daminozide (butanedioic acid mono (2,2-dimethylhydrazide)) in or on the raw agricultural commodity apples from 30 ppm to 20 ppm. The Agency proposed that the reduced tolerance would remain in effect until July 31, 1987. As discussed in the proposal, daminozide has been under Special Review by the Agency because of studies which indicate that daminozide and its breakdown product UDMH (unsymmetrical dimethylhydrazine) may pose a carcinogenic risk. The Agency's draft

Position Document 2/3/4 (PD 2/3/4) released on September 12, 1985, discussed the available carcinogenicity data in detail and proposed the cancellation of all food uses of the chemical. As required by section 25(d) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Agency submitted this proposal for review to the Agency's Scientific Advisory Panel (SAP). The SAP concluded that the available cancer studies are inadequate for predicting cancer risks from exposure to daminozide and UDMH in food products. In response to the recommendations of the SAP, the Agency has imposed extensive data requirements on the registrant of daminozide products, including four oncogenicity studies, mutagenicity studies, metabolism studies, and extensive residue monitoring studies. The Agency has also taken other regulatory measures to reduce exposure to daminozide pending receipt of the additional data. In particular, the Agency has approved a label amendment which reduces the application rate for daminozide on apples, effective in January 1986. Moreover, the registrant has committed to include a use advisory in every bag of Alar 85 recommending that daminozide treated apples not be sold for processing into sauce. Based on residue measurements at the reduced application rate, the Agency proposed that the tolerance on apples be reduced to 20 ppm, with an expiration date of July 31, 1987.

## II. Legal Background

The Federal Food, Drug and Cosmetic Act (FFDCA) authorizes the establishment of tolerances and exemptions from tolerances for residues of pesticide chemicals in or on raw agricultural commodities pursuant to section 408, and the promulgation of food additive regulations for pesticide residues in processed food under section 409 of that Act. 21 U.S.C. 346(a), 348. Under the Reorganization Plan that established EPA in 1970, the authority to set tolerances for pesticide chemicals in raw agricultural commodities and processed food under sections 408 and 409 of the FFDCA was transferred from the FDA to EPA. The FDA retains the authority to enforce the tolerance and food additive provisions under this Plan.

Without such tolerances, exemptions from tolerances, or food additive regulations (sometimes also referred to as "tolerances"), a food is "adulterated" under section 402 of the FFDCA, and hence may not legally move in interstate commerce. Pursuant to section 402(a)(2)(C) of the FFDCA, a food

additive regulation must be established for processed food if the pesticide residue in the processed food is greater than the tolerance prescribed for the raw agricultural commodity. Where, however, the pesticide residues in the processed food resulting from the "carryover" from treatment of the raw agricultural commodity do not exceed the tolerance level established for the raw agricultural commodity, a separate food additive regulation is not necessary. Section 402(a)(2)(C).

To establish a tolerance or an exemption under section 408, the Agency must make the finding that the promulgation of the rule would "protect the public health." Section 408(b). In reaching this determination, the Agency is directed to consider, among other relevant factors: (1) The necessity for the production of an adequate, wholesome, and economical food supply; (2) other ways in which the consumer may be affected by the pesticide; and (3) the usefulness of the pesticide for which a tolerance is sought. Thus, in essence, section 408 of the FFDCA gives the Agency the authority to balance risks against benefits in determining appropriate tolerance levels. The Agency is permitted to set a tolerance at zero "if the scientific data before the Administrator does not justify the establishment of a greater tolerance." Section 408(b).

The breadth of Congress' mandate to the Agency is supported by the legislative history, which addressed many times over the latitude granted the Agency in balancing risks and benefits in promulgating a tolerance rule. For example, in discussing section 408(b), the Senate noted:

This subsection gives to the Secretary of Health, Education, and Welfare the authority to establish tolerances. The subsection also sets forth the principal factors which should guide the administrative judgment in taking such action. The factors are designed to assure a proper balance between the need for protecting the consumer and the need for assuring an adequate, wholesome, and economical food supply.

S. Rep. No. 1635, 83d Cong., 2d Sess. at 7. See also H.R. Rep. No. 1835, 83d Cong., 2d Sess. at 2, 3, 4; (1954) S. Rep. No. 1635, 83d Cong., 2d Sess. at 3, 4 (1954).

Moreover, the U.S. Court of Appeals for the District of Columbia Circuit has addressed the standard found in section 408 and concluded that the Agency can weigh the risks and benefits for carcinogenic, as well as non-carcinogenic, pesticides. *Environmental Defense Fund v. United States Dept. of Health, Education and Welfare*, 428 F. 2d 1083, 1086-87, 1091 (D.C. Cir. 1970). In

that case, the Court clearly indicated that the restrictions of the Delaney clause in section 409 of the FFDCA do not apply to section 408; rather the safety of residues of a carcinogenic pesticide in raw agricultural commodities must be judged under the standard of section 408. *Id.* at 1091.

In addition, the statute and its legislative history are clear that section 408 merely authorizes, and does not explicitly require, a "zero tolerance" in the absence of adequate data to justify a higher level. Amendments were placed before Congress which would have made such a zero tolerance mandatory, at least with regard to pesticides which presented a risk of chronic toxicity. Residues of Pesticide Chemicals, Hearings before Subcommittee on Health of the Senate Committee on Labor and Public Welfare at 64 (June 23, 1954); See also, *id.* 53-76. Yet Congress refused to require such action, and instead enacted section 408(b), which clearly only provides that the Agency "may establish" a zero tolerance, not that it is required to take such action. In fact, EPA's regulations at 40 CFR 180.5 interpret the regulatory scheme to give discretion to the Agency in determining when to set zero tolerances. The regulations do not require the establishment of a zero tolerance in any particular situation, but merely enumerate situations where the Agency may find it appropriate to establish such tolerances.

The establishment of a food additive regulation under section 409 requires a finding that the pesticide "may be safely used." Section 409(a). Relevant factors in this safety determination include: (1) The probable consumption of the pesticide or metabolites; (2) the cumulative effect of the pesticide in the diet of man or animals, taking into account any related substances in the diet; and (3) appropriate safety factors to relate the animal data to the human risk evaluation. Section 409 contains the Delaney Clause, which specifically provides that no additive is deemed safe if it induces cancer when ingested by man or animals, except for an ingredient of animal feed, if such ingredient will not adversely affect the animal and no residues of the substance will be found by an Agency approved method in any edible food yielded or derived from the treated animal ("DES Proviso").

Under sections 408 and 409 of the FFDCA, the proponent of a tolerance or a food additive regulation has the burden of providing data establishing the safety of the pesticide for which a tolerance (or food additive regulation) is sought. Sections 408(d)(1) and 409(b)(2).

As noted by both the House and Senate reports:

Before any pesticide-chemical residue may remain in or on a raw agricultural commodity, scientific data must be presented to show that the pesticide chemical is safe from the standpoint of the consumer. The burden is on the person proposing the tolerance or exemption to establish the safety of such pesticide-chemical residue.

H.R. Rep. No. 1385, 83d Cong., 2d Sess. at 5 (1954); S. Rep. No. 1635, 83d Cong., 2d Sess. at 4 (1954).

Once a tolerance (or food additive regulation) has been established, the burden of justifying the continued safety of the pesticide residues authorized by the rule remains with the proponent of such rule. *EDF v. HEW*, 428 F.2d at 1092, n. 27.

Sections 408(m) and 409(h) of the FFDCA give the Agency authority to revoke or amend established tolerances at its discretion. These statutory provisions do not provide explicit guidance to the Agency regarding the timing of such revocation actions. Thus, for example, where new evidence raises questions about the appropriateness of an established tolerance rule, there is no directive in the FFDCA either to initiate a revocation action promptly or allow a reasonable time for data generation. However, a consideration of the regulatory approach of the closely interrelated provisions of FIFRA indicates that allowing a reasonable time for data generation is proper in appropriate situations.

Specifically, FIFRA provides a detailed regulatory scheme for addressing the situation where additional data are required to establish the safety of a registered pesticide. FIFRA gives the Agency the authority to require additional data to support the continued registration of a pesticide under section 3(c)(2)(B), and explicitly provides that the Agency must "permit sufficient time to applicants to obtain such additional information." Section 3(c)(2)(A). Cancellation of a registration is not appropriate under this regulatory scheme unless the available evidence indicates that the risks of use of a pesticide outweigh the benefits. Section 6(b). Since the Agency is charged with the task of regulating pesticides under both the authority of FIFRA and the FFDCA, the objectives of both of these statutes must be reconciled to achieve a common sense result. To be consistent with the directives of FIFRA in the situation where additional data have been requested pursuant to section 3(c)(2)(B), the Agency must allow a reasonable amount of time for the proponent of the tolerance rule to meet the burden of establishing the continued

safety of the pesticide residues. Otherwise, the Agency would be in the position of having to revoke a tolerance rule, while leaving the corresponding food crop registration intact during the time necessary for data generation under section 3(c)(2)(B). The revocation of the tolerance would be tantamount to the cancellation of the registration in contravention of the directive of section 3(c)(2)(A). This approach would create havoc for food growers, processors, and suppliers, and deprive the economy of the value of many useful pesticides. Such a result is clearly not consistent with the Congressional directive to regulate the use of pesticides to allow the beneficial use of these chemicals as long as there are no unreasonable adverse effects on the environment and the public health is protected. Of course, in those situations where the available data indicate that the risks of use exceed the benefits, the Agency would take action under section 6 of FIFRA to issue a cancellation notice, and would initiate rulemaking to revoke the corresponding tolerances and food additive regulations.

### III. Comments

The Agency received comments on the proposed tolerance reduction from a number of environmental groups, several states, a number of university professors and researchers, two interested individuals and two trade associations. The Natural Resources Defense Council, Inc. (NRDC) contended that the agency's proposal is inadequate to protect the public health. Instead of reducing the tolerance for daminozide on apples to 20 ppm, NRDC urged the Agency to establish a zero tolerance for all raw agricultural commodities and processed foods requiring daminozide tolerances. In support of this request, NRDC submitted a summary of the five carcinogenic bioassays which they believe support the view that both daminozide and UDMH are carcinogenic. Their comments also provided a summary of the regulatory history of daminozide with a particular focus on the Agency's draft determination in the PD 2<sup>34</sup> that daminozide and UDMH should be classified as probable human carcinogens. NRDC argues that where data are not sufficient to determine a safe tolerance level, EPA must establish a zero tolerance. In the view of NRDC, daminozide presents a situation where the existing data are inadequate to support the continuance of the tolerance levels above zero. Finally, NRDC claims that the **Federal Register** notice proposing the tolerance reduction does

not adequately discuss the health effects of daminozide or UDMH.

Of particular concern to NRDC was the potential risk to infants and young children who consume significant amounts of apple products, which may contain residues of daminozide and UDMH. NRDC points out that this increased risk is both a function of greater exposure to the chemical and increased susceptibility to carcinogenic agents. According to NRDC, one scientist has estimated that children consume between 6 and 19 times more apple products per unit of body weight than adults. They also claim that doses of UDMH ingested by children may be at least 10 times higher than for adults because of the children's higher consumption rate of processed apple products. Such processed foods contain higher levels of UDMH than raw commodities. NRDC notes that in the PD 2<sup>34</sup>, the Agency estimated that infants and children under the age of six may be exposed to 5 to 14 times more daminozide than adults. They also point to a Massachusetts Department of Public Health estimate that daminozide exposure in the first 3 years of life would produce 32 percent of the excess cancer risk that would be incurred by lifetime exposure, assuming that the consumption of apple products by children is 12 times greater than by adults. Another reason presented by NRDC regarding the greater risk of children relates to the multi-stage nature of cancer development. NRDC argues that an early exposure to a cancer initiator provides more time for a progression of the initiated cells to fully-developed cancers. They also contend that children may be at greater risk because their cells are inherently more sensitive to cancer initiators, and/or because new cells are being generated at a high rate in their developing organs.

The Coalition Against Toxics submitted comments requesting the Agency to cancel all food uses of daminozide because of the carcinogenic potential of daminozide and UDMH. This group also expressed concern about the potential risk to babies. The New Jersey Pesticide Safety and Right-to-Know Coalition and the New Jersey Coalition for Alternatives to Pesticides likewise urged the Agency to cancel the registrations of daminozide.

A number of states urged the Agency to set stricter tolerance limitations for daminozide. Specifically, the State of Massachusetts Department of Public Health argued that the existing carcinogenicity and mutagenicity data are sufficiently compelling that the Agency should eliminate the exposure of

infants and children to daminozide and UDMH residues as quickly as possible. Massachusetts Department of Public Health argued that, given the actual residue levels found in market basket surveys, a reduction of the tolerance on apples to 20 ppm would provide no incentive for further reducing application rates, nor would it have any effect in lowering dietary exposure to daminozide and UDMH. To minimize risks to public health, they recommended that the Agency adopt a regulation to eliminate daminozide over the course of 2 years and adopt tolerance levels similar to the action levels the state has adopted for processed food. The levels set for daminozide residues in the Massachusetts regulation are as follows:

Date	Heat-processed apple sauce and apple juice products	Infant and baby food
Oct. 1, 1986.....	5 ppm .....	1 ppm.
Oct. 1, 1987.....	1 ppm .....	Non-detectable.
Oct. 1, 1988.....	Non-detectable.....	Non-detectable.

The State of New York Department of Health also urged that lower tolerance limits be adopted by the Agency and proposed a schedule for tolerance reduction similar to that of Massachusetts. They argued that the available toxicology data on daminozide/UDMH and residue data for apples and other processed foods are sufficient to initiate measures to reduce exposure, particularly to infants and children. In the view of the New York State Department of Health, EPA's measures fail to achieve such reduction because available data indicate that residues are currently less than 5 ppm in apples. New York submitted data which supported this conclusion. They also noted that data on 205 samples from three major baby food processors found daminozide levels ranging from non-detectable to 4.5 ppm in processed apples. Lowering the tolerance on apples to 5 ppm now, with reductions to 1 ppm in a year, and non-detectable levels in 2 years, is recommended by the New York State Department of Health in order to reduce exposure from those products which are occasionally found to have high levels. In support of their requests, the New York State Department of Health submitted a report which summarized the carcinogenicity assays of daminozide and UDMH, a critique of that report by the Cornell Institute for Comparative and Environmental Toxicology, and the Department of Health's response to the Cornell evaluation. The Department of Health report concluded that daminozide meets the criterion for

characterization as a probable human carcinogen; on the other hand, the Cornell evaluation provides detailed information on the flaws of the studies and concludes that there is no convincing evidence to suggest that daminozide is a potent carcinogen. In the opinion of the Cornell report, the EPA made the proper decision to delay taking any precipitous regulatory action until the results of the chronic studies have been completed and evaluated. A detailed response to the Cornell report points out New York's disagreement with the conclusions reached by the Cornell evaluation.

The Maine Department of Agriculture, Food and Rural Resources also urged the Agency to adopt stricter tolerance levels for daminozide. Despite the disagreement among the medical experts about the safety of daminozide, the Maine Department of Agriculture believes that the most logical and responsible public policy in light of the public health concern is to minimize public exposure to the extent feasible until the new studies are completed. They urge the Agency to set a 5 ppm tolerance level for daminozide on all raw agricultural commodities, pointing out that market basket surveys indicate that the great majority of raw products have levels below 5 ppm.

The State of Maine Department of Human Services submitted a risk assessment of daminozide and UDMH prepared by their Bureau of Health, and urged the Agency to take more stringent measures than the proposed tolerance reduction to prevent public exposure to daminozide while further research is being conducted to demonstrate the safety of the chemical. The Woods Hole Research Center also contended that the Agency's proposed action was too permissive. A professor at the University of Massachusetts School of Public Health likewise contended that the Agency's proposal was not likely to lower exposure significantly.

Opposition to the Agency proposal was also expressed by four professors at the Harvard School of Public Health, who urged the Agency to set a nondetectable tolerance for daminozide and UDMH residues in all foods and food products and to actively discourage its use on food crops. These commentators believe that sufficient scientific evidence exists to conclude that both daminozide and its hydrolysis product UDMH are carcinogens. A particular concern expressed by the Harvard School of Public Health professors was the exposure of particularly sensitive groups to the highest dose on a unit weight basis. These groups include

infants which, according to the commentators, have a dietary exposure 9 to 12 times higher than adults, children under 12 (3 to 5 times higher dietary exposure than adults) and pregnant or nursing mothers. The commentators noted that fetuses, infants, and young children are very susceptible to carcinogenic substances since their rapidly growing bodies contain many dividing cells. Concern was also expressed that children exposed to even low doses of a carcinogen would have a full lifetime to develop cancer.

The Texas Center for Rural Studies also expressed its disapproval of the Agency proposal and urged the Agency to reduce tolerance levels of daminozide in apples as expeditiously as possible, as well as require labeling of any apples or apple products which may contain daminozide or UDMH residues. They argued that the reduction of the tolerance to 20 ppm would have virtually no impact since the average dietary residue is currently approximately 4 ppm. Their recommended approach would reduce tolerance levels on raw apples to 5 ppm immediately, to 3 ppm in a year, and to a non-detectable level in 2 years. Of particular concern to this commentator was the increased risk to children and infants from daminozide because of their greater food consumption per unit weight and their high consumption rates of apple products. Robert A. Michaels, Consultant in Environmental Toxicology and Risk Assessment, also opposed the Agency's proposal as only a half-way measure to phase out the use of daminozide. In support of his conclusions, Michaels submitted an assessment that the available data indicate that daminozide and UDMH pose a carcinogenic risk. A comment was also received from an individual in New Jersey who expressed opposition to the continued use of daminozide on apples, other fruits, and peanuts.

Two comments supported the Agency's proposal. First, the Grocery Manufacturers of America, Inc. (GMA) agreed with the Agency that the 20 ppm level was appropriate given current residue data and the limitations of the analytical methodology. They noted that changes in the labeling, application practices and a warning statement already imposed by the Agency will continue to lower residue levels. Any further reduction in the tolerance level is unwarranted, in their view, until the additional test data are obtained. The National Food Processors Association (NFPA) also was in favor of the Agency's proposal of 20 ppm for apples grown under the new use restrictions.

However, NFPA recommended that the 30 ppm tolerance remain in effect for all fresh apples and processed apple products harvested or produced prior to the effective date of the reduction in application rates.

#### IV. Response to Comments

The Agency has carefully evaluated the comments on the proposed tolerance reduction, in conjunction with all other data and information on daminozide available to the Agency. The Agency shares the concerns expressed by many commentators about the potential health risks posed by the long-term exposure to daminozide and UDMH. In fact, the possibility that these chemicals may pose a risk of cancer to consumers was the primary risk basis for the proposed action in 1985 to cancel the registrations of daminozide for use on food.

The commentators have identified five studies which they argue demonstrate that daminozide and its metabolite, UDMH, pose a risk of cancer: *Haun 1984*, *NCI 1978*, *Toth 1977a*, *Toth 1977b*, and *Toth 1973*. Each of these studies, however, has been examined by the Agency and the FIFRA Scientific Advisory Panel (SAP) and has been found not to provide an adequate basis for regulatory action at this time. The deficiencies of these studies are summarized below.

1. *The Haun Study*. In the *Haun 1984* study, animals were exposed to a test substance reported to be UDMH as gas, and an increase in tumor incidence was observed. A recent Agency audit, however, found the *Haun 1984* study inappropriate for regulatory reliance under FIFRA. Report of a Data Audit Conducted at the Air Force Aerospace Medical Research Laboratory, Wright-Patterson Air Force Base . . . on January 28 to 30, 1986. Specifically, the chemistry reviewer found that, contrary to the statements in the published reports: (1) Much of the test substance was not redistilled; (2) no tests were performed to determine the chemical purity of the test substance; (3) the boiling point of the test substance was 30 to 40°C different from the literature value for the boiling point of UDMH; and (4) the test used to determine whether the nitrosamine contaminant of UDMH had been removed was unreliable. *Id.* Based on these findings, the reviewer determined "the study should not be accepted as valid for regulatory purposes." *Id.* In addition, the audit team found discrepancies in the reporting of data. *Id.*

2. *The NCI Study*. The *NCI 1978* bioassay was conducted in both mice and rats with exposure of the animals to daminozide in dry food. This study was

apparently well-conducted, but used only 20 control animals per sex per species, resulting in "extremely low statistical power." Agency Peer Review of Oncogenicity of Daminozide, April 5, 1985, p. 8. No indication of carcinogenicity was found in the male rats or female mice. Draft PD 2/3/4 at II-20. In the male mice there may have been an association of daminozide treatment with development of hepatocellular carcinomas, but the investigators, after comparing the results to historical control values, found that the relationship was "not clear." *Id.* *NCI 1978* at 36. Finally, the NCI study indicated that daminozide may induce adenocarcinomas of the endometrium of the uterus and leiomyosarcomas of the uterus in female rats; there was no significant relationship when compared to concurrent controls, but there was when compared to historical controls. *NCI 1978* at 35-36. EPA found these results in the female rats "to be only marginally statistically significant." Peer Review of Oncogenicity of Daminozide at p. 8.

In a subsequent review of the NCI Bioassay by a Department of Health, Education and Welfare peer review, two reviewers expressed divergent views of the meaning of the study. The primary reviewer stated that the NCI study showed "Daminozide was, at most, a borderline carcinogen in female rats." *NCI 1978* at 113. The secondary reviewer, however, believed that the NCI bioassay showed daminozide to be carcinogenic in female rats and male mice. *Id.*

3. *The Toth Studies*. The three Toth studies (*Toth 1977a*, *Toth 1977b*, and *Toth 1973*) displayed a statistically significant relationship between administration of daminozide or UDMH and the development of tumors, but also had numerous flaws which undercut their reliability for regulatory decision-making. These studies involved exposure to UDMH in drinking water in mice (*Toth 1973*) and hamsters (*Toth 1977b*) and exposure to daminozide in drinking water in mice (*Toth 1977a*). In *Toth 1977a*, after exposure to daminozide, male mice showed statistically significant increases of tumors in the lung, kidney, and blood vessels, and female mice displayed statistically significant increases in tumors in the blood vessels. Draft PD 2/3/4 at II-21. In *Toth 1977b*, male and female hamsters exposed to daminozide showed some increases in various tumors, including tumors of the blood vessels and the cecum. *Id.* at II-26. In *Toth 1973*, statistically significant increases in blood vessel, lung, and

kidney tumors were observed in mice exposed to UDMH in drinking water.

A number of flaws limit the reliance that can be placed on the results of these studies. Specifically, the EPA audit found that: (1) The studies did not use the concurrent control groups in the published report, but relied only on historical controls; (2) only a single dose level was used in each study; (3) control groups were housed in the same animal room as test groups and more than one chemical was tested in the room simultaneously; (4) there was a possibility of cross-contamination in dose preparation rooms; (5) the quality assurance procedures were limited; (6) the maximum tolerated dose of the test substance was apparently exceeded; and (7) there were differences between the antibiotic treatment of controls and test animals. Finally, the number of test animals in *Toth 1977b* was extremely limited (no more than 10 hamsters in each test group), raising questions about the significance of the results. Draft PD 2/3/4 at III-26.

An earlier study, *Oser 1966*, revealed no indication of carcinogenicity after administration of daminozide in feed. EPA is unaware of any other studies which might be adequate for regulatory purposes regarding the carcinogenicity of either daminozide or UDMH.

To resolve these concerns, the Agency is requiring the registrant to submit oncogenicity studies in the rat and mouse for both daminozide and UDMH, a full complement of mutagenicity studies on UDMH, a study in miniature pigs to determine conversion of daminozide to UDMH in mammalian species, a market basket survey, metabolism studies, analytical methodology, daminozide degradation to UDMH studies, livestock feeding studies, and residue field trials. Until these studies are received, the Agency cannot reach any definitive conclusions about the long-term risks posed by the use of daminozide. Given the low risks at the 20 ppm tolerance level for the short effective life of the tolerance rule, there is no basis for reducing the tolerance further at the present time. Accordingly, the Agency believes that the public health will be protected during the time necessary to generate the additional data which will address the Agency's long-term concerns about daminozide residues in food. As discussed in the legal background section above, the FFDCA provides the Agency with latitude to allow time for data generation in appropriate situations. On the basis of available data, the Agency does not believe that a zero tolerance is warranted because of

the low potential risk during the effective time period for the tolerance rule. The Agency will reassess the 20 ppm tolerance for apples before July 31, 1987, in light of the new data, and determine the appropriate tolerance level warranted by the toxicology data and residue studies. If the data indicate that the presence of daminozide residues in apples poses a long-term health hazard to the consumer, the Agency will act promptly to amend or revoke the daminozide tolerance on apples.

Based on the information considered by the Agency, and discussed in the proposed rule of April 16, 1986 (51 FR 12889), and the Agency support documents available at the address given above, and after consideration of comments submitted to the docket, the Agency has concluded that the establishment of a 20 ppm tolerance for residues of daminozide on apples, effective until July 31, 1987, will protect the public health. Therefore, this rule is established as set forth below. Prior to the expiration date of this rule, the Agency will evaluate the new data, and determine the appropriate level, if any, for a permanent or interim tolerance for residues of daminozide on apples.

Any person adversely affected by this regulation establishing a 20 ppm tolerance for residues of daminozide on apples, effective until July 31, 1987 may, within 30 days after the date of publication of this regulation 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. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

In the event that a hearing is sought, this tolerance rule remains effective during the pendency of the hearing. Section 408(d)(4), FFDCFA.

#### Executive Order 12291

Under Executive Order 12291, the Agency must determine whether a proposed regulatory action is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. The Agency has determined that this regulatory action is not a major regulatory action, i.e., it will not have an annual effect on the economy of at least \$100 million, will not cause a major increase in prices, and will not have a significant adverse effect on competition or the ability of U.S. enterprises to compete with foreign enterprises.

This rule has been reviewed by the Office of Management and Budget as required by E.O. 12291.

#### Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*), and it has been determined that it will not have a significant impact on a substantial number of small businesses, small governments, or small organizations.

Measures to reduce dietary exposure to daminozide were put in place by the beginning of the current growing season. With the reduction in application rate, residues of daminozide in legally treated apples are not expected to exceed the level of the reduced interim tolerance of 20 ppm.

Therefore, pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*), the Agency has determined that this regulation will not have a significant economic impact on a substantial number of small entities.

Accordingly, it is certified that this regulatory action does not require a separate regulatory flexibility analysis under the Regulatory Flexibility Act.

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 6, 1987.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

#### PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.246 is revised to read as follows:

#### § 180.246 Daminozide: tolerances for residues.

Tolerances are established for residues of the plant growth regulator daminozide (butanedioic acid mono-(2,2-dimethylhydrazide)) in or on the following raw agricultural commodities:

Commodities	Parts per million	Expiration date (if any)
Apples.....	20.0	July 31, 1987.
Brussels sprouts.....	20.0	
Cattle; fat, meat, and meat byproducts (mbyp).....	0.2	
Cherries, sour.....	55.0	

Commodities	Parts per million	Expiration date (if any)
Cherries, sweet.....	30.0	
Eggs.....	0.2	
Goats; fat, meat, and mbyp.....	0.2	
Hogs; fat, meat, and mbyp.....	0.2	
Horses; fat, meat, and mbyp.....	0.2	
Grapes.....	10.0	
Melons.....	3.0	
Milk.....	0.02(N)	
Nectarines.....	30.0	
Peaches.....	30.0	
Peanuts.....	30.0	
Peanut, hay.....	20.0	
Peanut, hulls.....	10.0	
Pears.....	20.0	
Peppers.....	1.0	
Plums (fresh prunes).....	50.0	
Poultry; fat, meat, and mbyp (except kidney).....	0.2	
Poultry, kidney.....	2.0	
Sheep; fat, meat, and mbyp.....	0.2	
Tomatoes.....	40.0	

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## DEPARTMENT OF DEFENSE

### 48 CFR Part 215

#### Department of Defense Federal Acquisition Regulation Supplement: Special Tooling

AGENCY: Department of Defense (DoD).

ACTION: Interim rule and request for comment.

**SUMMARY:** The Defense Acquisition Regulatory Council has decided to issue on an interim basis new coverage in the Department of Defense Federal Acquisition Regulation Supplement, in order to comply with the portion of section 9105 of Title IX of Pub. L. 99-500, the FY 1987 DoD Appropriations Act, *et seq.*

**EFFECTIVE DATE:** 16 January 1987.

**Comments:** Comments must be received by the DAR Council at the address shown below on or before March 17, 1987.

**ADDRESS:** Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD(P)/DARS, c/o OASD(A&L)(MRS), Room 3C841, The Pentagon, Washington, DC 20301-3062. Please cite DAR Case 86-176 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, 202/697-7267.

**SUPPLEMENTARY INFORMATION:** A determination has been made under the authority of the Secretary of Defense that this regulation must be issued as an interim regulation in order to comply with the portion of section 9105 of Title

IX of Pub. L. 99-500, the FY 1987 DoD Appropriations Act, et seq.

#### A. Background

Section 9105 states in pertinent part:

Provided further, That no contractor may be reimbursed directly under a contract awarded 90 days after the effective date of this act, where the purchase of additional quantities of like items is contemplated in subsequent years, for more than 50 percent of the full acquisition cost of production special tooling and production special test equipment as a direct cost unless (a) such special equipment is to be used solely for final production acceptance test or (b) additional reimbursement that is in the best interest of the Government is approved in advance by the Service Secretary for programs reported on Selected Acquisition Reports or approved by an Assistant Service Secretary for all other programs: Provided further, That the contract may provide that if such a contract is terminated for any reason that does not reflect a failure of the contractor to perform, the contractor shall be entitled to be paid by the United States for the cost of any special tooling and special test equipment which has not been fully amortized and the United States may elect to take title to such special tooling and special test equipment.

Accordingly, new coverage at DFARS 215.873, Production Special Tooling and Production Special Test Equipment, is hereby promulgated. This new coverage applies to contracts awarded on or after 16 January 1987.

#### B. Regulatory Flexibility Act

The new coverage at DFARS 215.873 is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because small entities are not usually involved with Government prime contracts which require substantial amounts of production special tooling or production special test equipment. Also, small entities usually completely own and provide all financing necessary to acquire production special tooling and production special test equipment, and hence are not affected by the deferred recovery policy.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose any additional recordkeeping or information collection requirements. Therefore, OMB approval under 44 U.S.C. 3501 et seq. is not required.

#### List of Subjects in 48 CFR Part 215

Government procurement.  
Charles W. Lloyd,  
*Executive Secretary, Defense Acquisition  
Regulatory Council.*

Therefore, 48 CFR Part 215 is amended as follows:

1. The authority citation for 48 CFR Part 215 continues to read as follows:

**Authority:** 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35 and DoD FAR Supplement 201.301.

#### PART 215—CONTRACTING BY NEGOTIATION

2. A new Section 215.873 is added to read as follows:

##### 215.873 Production special tooling and production special test equipment (PST and PSTE)

(a) *General.* Section 9105 of Pub. L. 99-500 requires that a contract awarded on or after 16 January 1987 shall not provide for payment as a direct cost of more than 50 percent of the full acquisition cost of production special tooling (PST) and production special test equipment (PSTE) when the purchase of additional quantities of like items is contemplated in subsequent years. The cost for PST and PSTE not covered under the contract may be amortized and recovered under future contracts. The term "contract" in this context means the contract action for a year's production requirement (e.g., the first year of a multiyear contract). This policy is designed to shift part of the burden of financing PST and PSTE to the contractor, but not in such a way as to place the contractor at undue financial risk. It is not intended that any portion of the deferred production special tooling and production special test equipment cost be made unallowable by this policy. However, the deferred cost of production special tooling and production special test equipment shall not be shifted or assigned to other programs by charging such costs to indirect cost pools.

(b) *Definitions.* "Production special tooling" and "production special test equipment" are those subsets of "special tooling" and "special test equipment" (as defined in FAR 45.101) that support production rates and quantities.

##### (c) *Policy.*

(1) A contractor shall not be paid as a direct cost more than 50 percent of the full acquisition cost of production special tooling or production special test equipment under a contract. Exempt from this requirement are the following:

(i) Such special test equipment which is used solely for final production acceptance test.

(ii) Production contracts for items where the purchase of additional quantities of like items is not contemplated.

(iii) Contracts where additional reimbursement for production special tooling or production special test equipment has been approved in advance as in the best interest of the Government by the Service Secretary for programs reported on Selected Acquisition Reports, or by an Assistant Service Secretary for all other programs.

(iv) Contracts which do not involve the acquisition of PST and PSTE for the support of production programs. Normally, the following types of contracts do not involve such acquisitions.

(A) Contracts awarded as a result of sealed bidding procedures contained in FAR Part 14.

(B) Contracts in which the prices are, or are based on, established catalog or established market prices of commercial items sold in substantial quantities to the general public.

(C) Contracts in which the price is set by law or regulation.

(2) A contract containing a requirement for PST or PSTE may provide that, in the event of termination, nonexercise of an option or program cancellation for any reason that does not reflect a failure of the contractor to perform, the contractor shall be entitled to be paid by the Government for any cost of any PST and PSTE which has not been fully amortized and that the Government may elect to take title to such PST and PSTE. Alternatively, the amortization schedule may be equitably adjusted.

(3) The contracting officer should include where appropriate a special provision in the solicitation and contract which as a minimum addresses the following:

(i) The dollar ceiling for PST and PSTE as well as the amortization schedule by fiscal year.

(ii) A specific method to establish the cost to the Government at which unamortized items would be reimbursed subject to availability of funds if the contract is terminated, option is not exercised, or program cancelled.

(iii) If not otherwise provided, a method for disposition of PST or PSTE.

(iv) Any Government right to title or option to take title.

(v) How facilities capital cost of money will be estimated, measured, and paid on the unamortized cost of the PST and PSTE.

(vi) The computing of profit or fee for PST and PSTE.

[FR Doc. 87-992 Filed 1-15-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 1

[OST Docket No. 1; Amend. No. 214]

#### Organization and Delegation of Powers and Duties; Appendix A—Delegations and Re Delegations by Secretarial Officers

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** The purpose of this amendment is to delegate to the Chief Counsel of the Coast Guard authority and functions vested in the General Counsel as the Judge Advocate General under Chapter 47 of Title 10, United States Code, and the Manual for Courts-Martial, Executive Order 12473.

The Uniform Code of Military Justice, Chapter 47 of Title 10, United States Code, and the Manual for Courts-Martial have recently been changed to permit review of courts-martial by the Supreme Court. This and other changes in the Code and the Manual have made it appropriate to republish the delegations from the General Counsel. The revisions clarify former delegations, adds new delegations to cover changes in the Code and the Manual, and changes delegations to conform with existing practice.

**EFFECTIVE DATE:** January 16, 1987.

**FOR FURTHER INFORMATION CONTACT:** Sam Whitehorn, Department of Transportation, Office of General Counsel; (202) 366-9307, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** This amendment relates to departmental management, procedures, and practices. Therefore, it is exempted from notice and public procedure requirements and may be made effective in fewer than thirty (30) days after publication in the Federal Register.

**Drafting information:** The principal drafter of this final rule is LT Michael J. Zmaczynski, Military Justice Division, Office of Chief Counsel, U.S. Coast Guard.

**Discussion:** The Uniform Code of Military Justice, Chapter 47 of Title 10, United States Code, and the Manual for Courts-Martial have recently been changed to permit review of courts-martial by the Supreme Court. This and

other changes in the Code and the Manual have made it appropriate to republish the delegations from the General Counsel. The revision clarifies former delegations, adds new delegations to cover changes in the Code and the Manual, and changes delegations to conform with existing practice.

**Evaluation:** This is a rule of agency organization, not preceded by an NPRM, which is exempt from the provisions of Executive Order 12291; the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.); and DOT Order 2100.5. This rule will provide information for the public concerning the status of the General Counsel's delegations to the Chief Counsel.

#### List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

In accordance with the foregoing, 49 CFR Part 1 is amended as follows:

#### PART 1—ORGANIZATION AND DELEGATION OF POWERS AND DUTIES

1. The authority citation for Part 1 continues to read as follows:

**Authority:** 49 U.S.C. 102-110 and 332(a) and (b).

2. Appendix A to 49 CFR Part 1 is amended by revising paragraph 2, introductory text and (1), (5), and (8), and by adding paragraph 2, (9) to read as follows:

#### APPENDIX A—DELEGATIONS AND REDELEGATIONS BY SECRETARIAL OFFICERS

2. *Chief Counsel, U.S. Coast Guard.* (a) The General Counsel, as Judge Advocate General for the U.S. Coast Guard, has delegated to the Chief Counsel, U.S. Coast Guard, pursuant to the Uniform Code of Military Justice, Chapter 47 of Title 10, United States Code, authority to exercise the following powers and duties:

(1) The authority to recommend assignment for duty of judge advocates under Article 6(a), section 806(a) of Title 10, United States Code.

(5) The authority to instruct the convening authority to take action in accordance with the decision of the Court of Military Review or dismiss the charges under Article 66(e), section 866(e) of Title 10, United States Code.

(8) The authority to detail appellate Government counsel and appellate defense counsel to perform duties in connection with the review of court-martial cases by the Court of Military Review, the Court of Military Appeals and the Supreme Court.

(9) The authority to perform any other duty and exercise any other power which the

General Counsel is authorized or required to perform under the Uniform Code of Military Justice or the Manual for Courts-Martial, with the exception of the following which are reserved to the General Counsel or his or her delegatee within the Office of the General Counsel:

(i) Authority to certify commissioned officers as qualified for duty as military judges under Article 26(b), section 826(b) of Title 10, United States Code.

(ii) Authority to establish a Court of Military Review and designate a chief judge of the court under Article 66(a), section 866(a) of Title 10, United States Code.

(iii) Authority to order cases sent to the Court of Military Appeals under Article 67(b)(2), section 867(b)(2) of Title 10, United States Code.

(iv) Authority to examine records of general courts-martial not reviewed under Article 66, section 866 of Title 10, United States Code, and modify or set aside the findings or the sentence, or refer the record to the Court of Military Review under Article 69(a), section 869(a) of Title 10, United States Code.

(v) Authority to prescribe rules not inconsistent with the Manual for Courts-Martial to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the UCMJ and Manual for Courts-Martial.

(vi) Authority to make the recommendation of the Judge Advocate General in a court-martial case requiring approval by the Secretary or the President.

(vii) Authority to approve a vacation of suspension of dismissal of military personnel.

\* \* \* \* \*

Issued On: December 30, 1986.

Jim J. Marquez,  
General Counsel.

[FR Doc. 87-867 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-62-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 604 and 653

[Docket No. 60617-6320]

#### Red Drum Fishery of the Gulf of Mexico; Corrections

**AGENCY:** National Marine Fisheries Service (NFMS), NOAA, Commerce.

**ACTION:** Final rule; corrections.

**SUMMARY:** This document corrects several mistakes in the preamble and the regulatory text of the final rule for the Red Drum Fishery of the Gulf of Mexico which was published December 24, 1986, 51 FR 46675.

**FOR FURTHER INFORMATION CONTACT:**  
Elizabeth D. Haynes, Fishery  
Management Specialist, 202-673-5319.

**SUPPLEMENTARY INFORMATION:** In FR  
Doc. 86-28903 beginning on page 46675  
in the issue of December 24, 1986, make  
the following corrections:

On page 46676, in the second column,  
last line, insert "pounds" after "350,000".

**§ 653.2 [Corrected]**

On page 46679, in the second column  
under the definition for "Directed  
commercial red drum fishing (fishery)"  
line five of that paragraph, remove "(5)"  
after "five".

**§ 653.5 [Corrected]**

On page 46680, in the second column,  
line five of § 653.5(b)(1), insert "is" after  
"but".

**§ 653.23 [Corrected]**

On page 46681, in the third column,  
line five of § 653.23(a), "§ 653.21(a)(1)"  
should read "§ 653.21(a)", and on page

46682, in the first column, line two of  
§ 653.23(b), "653.21(a)(2)" should read  
"§ 653.21(b)".

(16 U.S.C. 1601 *et seq.*)

Dated: January 13, 1987.

**Carmen J. Blondin,**

*Deputy Assistant Administrator For Fisheries  
Resource Management, National Marine  
Fisheries Service.*

[FR Doc. 87-1035 Filed 1-15-87; 8:45 am]

**BILLING CODE 3510-22-M**

**50 CFR Part 611**

[Docket No. 60985-6232]

**Foreign Fishing; Foreign Fee Schedule;  
Corrections**

**AGENCY:** National Oceanic and  
Atmospheric Administration (NOAA),  
Commerce.

**ACTION:** Final rule; corrections.

**SUMMARY:** This document corrects two  
mistakes in the preamble of the final

rule which implements the 1987 fishing  
fee schedule for foreign vessels,  
published January 6, 1987, 52 FR 417.

**FOR FURTHER INFORMATION CONTACT:**  
Alfred J. Bilik, 202-673-5315.

**SUPPLEMENTARY INFORMATION:** In FR  
Doc. 86-29543 beginning on page 417 in  
the issue of January 6, 1987, make the  
following corrections:

1. On page 418, in the first column,  
line eight, insert "the" before  
"Assistant".

2. On page 420, in the first column,  
line sixteen, "January 2, 1986," should  
read "January 3, 1986," and on line  
seventeen, "January 5, 1985" should read  
January 4, 1985."

Dated: January 13, 1987.

**Carmen J. Blondin,**

*Deputy Assistant Administrator For Fisheries  
Resource Management, National Marine  
Fisheries Service.*

[FR Doc. 87-1034 Filed 1-15-87; 8:45 am]

**BILLING CODE 3510-22-M**

## Proposed Rules

Federal Register

Vol. 52, No. 11

Friday, January 16, 1987

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.

### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

##### 7 CFR Part 981

#### Almonds Grown in California; Administrative Rules and Regulations Governing Crediting for Marketing Promotion Expenses

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would change the administrative rules and regulations established under the Federal marketing order for California almonds to allow handlers of California almonds to receive credit against their annual advertising assessments for certain costs directly related to their own mail order promotions. Such credit would be limited to \$25,000 per handler per crop year. This rule would give handlers a new opportunity to take advantage of crediting.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the reporting or recordkeeping provisions that are included in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB). They are not effective until OMB approval has been obtained.

**DATE:** Comments must be received by February 17, 1987.

**ADDRESS:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in duplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2085, South Building, Washington, DC 20250. Comments should reference the date and page number of this issue of the Federal Register and will be available for public inspection in the office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS,

USDA, Washington, DC 20250  
telephone: (202) 447-5697.

**SUPPLEMENTARY INFORMATION:** This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has determined that this action would not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing Orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

It is estimated that 102 handlers and 7,500 producers of almonds under the marketing order for California almonds would be subject to regulation during the course of the current season. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2 (1985)) as those having average annual gross revenues for the last three years of less than \$100,000, and agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The average annual crop value for almond producers for the 1983-84 through 1985-86 seasons was \$328,199,333. The average annual gross revenues for the last three years was approximately \$43,760 for producers. The majority of handlers and producers of almonds may be classified as small entities.

Pursuant to the requirements set forth in the RFA, the Administrator of the Agricultural Marketing Service has considered the economic impact on small entities. This proposed rule would provide a new method for handlers of California almonds to receive credit against their annual advertising assessments for certain expenses incurred in conjunction with their own mail order promotions. The proposed

rule would allow handlers additional flexibility in their advertising expenditures in order to promote the sale of California almonds, which will benefit growers, handlers and consumers. It is the Agency's view that participating handlers may avail themselves of this added flexibility with only minimal recordkeeping requirements involving the completion of ABC Form 31 and submission of appropriate proofs of performance. These requirements would not involve significant costs.

This proposal would revise § 981.441 of Subpart—Administrative Rules and Regulations issued under marketing agreement and Order No. 981 (7 CFR Part 981), both as amended, regulating the handling of almonds grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). The proposal is based on a unanimous recommendation of the Almond Board of California (ABC), which works with USDA in administering the order, and other information.

Section 981.41(c) of the order provides that the ABC, with the approval of the Secretary, may allow handlers to receive credit for their direct marketing promotion expenditures, including paid advertising, against their annual advertising assessments. That paragraph also provides that a handler shall not receive credit for allowable expenditures that would exceed that portion of such handlers assessment obligation which is designated for marketing promotion, including paid advertising. Section 981.41(e) provides that before crediting is undertaken, the Secretary, after recommendation by the ABC, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

Section 981.441 currently prescribes rules and regulations to regulate the crediting of paid advertising expenditures and two types of other marketing promotion expenditures. This proposal would revise that section to add authority for the crediting of certain marketing promotion expenditures related to mail order promotions. These new creditable expenditures would be the cost of purchasing mailing lists to be used to conduct mail order promotions and the cost of envelopes and postage to mail printed promotional materials. The

amount of credit a handler could receive for mail order promotion would be limited to \$25,000 per crop year. This proposed rule would give handlers a new opportunity to take advantage of crediting.

The ABC has not generally recommended that credit be allowed for marketing promotion expenditures other than paid advertising because of the difficulty of verifying such expenditures. However, the ABC believes that the proposed creditable expenses would be verifiable through invoices and postal receipts. Procedures for filing claims for credit are included in the proposed rule. These procedures are similar to those currently in effect for paid media advertising.

#### List of Subjects in 7 CFR Part 981

Marketing agreements and orders, Almonds, California.

#### PART 981—ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 981 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C 601-674.

#### Subpart—Administrative Rules and Regulations

2. It is proposed to amend § 981.441 by adding paragraph (d)(1)(iii) as follows:

#### § 981.441 Crediting for marketing promotion including paid advertising.

(d) \* \* \*

(1) \* \* \*

(iii) For costs directly related to mail order promotion subject to the following conditions:

(A) Credit shall only be granted for the following expenditures:

(1) For the purchase of mailing lists to conduct mail order promotions.

(2) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of \$25,000 per handler per crop year.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or

before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

Dated: January 13, 1987.

Thomas R. Clark,

Deputy Director Fruit and Vegetable Division.

[FR Doc. 87-1031 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 989

#### Raisins Produced From Grapes Grown in California; Amendment to the Substandard Dockage System for Certain Varietal Types of Raisins

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

**SUMMARY:** This proposed rule invites comments on an amendment to the substandard dockage system for Muscat, Sultana, and Zante Currant raisins. Currently, handlers may acquire as standard raisins any lot of these raisin varieties containing more than 12 percent, by weight, of substandard raisins subject to a weight dockage system. This proposal would limit the percentage of substandard raisins that can be received by handlers to 17 percent, but would not alter the dockage factor. Raisin lots containing in excess of 17 percent substandard raisins would be off-grade and would have to be reconditioned before they could be acquired as standard raisins by handlers. This proposal was unanimously recommended by the Raisin Administrative Committee, which works with the USDA in administering the marketing order. If adopted, this change will be effective beginning in the 1987-88 crop year.

**DATE:** Comments must be received by February 17, 1987.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Washington, DC 20250 (202) 447-5697.

**ADDRESS:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in duplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2085, South Building, Washington, DC 20250. Comments should reference the date and page number of this issue of the *Federal Register* and will be available for public inspection in the

Office of the Docket Clerk during regular business hours.

**SUPPLEMENTARY INFORMATION:** This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation No. 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has considered the economic impact of this proposed action on small entities as well as large ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There were approximately 23 handlers and 300 producers of Muscat, Sultana, and Zante Currant raisins during the 1985-86 crop year. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2 (1985)) as those having average annual gross revenues for the last three years of less than \$100,000 and agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. It is believed that the California raisin industry is characterized by small producers and handlers. The estimated crop value of production for the past three years for Muscat, Sultana, and Zante Currant raisins was \$8,111,402, which would average \$27,038 per producer.

The regulation would apply to all handlers of Muscat, Sultana, and Zante Currant raisins. The amount of tonnage estimated to be affected during the 1986-87 crop season by this regulation is 2,750 tons. Handlers have experienced difficulties processing lots of raisins which have excessive amounts of substandard raisins. This regulation will enable handlers to market these raisins with higher quality levels at lower processing costs.

Producers are paid according to the creditable fruit weight of raisins delivered. If producers deliver lots of raisins which contain excessive amounts of substandard raisins, the delivery weight of such lots will be docked, thereby decreasing their payment for that lot. If the lot exceeds

the proposed 17 percent limit, the producer would incur the reconditioning costs necessary to bring the lot within acceptable requirements. However, this change, if adopted, would not be effective until the 1987-88 crop year to give producers adequate time to adjust their cultural practices in order to help prevent the production of excessive amounts of substandard raisins and improve the quality of these varietal types of raisins delivered for processing. The 1987-88 crop year begins on August 1, 1987.

The reporting and recordkeeping requirements under the raisin marketing order are incurred by handlers. However, handlers in turn may require individual producers to utilize certain reporting and recordkeeping practices to enable handlers to carry out their functions. In addition, costs incurred by handlers in connection with recordkeeping and reporting requirements may be passed on to producers. Reporting and recordkeeping functions are already used in connection with existing quality requirements, and there should be no increase in such requirements as a result of this proposal. USDA inspectors currently determine the percent of substandard raisins in a lot. Thus, no additional costs of this type would be expected.

It is likely that additional costs (i.e., production costs based on the implementation of improved cultural practices) will be incurred by producers to reduce the quantity of substandard raisins delivered to handlers. However, it is expected that these costs will be offset by the benefits of reduced processing and/or reconditioning costs that are ultimately incurred by the producers. This should contribute to a more efficient processing operation and a better quality product.

Based on available information, the Administrator of the Agricultural Marketing Service has determined that the issuance of this proposed rule would not have a significant economic impact on a substantial number of small entities.

The substandard dockage system permits handlers to acquire as standard raisins any lot of Muscat, Sultana, and Zante Currant raisins even though the lot has been determined to be off-grade because they contain an excess amount of substandard raisins. Currently, no upward limit is prescribed on the quantity of substandard raisins containing more than 12 percent, by weight, of substandard raisins are subject to a dockage factor. This factor reduces the weight of the lot by an amount approximating the weight of the

substandard raisins needed to be removed in order for the balance of the lot to meet grade standards. This dockage factor would remain unchanged by this proposed amendment.

The Committee has recommended that the percentage of substandard raisins allowed to be acquired by handlers be limited to 17 percent. Producers delivering these types of raisins containing between 12.1 percent and 17 percent substandard raisins would be docked a 0.1 percent weight deduction for each 0.1 percent of substandard raisins in excess of 12.1 percent—up to the 17 percent maximum. Raisin lots that exceed 17 percent substandard would be off-grade and require reconditioning before they could be acquired as standard raisins by handlers.

This proposed rule is issued under Marketing Order No. 989, as amended (7 CFR Part 989), regulating the handling of raisins produced from grapes grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674).

#### List of Subjects in 7 CFR Part 989

Marketing agreements and orders, Grapes, Raisins, California.

1. The authority citation for 7b CFR Part 989 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 989.212 would be amended by revising the second and third sentences of paragraph (a), paragraph (c), and the note to read as follows:

#### PART 989—[AMENDED]

##### Subpart—Supplementary Regulations

##### § 989.212 Substandard dockage.

(a) \* \* \* A handler also may, subject to prior agreement, acquire as standard raisins any lot of Muscat (including other raisins with seeds), Sultana, and Zante Currant raisins containing from 12.1 percent through 17 percent, by weight, of substandard raisins under a dockage system. The creditable weight of each lot of raisins acquired under the substandard dockage system shall be obtained by multiplying the applicable net weight or creditable weight (weight determined by applying the applicable weight adjustment factor for moisture), of the lot of raisins by the applicable dockage factor from the appropriate dockage table prescribed in paragraph (b) or (c) of this section.

(b) \* \* \*

(c) *Substandard dockage table applicable to Muscat (including other raisins with seeds), Sultana and Zante Currant raisins.*

Percent substandard	Dockage factor
12.0 or less.....	(1)
12.1.....	.999
12.2.....	.998
12.3.....	.997
12.4.....	.996
12.5.....	.995

<sup>1</sup> No dockage.

Note.—Percentages in excess of the last percentage shown in the table shall be expressed in the same increments as the foregoing, and the dockage factor for each such increment shall be .001 less than the dockage factor for the preceding increment. Deliveries in excess of 17 percent would be off-grade, therefore, the dockage factor does not apply.

Dated: January 6, 1987.

Thomas R. Clark,  
Deputy Director, Fruit and Vegetable  
Division.

[FR Doc. 87-925 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-02-M

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Part 271

#### Prevention of Unauthorized Landing of Aliens, by Owners and Operators of Railroad Lines, International Bridges, or Toll Roads

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: It has long been the contention of owners of international bridges that sufficient safeguards to fine procedures were lacking in the statutory language of section 271 [8 U.S.C. 1321] of the Immigration and Nationality Act, as amended. The Immigration Reform and Control Act of 1986, Part B, at section 114 provides amelioration to some degree of this contention. The proposed regulation would provide for an inspection by the Attorney General, at the request of owners and operators of facilities which provide a means for the unlawful entry of aliens into the United States.

DATE: Comments must be received on or before February 17, 1987.

**ADDRESS:** Please submit written comments, in duplicate, to the Director of Policy Directives and Instructions, Immigration and Naturalization Service, Room 2011, 425 I Street, NW., Washington, DC 20536.

**FOR FURTHER INFORMATION CONTACT:**

For general information: Jack Kravitz, Acting Director, Policy Directives and Instructions, Immigration and Naturalization Service, 425 I Street, NW., Washington, DC 20536, Telephone: (202) 633-3048.

For specific information: Ellis B. Linder, Assistant Chief Inspector, Immigration and Naturalization Service, 425 I Street, NW., Washington, DC 20536, Telephone: (202) 633-2745.

**SUPPLEMENTARY INFORMATION:** Section 271 of the Immigration and Nationality Act, as amended (8 U.S.C. 1321) provides, in pertinent part, that the owners, masters, officers and agents of vessels, aircraft, transportation lines, or international bridges or toll roads—that for failure to prevent the landing of aliens in the United States at a port of entry other than as designated by the Attorney General or at anytime or place other than as designated by the immigration officers—shall be liable to a penalty to be imposed by the Attorney General of \$1,000 for each violation.

The proposed regulation would provide for an inspection by the Attorney General, at the request of owners and operators of facilities which provide a means for the unlawful entry of aliens into the United States. After a facility is inspected and a determination is made that owners or operators of railroad lines, international bridges or toll roads have taken acceptable measures to prevent the unlawful entry of aliens into the United States, such owners or operators shall not be liable to the penalty for a period of one year.

In accordance with 5 U.S.C. 605(b) the Commissioner of Immigration and Naturalization Service certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This order would not be a major rule within the meaning of section 1(b) of E.O. 12291.

**List of Subjects in 8 CFR Part 271**

Aliens, Transportation, Unauthorized landing.

Accordingly, it is proposed to amend Chapter 1 of Title 8 of the Code of

Federal Regulations by adding a new part as set forth below:

**PART 271—DILIGENT AND REASONABLE EFFORTS TO PREVENT THE UNAUTHORIZED ENTRY OF ALIENS BY THE OWNERS OF RAILROAD LINES, INTERNATIONAL BRIDGES OR TOLL ROADS**

**Authority:** Sections 103 and 271 of the Immigration and Nationality Act, as amended; 8 U.S.C. 1103 and 1321.

**§ 271.1 Procedures for inspections.**

(a) *Applicability.* The following terms and conditions apply to those owners or operators of railroad lines, international bridges or toll roads which provide a means for an alien to come to the United States, who request that such facilities or method utilized be inspected by the Attorney General.

(b) *Inspection of facility.* Based upon a written request by the owners or operators, the INS district director or his or her designee will, once each calendar year, inspect the facility or method utilized in order to ensure that owners and operators have acted diligently in taking adequate steps to prevent the unlawful entry of aliens into the United States. Such measures may include but are not necessarily limited to the following:

- (1) Fencing;
- (2) Barricades;
- (3) Lighting; or
- (4) Security guards as deemed

necessary by the district director. If the district director determines that preventive measures are inadequate, he or she shall advise the owners or operators in writing, citing the reasons for such determination.

(c) *Preventive measures and certification.* Upon a determination by the district director that adequate preventive measures have been taken by the owners and operators, he or she will certify that so long as the facility or method utilized is maintained in the condition in which approved, for a period not to exceed one year, the owners and operators are relieved from liability to fine proceedings.

Dated: December 17, 1986.

Richard E. Norton,  
Associate Commissioner, Examinations,  
Immigration and Naturalization Service,  
[FR Doc. 87-922 Filed 1-15-87; 8:45 am]

BILLING CODE 4410-10-M

**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

9 CFR Parts 71, 76, and 85

[Docket No. 85-013]

**Movement of Swine in Interstate Commerce; Cleaning and Disinfecting Means of Conveyance**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the regulations concerning cleaning and disinfecting means of conveyance used for the interstate movement of swine. It is proposed to require, with certain exceptions, that any means of conveyance used for the interstate movement of swine be cleaned and disinfected immediately prior to the loading of swine for the interstate movement. This action appears warranted in order to help prevent the spread of swine diseases, such as pseudorabies, by preventing certain swine from having contact with contaminated means of conveyance.

**DATE:** Written comments must be received on or before March 17, 1987.

**ADDRESS:** Written comments should be submitted to Steven R. Poore, Acting Assistant Director, Regulatory Coordination Group, Animal and Plant Health Inspection Service, United States Department of Agriculture, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Comments should state that they are in response to Docket Number 85-013. Written comments received may be inspected in Room 728 of the Federal Building, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Dr. G.H. Frye, Chief Staff Officer, Program Planning Staff, VS, APHIS, USDA, Room 846, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8711.

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations in 9 CFR Subchapter C (referred to below as the regulations), among other things, regulate the interstate movement of livestock (swine, cattle, sheep, and goats) to help prevent the interstate dissemination of various diseases, including pseudorabies. This document proposes to amend the regulations as they relate to pseudorabies by making changes

concerning cleaning and disinfecting means of conveyance used in connection with the movement of certain swine in interstate commerce. Pseudorabies, also known as Aujeszky's disease, mad itch, and infectious bulbar paralysis, is primarily a disease of swine and is caused by a herpes virus.

Under the regulations, any means of conveyance used for the interstate movement of swine infected with or exposed to pseudorabies is required to be cleaned and disinfected by the carrier, in accordance with certain provisions, at the point where the animals are unloaded (See 9 CFR 71.6(a), 76.30, and 85.12.)

With respect to pseudorabies, it is proposed to amend the regulations as follows:

(1) To require that means of conveyance used for the interstate movement of certain swine be cleaned and disinfected by the carrier immediately prior to the loading of the swine for the interstate movement, rather than after the interstate movement has occurred;

(2) To require that means of conveyance used for the interstate movement of swine be cleaned and disinfected by the carrier prior to all interstate movements of swine, regardless of whether the means of conveyance were used previously to transport pseudorabies-free, pseudorabies-exposed, or pseudorabies-infected swine, except that this requirement would not apply to: (a) Means of conveyance used for the interstate movement of swine directly to a recognized slaughtering establishment or a slaughter market; (b) means of conveyance used for the interstate movement of pseudorabies-exposed swine directly to a quarantined herd or quarantined feedlot; (c) means of conveyance used to move swine to or from a single herd if the means of conveyance has never been used to move swine other than to or from such herd; and (d) means of conveyance used to move swine to or from a single herd if the means of conveyance has not been used to move swine other than to or from such herd after the means of conveyance was cleaned and disinfected in accordance with § 85.12 of the pseudorabies regulations; and

(3) To require that any owner-shipper statement, permit, or certificate accompanying swine moved interstate in any means of conveyance required to be cleaned and disinfected as a condition of interstate movement contain a statement that has been signed and dated by the carrier and that specifies that the cleaning and

disinfecting requirements have been met.

It is proposed to retain the current requirement that cleaning and disinfecting a means of conveyance be performed by the carrier at no expense to the Department of Agriculture. Also, it is proposed to leave unchanged the physical procedures set forth in the regulations for cleaning and disinfecting a means of conveyance.

The current cleaning and disinfecting provisions were included in the regulations to prevent means of conveyance contaminated with pseudorabies virus from spreading the virus to swine subsequently moved in the means of conveyance. Means of conveyance can become contaminated with pseudorabies virus by discharges (usually oral or nasal) from infected livestock. Cleaning and disinfecting means of conveyance destroys pseudorabies virus that may be present on the means of conveyance. Further, cleaning and disinfecting means of conveyance prior to the loading of swine for interstate movement, as opposed to after the unloading of pseudorabies-infected or pseudorabies-exposed swine, would ensure the destruction of pseudorabies virus from infected or exposed swine not known to be infected or exposed.

It appears that requiring that carriers clean and disinfect means of conveyance prior to the loading of swine for interstate movement, coupled with requiring that a document accompanying the swine contain a statement that has been signed and dated by the carrier and that specifies that cleaning and disinfecting requirements have been met, would strengthen the protection against the spread of pseudorabies by contaminated means of conveyance. Based on Departmental experience, it appears that the current cleaning and disinfection requirements are often ignored. Further, the Department does not have sufficient personnel to monitor compliance with the current cleaning and disinfecting requirements. It appears likely that means of conveyance would be cleaned and disinfected prior to loading swine for interstate movement if the carrier has to state on a document to be presented to the consignee that cleaning and disinfecting has been accomplished. Further, it appears that consignors and consignees would insist that means of conveyance be cleaned and disinfected prior to the loading of swine for interstate movement since they would have an interest in delivering or receiving pseudorabies-free swine. In addition, requiring the carrier's statement on

documents accompanying swine interstate would help State animal health officials monitor compliance with the proposed cleaning and disinfecting requirements.

As noted above, the proposal would exempt certain interstate movements of swine from the cleaning and disinfecting requirements.

It is proposed that the cleaning and disinfecting requirements not apply to means of conveyance used for the movement of swine directly to slaughter markets or recognized slaughtering establishments. Even if such means of conveyance were contaminated with pseudorabies virus, it is unlikely that swine carried in such means of conveyance would develop pseudorabies in the time remaining before slaughter.

Also, it is proposed that the cleaning and disinfecting requirements not apply to means of conveyance used for the movement of exposed swine directly to a quarantined herd or quarantined feedlot. Cleaning and disinfecting a means of conveyance before loading swine already exposed to pseudorabies would not significantly increase protection against the spread of pseudorabies.

In addition, it is proposed that the cleaning and disinfecting requirements not apply to means of conveyance used to move swine to or from a single herd if the means of conveyance has never been used other than to move swine to or from such herd; and shall not apply to means of conveyance that are used to move swine to or from a single herd if the means of conveyance has not been used other than to move swine to or from such herd after the means of conveyance was cleaned and disinfected in accordance with § 85.12 of the regulations. A means of conveyance used to move swine to or from a single herd could be contaminated with pseudorabies virus if the swine that move to or from the herd are infected with or exposed to pseudorabies; however, cleaning and disinfecting the means of conveyance for such movements would not significantly reduce the risk of spreading pseudorabies because the swine themselves would be the primary source of pseudorabies virus.

Finally, it is proposed that means of conveyance be cleaned and disinfected prior to loading swine, and not other animals, for interstate movement since it is extremely unlikely that livestock other than swine would contract pseudorabies from contact with a contaminated means of conveyance. Also, if animals other than swine were

to contract pseudorabies from a contaminated means of conveyance, the animals would not spread the disease. Only swine spread pseudorabies.

#### Miscellaneous

This document also proposes to make three minor changes to Parts 71 and 76 so that provisions in these parts requiring cleaning and disinfecting of means of conveyance after animals are unloaded would not conflict with proposed § 85.12. In addition, this document would revise § 76.18(b)(1), paragraph 9, which requires approved livestock markets to provide facilities and services for cleaning and disinfecting means of conveyance as prescribed in §§ 76.30 and 76.32, by adding a reference to § 85.12.

#### Paperwork Reduction Act

In accordance with section 3507 of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the information collection provisions included in this proposed rule have been cleared by the Office of Management and Budget (OMB) and have been assigned OMB control number 0579-0070.

#### Executive Order 12291 and Regulatory Flexibility Act

This proposal is issued in conformance with Executive Order 12291 and has been determined to be not a "major rule." The Department has determined that this rule would not have a significant annual effect on the economy; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and would have no significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The proposal, if adopted, would require that means of conveyance used for the interstate movement of swine, with certain exceptions, be cleaned and disinfected prior to the loading of the swine for the interstate movement. Means of conveyance used to move swine to or from a single herd would not have to be cleaned and disinfected if the means of conveyance has never been used to move swine other than to or from such herd, or if the means of conveyance has not been used to move swine other than to or from such herd after the means of conveyance was cleaned and disinfected. This exemption

would apply to many farmers who haul their own swine. Also, means of conveyance would not have to be cleaned and disinfected prior to the loading of swine for interstate movement directly to a recognized slaughtering establishment or a slaughter market, or prior to the loading of exposed swine for interstate movement directly to a quarantined herd or quarantined feedlot. A large number of interstate movements of swine are to one of these destinations.

Under the circumstances explained above, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR 3015, Subpart V.)

#### List of Subjects

##### 9 CFR Part 71

Animal diseases, Livestock and livestock products, Poultry and poultry products, Quarantine, Transportation.

##### 9 CFR Part 76

Animal diseases, Hogs, Quarantine, Transportation, Hog cholera Garbage.

##### 9 CFR Part 85

Animal diseases, Livestock and livestock products, Quarantine, Transportation, Pseudorabies.

Accordingly, 9 CFR Parts 71, 76, and 85 would be amended as follows:

#### PART 71—GENERAL PROVISIONS

1. The authority citation for Part 71 would continue to read as follows:

Authority: 21 U.S.C. 111-113, 114a, 114a-1, 115-117, 120-126, 134b, and 134f; 7 CFR 2.17, 2.51, and 371.2(d).

##### § 71.6 [Amended]

2. In paragraph (a) of § 71.6, "pseudorabies," would be added immediately after "brucellosis."

3. In paragraph (b) of § 71.6, "pseudorabies and" would be added immediately after "other than".

#### PART 76—HOG CHOLERA AND OTHER COMMUNICABLE SWINE DISEASE

4. The authority citation for Part 76

would continue to read as follows:

Authority: 21 U.S.C. 111-113, 114g, 115, 117, 120, 121, 123-126, 134b, and 134f; 7 CFR 2.17, 2.51, and 371.2(d).

##### § 76.18 [Amended]

5. In § 76.18(b)(1), paragraph 9, reference to "§§ 76.30 and 76.32" would be replaced by "§§ 76.30, 76.32, and 85.12".

##### § 76.30 [Amended]

6. In § 76.30(b) "except pseudorabies," would be added immediately after "disease,".

#### PART 85—PSEUDORABIES

7. The authority citation for Part 85 would continue to read as follows:

Authority: 21 U.S.C. 111, 112, 113, 115, 117, 120, 121, 123-126, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

8. Section 85.12 would be revised to read as follows:

##### § 85.12 Cleaning and disinfecting means of conveyance.

(a) Any means of conveyance and associated equipment used in connection with the interstate movement of swine shall be cleaned and disinfected immediately prior to the loading of swine for the interstate movement; except that this requirement shall not apply to:

(1) Means of conveyance used for the interstate movement of swine directly to a recognized slaughtering establishment or a slaughter market;

(2) Means of conveyance used to move exposed swine directly to a quarantined herd or quarantined feedlot;

(3) Means of conveyance used to move swine to or from a single herd if the means of conveyance has never been used to move swine other than to or from such herd; and

(4) Means of conveyance used to move swine to or from a single herd if the means of conveyance has not been used to move swine other than to or from such herd after the means of conveyance was cleaned and disinfected.

(b) The carrier shall be responsible for cleaning and disinfecting all means of conveyance and associated equipment as required by this section without expense to the Department of Agriculture.

(c) Any owner-shipper statements, certificate, or permit accompanying swine moved interstate in any means of conveyance required to be cleaned and disinfected as set forth in this section shall contain a statement, signed and

dated by the carrier, specifying that the cleaning and disinfecting requirements of this section have been met.

(d) Any means of conveyance required to be cleaned and disinfected for the interstate movement of swine, as provided in paragraph (a) of this section, shall be cleaned and disinfected as follows: All litter feed, and manure shall be removed from all portions of the means of conveyance, including all ledges and framework inside and outside, and handled so as not to expose any livestock to any pseudorabies virus it may contain; the interior and exterior of the means of conveyance and its associated equipment shall be cleaned; and the entire interior surface, including all doors, endgates, portable chutes, and similar equipment shall be saturated with a disinfectant registered under the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 135 *et seq.*), as virucidal against herpes. The disinfectant shall be used in accordance with directions on the label.

Done at Washington, DC, this 13th day of January, 1987.

J.K. Atwell,

Deputy Administrator Veterinary Services.

[FR Doc. 87-1032 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-34-M

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Ch. I**

[Summary Notice No. PR-87-1]

**Petitions for Rulemaking; Summary of Petitions Received and Dispositions of Petitions Denied or Withdrawn**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petitions for rulemaking and of dispositions of petitions denied or withdrawn.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR Part 11), this notice contains a summary of certain petitions requesting the initiation of rulemaking procedures for the amendment of specified provisions of the Federal Aviation Regulations and of denials or withdrawals of certain petitions previously received. The purpose of this notice is to improve the public's awareness of this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the

legal status of any petition or its final disposition.

**DATE:** Comments on petitions received must identify the petition docket number involved and be received on or before, March 17, 1987.

**ADDRESSES:** Send comments on the petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Petition Docket No. \_\_\_\_\_, 800 Independence Avenue, SW., Washington DC 20591.

**FOR FURTHER INFORMATION CONTACT:** The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-204), Room 916, FAA Headquarters Building (FOB-10A), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 426-3644.

This notice is published pursuant to paragraphs (b) and (f) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC on January 12, 1987.

John H. Cassady,

Assistant Chief Counsel, Regulations and Enforcement Division.

**PETITIONS FOR RULEMAKING**

Docket No.	Petitioner	Description of the petition
25096	Aerospace Industries Association of America (AIA)	Description of Petition: This petition proposes changes in wording and organization of certain Federal Regulations that will provide a basis for resolution of problems in application and interpretation of 14 CFR 25.1309, Equipment, Systems and Installations. Regulations Affected: 14 CFR 25.903, 25.1301 and 25.1309 and a new § 25.13XX on Essential Loads. Petitioner's Reason for Rule: No relaxation of safety standards is sought, intended or proposed by this petition. The objectives are by this petition. The objectives are to clarify the intent of the regulation, and to recognize experience and improved understanding in the administration and compliance of the rule.
25113	USAF	Description of Petition: To incorporate updated changes to Realignment of Air Defense Identification Zones. Regulations Affected: 14 CFR Part 99. Petitioner's Reason for Rule: Provide a contiguous ADIZ, standardize the configuration and nomenclature, accommodates radar coverage, eliminates areas in Mexican airspace.
25105	National Transportation Association	Description of Petition: Petitioner proposes amendment to § 25.812 to require that floor proximity escape path marking lighting systems required by § 25.812(a)(1) be demonstrated to be effective in smoke conditions, and amendment to § 121.310(c) to provide for installation of such systems. Regulations Affected: 14 CFR 25.812(a)(1) and 121.310(c).

**PETITIONS FOR RULEMAKING: WITHDRAWN OR DENIED**

Docket No.	Petitioner	Description and disposition of the rule requested
24171	National Rifle Assoc. (NRA)	Description of Petitions: Add a new subsection to read as follows: "Each certificate holder required to conduct security screening under a security program, where such certificate holder provides no location at which to check baggage before screening, or directs passengers to proceed through security screening prior to checking their baggage, shall adopt a procedure to allow a person in whose property an unloaded firearm has been found during screening to proceed with the property containing the unloaded firearm from the location of the screening to a location where the property containing the unloaded firearm may be transferred to an area within the aircraft, other than the flightcrew compartment, that is inaccessible to passengers." Regulation Affected: 14 CFR 108.9. Denied 10/15/86.

[FR Doc. 87-949 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-13

**14 CFR Part 71****[Airspace Docket No. 86-AGL-35]****Proposed Establishment of Transition Area; Mora, MN****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of Proposed rulemaking.

**SUMMARY:** This notice proposes to establish the Mora, Minnesota, transition area to accommodate a new NDB Runway 35 Standard Instrument Approach Procedure (SIAP) to Mora Municipal Airport.

The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

**DATES:** Comments must be received on or before February 17, 1987.

**ADDRESS:** Send comments on the proposal in triplicate to: Federal Aviation Administration, Regional Counsel, AGL-7, Attn: Rules Docket No. 86-AGL-35, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Regional Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

An informal docket may also be examined during normal business hours at the Air Traffic Division, airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

**FOR FURTHER INFORMATION CONTACT:** Edward R. Heaps, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

**SUPPLEMENTARY INFORMATION:** The development of a new NDB Runway 35 SIAP requires that the FAA designate airspace to ensure that the procedure will be contained within controlled airspace.

The minimum decent altitude for this procedure may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined area which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

**Comments Invited**

Interested parties are invited to

participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 86-AGL-35." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRM's**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2, which describes the application procedure.

**The Proposal**

The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a transition area airspace near Mora, Minnesota.

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The FAA has determined that this

proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 71**

Aviation safety, transition areas

**The Proposed Amendment****PART 71—[Amended]**

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

1. The authority citation for Part 71 continues to read as follows:

**Authority:** 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

**§ 71.181 [Amended]**

2. Section 71.181 is amended as follows:

**Mora, Minnesota [New]**

That airspace extending upward from 700 feet above the surface within a 5 mile radius of the Mora Municipal Airport (Lat. 45°53'05" N., Long. 93°16'20" W.); and within 3 miles either side of the 177° bearing from the Mora NDB (Lat. 45°53'25" N., Long. 93°16'04" W.) extending from the 5 mile radius to 8.5 miles south of the airport.

Issued in Des Plaines, Illinois, on January 5, 1987.

Teddy W. Burcham,  
Manager, Air Traffic Division.  
[FR Doc. 87-950 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 71****[Airspace Docket No. 86-ASO-25]****Proposed Alteration of Federal Airways—Georgia and Alabama****AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Correction to notice of proposed rulemaking.

**SUMMARY:** This action corrects the comment date for Federal Airways V-311 and V-168 as published in the *Federal Register* on December 23, 1986 (51 FR 45911). The date given for comments was "January 8, 1987." The correct date is "February 11, 1987."

**FOR FURTHER INFORMATION CONTACT:** William C. Davis, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9250.

Issued in Washington, D.C., on January 9, 1987.

Daniel J. Peterson,

Manager, Airspace—Rules and Aeronautical Information Division.

[FR Doc. 87-951 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-13-M

## FEDERAL TRADE COMMISSION

### 16 CFR Part 13

[File No. 852 3106]

#### Reliance Wood Preserving, Inc., et al.; Proposed Consent Agreements With Analysis To Aid Public Comments

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreements.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, these consent agreements, accepted subject to final Commission approval, would prohibit, among other things, the Federalsburg, Maryland manufacturer and the Greensboro, NC-based retailer of flame-retardant, pressure-treated wood from misrepresenting the flame-retardant value of its products and would require respondents to notify purchasers that some of the wood may not meet established safety standards.

**DATE:** Comments will be received until March 17, 1987.

**ADDRESS:** Comments should be addressed to: FTC/Office of the Secretary, Room 136, 6th St. and Pa. Ave. NW, Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Charles Peterson, Atlanta Regional Office, Federal Trade Commission, 1718 Peachtree St. NW., Room 1000, Atlanta, GA 30367. (404) 347-4836.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade

Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

#### List of Subjects in 16 CFR Part 13

Pressure-treated wood, Trade practices.

In the matter of Reliance Wood Preserving, Inc., a corporation, and Daniel Roy Dorman, individually and as an officer of said Corporation; File No. 852 3106; Agreement containing consent order to cease and desist.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Reliance Wood Preserving, Inc., and Daniel Roy Dorman, individually and as an officer of Reliance Wood Preserving, Inc., ("proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed by and between proposed respondents, their duly authorized officers and attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent Reliance Wood Preserving, Inc., (Reliance) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at Federalsburg Industrial Park, P.O. Box 349, Federalsburg, Maryland 21632.

2. Proposed respondent Daniel Roy Dorman (Dorman) is President of Reliance. He formulates, directs, controls, and participates in the policies, acts and practices of Reliance, and his address is the same as that of said corporation.

3. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint here attached.

4. Proposed respondents waive:

a. Any further procedural steps;  
b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of laws;

c. All rights to seek judicial review or otherwise to challenge or contest the

validity of the order entered pursuant to this agreement; and

d. Any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information with respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute and should not be construed as an admission by proposed respondents that the law has been violated as alleged in the draft complaint here attached.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft complaint attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public with respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service.

The complaint attached hereto may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand

that, once the order has been issued, each will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondents further understand that each may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

#### Order

For purposes of this order, the following definitions shall apply:

A. "ASTM E 84" is a test recognized in the lumber industry as a measure of the fire retardancy of wood based on the rate of flame spread.

B. An "ASTM E 84 flame spread index" (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

C. "Fire Retardant Treated Wood" or "FRTW" is wood chemically treated under pressure with fire retardant chemicals and has an ASTM flame spread index of 25 or less.

D. "Respondents' FRTW" is wood that Reliance and Dorman represented as being fire retardant or Class "A" or having a flame spread of 25 or less.

E. A "class 'A' rating" means that FRTW possesses a flame spread index of 25 or less.

F. "Flameguard" is a brand name that respondents use for their FRTW.

G. "Timber Products Inspection" is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

#### I.

It is ordered that Reliance Wood Preserving, Inc., and Daniel Roy Dorman, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertisement, offering for sale, sale, or distribution of respondents' FRTW, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that:

A. Respondents' FRTW is fire retardant, unless such is the fact;

B. Respondents' FRTW possesses a flame spread index of 25 or less, unless such is the fact;

C. Respondents' FRTW possesses a class "A" rating, unless such is the fact;

D. Respondents' FRTW has specified fire retardant properties, unless such is the fact;

E. Respondents' FRTW is classified or otherwise approved by UL, unless such is the fact;

F. Respondents' FRTW is quality assured or otherwise approved by Timber Products Inspection, unless such is the fact;

G. Respondents' FRTW is certified or otherwise approved by the American Wood Preservers' Bureau, unless such is the fact; and

H. Respondents' FRTW is certified or otherwise approved by any organization, individual, or governmental agency, unless such is the fact.

Respondents shall maintain records to be made available upon reasonable request for review by the Federal Trade Commission substantiating representations referred to in this section of the order. Substantiation for representations in sections I.A. through I.D. shall consist of certifications or tests made in accordance with customary industry standards by an inspection service for fire retardant wood recognized by one of the following bodies: Building Officials and Code Administrators International, Inc.; International Conference of Building Officials; or the Southern Building Code Congress International, Inc.

#### II.

It is further ordered that, within fifteen (15) days after the date of service of this order, respondent Reliance Wood Preserving, Inc., shall request that the follow-up service currently inspecting its FRTW confirm that it is inspecting respondents' FRTW by forwarding to the service a letter in the form attached as Appendix A.

#### III.

It is further ordered that, within fifteen (15) days after the date of service of this order, respondents shall notify all purchasers of respondents' FRTW prior to April 15, 1985, that some of respondents' FRTW sold prior to April 15, 1985, may not have the fire retardant properties specified in respondents' representations concerning that FRTW. Such notice in the form of Appendix B shall be made by postage pre-paid, certified mail, return receipt requested, addressed to the last known address of the purchasers of respondents' FRTW who purchased prior to April 15, 1985, as reflected in respondents' business records and in a list furnished to respondents by Reliance Treated Wood, Inc., Greensboro, NC.

#### IV.

It is further ordered that respondent, Reliance Wood Preserving, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution,

assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in its organization that may affect compliance obligations arising out of this order.

#### V.

It is further ordered that the individual respondent Daniel Roy Dorman notify the Commission fifteen (15) days in advance of any proposed change of his affiliation with respondent Reliance and within fifteen (15) days of any new affiliation that he has with any corporation, partnership, proprietorship, or other business entity engaged in the manufacture, advertisement, offering for sale, sale, or distribution of fire retardant treated wood.

#### VI.

It is further Ordered that, within fifteen (15) days after service of this order, respondent Reliance Wood Preserving, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of Reliance Wood Preserving, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of Reliance Wood Preserving, Inc., within fifteen (15) days after each new officer or director is appointed or elected, and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

#### VII.

It is Further Ordered that:

A. Within sixty (60) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order, including a list of the individuals or entities notified pursuant to Paragraph III of this order together with a copy of the return receipts from such individuals or entities showing their receipt of such required notification.

B. In addition to the report required by VII(A), each respondent shall file or cause to be filed, within sixty days after service of this order, copies of the most recent ASTM E 84 tests conducted to obtain certification that each species of respondents' FRTW is fire retardant together with reports from the follow-up service utilized by respondents regarding its two most recent follow-up inspections.

C. In addition to the report required by VII(A), each test results required by VII(B), each respondent shall file or

cause to be filed, one (1) year after the date of service of this order and at such times as the Commission or its staff by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this order.

#### Appendix A

(Date) \_\_\_\_\_

Dear \_\_\_\_\_:

On \_\_\_\_\_ Reliance Wood Preserving, Inc., entered into a consent agreement with the Federal Trade Commission. The agreement, among other things, requires Reliance to possess substantiation for the claim that Reliance's fire retardant treated wood ("FRTW") is fire retardant (*i.e.*, has a flame spread index of 25 or less).

Reliance requests that you write a letter directly to the Commission confirming that you are currently performing follow-up inspections to assure that Reliance's FRTW is in fact fire retardant. In your letter, please indicate that you will notify the Commission should you cease performing follow-up inspections on Reliance's FRTW. Your letter should be sent to the address below: Federal Trade Commission, Division of Enforcement, 6th Street & Pennsylvania Ave., Washington, DC 20580.

Your cooperation will be greatly appreciated.

Reliance Wood Preserving, Inc.

By: \_\_\_\_\_

#### Appendix B

(Date) \_\_\_\_\_

Dear [Customer]:

On \_\_\_\_\_ Reliance Wood Preserving, Inc., entered into a consent agreement with the Federal Trade Commission settling charges that some Flameguard fire retardant treated wood (FRTW) manufactured and sold prior to April 15, 1985, may not in fact be fire retardant.

Most of our FRTW is sold by Reliance Treated Wood, Inc., a subsidiary of McCoy Industries, Inc., both of which are located in Greensboro, NC.

Because our records and/or Reliance Treated Wood's records indicate that you may have purchased Flameguard during the applicable time period, our agreement with the Federal Trade Commission requires us to notify you of the possibility that some Flameguard fire retardant treated wood may not be fire retardant so that you may take whatever steps, if any, that you deem appropriate. Please bear in mind that only FRTW manufactured and sold prior to April 15, 1985, is involved.

Reliance Wood Preserving, Inc.

By: \_\_\_\_\_

In the matter of McCoy Industries, Inc., and Reliance Treated Wood, Inc., Corporations; File No. 582 3106; Agreement containing consent order to cease and desist.

The Federal Trade Commission having initiated an investigation of certain alleged acts and practices of McCoy Industries, Inc. and Reliance

Treated Wood, Inc., ("proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the alleged acts and practices being investigated.

It is hereby agreed by and between proposed respondents, their duly authorized officers, who were represented by counsel, and counsel for the Federal Trade Commission that:

1. Proposed respondent Reliance Treated Wood, Inc., (Treated Wood) is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office located at 300 East Wendover Avenue, Greensboro, North Carolina 27420, and its principal place of business located at Federalsburg Office Park, Federalsburg, Maryland.

2. Proposed respondent McCoy Industries, Inc., (McCoy) is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina with its office and principal place of business located at 300 East Wendover Avenue, Greensboro, North Carolina 27420. Proposed respondent McCoy owns 100% of the outstanding stock of Treated Wood.

3. Proposed respondents, for purposes of this settlement, admit all the jurisdictional facts set forth in the draft complaint here attached.

4. Proposed respondents waive:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusion of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. Any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information with respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute and should not be construed as an admission by proposed respondents of any liability or the violation of law as alleged in the draft complaint here attached.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft complaint attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public with respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service.

The complaint attached hereto may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that, once the order has been issued, each will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondents further understand that each may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

#### Order

For purposes of this order, the following definitions shall apply:

A. "ASTM E 84" is a test recognized in the lumber industry as a measure of the fire retardancy of wood based on the rate of flame spread.

B. An "ASTM E 84 flame spread index" (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

C. "Fire Retardant Treated Wood" or "FRTW" is wood chemically treated under pressure with fire retardant chemicals and has an ASTM flame spread index of 25 or less.

D. "Treated Wood's FRTW" is wood that Treated Wood has represented as being fire retardant or Class "A" or having a flame spread of 25 or less.

E. A "class 'A' rating" means that FRTW possesses a flame spread index of 25 or less.

F. "Flameguard" is a brand name that respondent Treated Wood uses for its FRTW.

G. "Underwriters Laboratories" (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

H. "The American Wood Preservers Bureau" is an industry association concerned with the quality of wood.

I. "Timber Products Inspection" is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

#### I.

It is ordered that Reliance Treated Wood, Inc., and McCoy Industries, Inc., directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertisement, offering for sale, sale, or distribution of Treated Wood's FRTW, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that:

A. Treated Wood's FRTW is fire retardant, unless such is the fact;

B. Treated Wood's FRTW possesses a flame spread index of 25 or less, unless such is the fact;

C. Treated Wood's FRTW possesses a class "A" rating, unless such is the fact;

D. Treated Wood's FRTW has specified fire retardant properties, unless such is the fact;

E. Treated Wood's FRTW is classified or otherwise approved by UL, unless such is the fact;

F. Treated Wood's FRTW is quality assured or otherwise approved by Timber Products Inspection, unless such is the fact;

G. Treated Wood's FRTW is certified or otherwise approved by the American Wood Preservers Bureau, unless such is the fact; and

H. Treated Wood's FRTW is certified or otherwise approved by any organization, individual, or governmental agency, unless such is the fact.

Respondents shall maintain records to be made available upon reasonable request for review by the Federal Trade Commission substantiating representations referred to in this section of the order. Substantiation for representations in Sections I.A. through I.D. shall consist of certifications or tests made in accordance with customary industry standards by an inspection service for fire retardant wood recognized by one of the following bodies: Building Officials and Code Administrators International, Inc.; International Conference of Building Officials; or the Southern Building Code Congress International, Inc.

#### II.

It is further ordered that, within fifteen (15) days after the date of service of this order, respondents shall furnish to Reliance Wood Preserving, Inc., Federalsburg, Maryland, the name and last known address of each purchaser of Treated Wood's FRTW that purchased such FRTW prior to April 15, 1985, as reflected in respondents' business records.

#### III.

It is further ordered that each respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergency of a successor corporation, the creation or dissolution of subsidiaries, or any other change in its organization that may affect compliance obligations arising out of this order.

#### IV.

It is further ordered that:

A. Within fifteen (15) days after service of this order, respondent Reliance Treated Wood, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of Reliance Treated Wood, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of Reliance Treated Wood, Inc., within fifteen (15) days after each new officer or director is appointed or elected, and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

B. Within fifteen (15) days after service of this order, respondent McCoy Industries, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of McCoy Industries, Inc., and, for a period of three (3) years after that

date, shall provide a copy of such order and complaint to each new officer and director of McCoy Industries, Inc., within fifteen (15) days after each new officer or director is appointed or elected and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

#### V.

It is further ordered that:

A. Within sixty (60) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

B. In addition to the report required by V (A), each respondent shall file or cause to be filed, within sixty days after service of this order, copies of the most recent ASTM E 84 tests conducted to obtain certification that each species of Treated Wood's FRTW is fire retardant together with reports from the follow-up service utilized regarding its two most recent follow-up inspections.

C. In addition to the report required by V (A) and test results required by V (B), each respondent shall file or cause to be filed, one (1) year after the date of service of this order and at such times as the Commission or its staff by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this order.

**Reliance Wood Preserving, Inc., et al.**

[File No. 852 3106]

#### *Analysis of Proposed Consent Order to Aid Public Comment*

The Federal Trade Commission has accepted agreements to proposed orders from Reliance Wood Preserving, Inc., Daniel Roy Dorman, McCoy Industries, Inc., and Reliance Treated Wood, Inc. The agreements would settle charges by the Commission that the proposed respondents, through certain acts and practices, misrepresented fire retardant treated wood, in violation of Section 5 of the Federal Trade Commission Act.

Fire retardant treated wood (FRTW) is wood that has been pressure treated with chemicals to make it more resistant to fire than untreated wood. Reliance Wood Preserving manufactures the FRTW; Reliance Treated Wood sells the wood; Daniel Roy Dorman is the owner of Reliance Wood Preserving; McCoy Industries is the parent company of Reliance Treated Wood.

The proposed consent orders have been placed on the public record for

sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

### I. The Proposed Complaint

A complaint has been prepared for issuance by the Commission with the proposed orders. It alleges that proposed respondents misrepresented the fire retardant qualities of their wood by specifically stating that the wood was fire retardant and by making statements, among others, that their FRTW had the following characteristics:

- Retards the spread of flames;
- Is self-extinguishing; and
- Minimizes fire hazards.

The Complaint also alleges that proposed respondents misrepresented the approvals of their FRTW by stating or implying that the wood was approved by such agencies as Underwriters Laboratories and the American Wood Preservers Bureau.

According to the complaint, all of the claims made above were not true because some of proposed respondents' wood was not fire retardant and some of the wood was not approved by the agencies as represented by proposed respondents.

### II. The Proposed Orders

Proposed respondents Reliance Wood Preserving and Daniel Roy Dorman signed a consent agreement separate from the consent agreement signed by McCoy Industries and Reliance Treated Wood. The agreement signed by Dorman and Reliance Wood Preserving contains an order that would prohibit them from making the claims alleged in the complaint, unless the claims are true. The order also would require Reliance Wood Preserving to notify all purchasers of FRTW that it manufactured prior to April 15, 1985, that some of the wood may not be fire retardant as represented.

The agreement signed by McCoy Industries and Reliance Treated Wood contains a proposed order that would prohibit them from making the claims alleged in the complaint unless the claims are true. Reliance Treated Wood is also required to furnish Reliance Wood Preserving, with a list of the customers to which it sold FRTW, prior to April 15, 1985, so that Reliance Wood Preserving, can give the notice described above to those buyers.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed order or to modify in any way their terms.

Emily H. Rock,  
Secretary.

### Dissenting Statement of Commissioner Strenio

Respondents in this case are processors and sellers of fire-retardant treated wood ("FRTW"). Because flames spread across FRTW more slowly than across untreated wood, many state and local building codes require the use of FRTW in parts of certain buildings (such as the roofs of hospitals, nursing homes, and apartment complexes).

The complaint in this case alleges that for at least a year (from January 1984 through January 1985), the respondents sold wood labeled as being of high FRTW quality when in fact that wood did not meet accepted standards. Further, the complaint charges respondents misrepresented that the wood was certified by an independent testing service when in fact that wood was not so certified.

Based upon my review of the record, I agree that there is reason to believe the complaint allegations. The potential safety hazard from these practices is obvious. Further, purchasers would be likely to believe respondents' claims because they were made explicitly in promotional materials as well as on the wood itself.

Despite the seriousness of these charges, the consent agreements pending before us do not include monetary consumer redress. While I commend staff for the diligence in developing this case, and applaud the provisions that prohibit future misrepresentations and require notification to certain purchasers and building inspectors regarding the allegedly defective wood, I cannot endorse the omission of any form of monetary redress.

It is true that a direct redress program probably is not feasible because of the practical difficulties of identifying injured parties and specifying the extent of any individual injuries. Nonetheless, total reliance upon private litigation to establish damages and obtain relief would at a minimum impose substantial transaction costs upon the class of purchasers and ultimate users of respondents' wood who may have been injured. Even commercial entities, with perhaps greater incentives and capabilities to litigate than individual consumers, could incur substantial time delays and heavy costs.

More importantly, we do not know how many purchasers would be precluded from any recovery because the statutes of limitation have expired in their states. Certainly residents of states whose statutory periods commence from the date of purchase (rather than from the date of discovery of a defect) will find themselves in a severe time bind if it is not already too late to file private lawsuits. Similarly, state law priority or other requirements could preclude recovery by injured parties.

Although a direct redress program may not be feasible here, alternative forms of redress may be available. For example, in this case the benefits of an arbitration program may outweigh its administrative costs. If so, it seems to me that the Commission would well serve the public interest if it required the respondents to arbitrate all claims. That would guarantee consumers a forum to bring their claims at less overall cost and without the risk of expired statutory time periods.

Because of the dangers to public safety from the misrepresentations alleged here, and the difficulty for consumers of detecting the existence and extent of any injury, I would reject the consents and insist upon monetary redress provisions. In their absence, I respectfully must dissent.

[FR Doc. 87-1027 Filed 1-15-87; 8:45 am]

BILLING CODE 6750-01-M

## DELAWARE RIVER BASIN COMMISSION

### 18 CFR Part 410

### Proposed Amendments to Comprehensive Plan and Water Code of the Delaware River Basin; Proposed Rules and Public Hearing

**AGENCY:** Delaware River Basin Commission.

**ACTION:** Proposed rules and public hearing.

**SUMMARY:** Notice is hereby given that the Delaware River Basin Commission will hold a public hearing to receive comments on two proposed amendments to its Comprehensive Plan and Water Code in relation to leak detection and repair and service metering. The hearing will be part of the Commission's regular business meeting which is open to the public.

**DATE:** The public hearing is scheduled for Wednesday, February 25, 1987, beginning at 1:30 p.m. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing. The comment closing date will be determined at the hearing.

**ADDRESSES:** Written comments should be submitted to Susan M. Weisman, Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628. The public hearing will be held in the Goddard Conference Room of the Commission's offices at State Police Drive, West Trenton, New Jersey.

**FOR FURTHER INFORMATION CONTACT:** Susan M. Weisman, Commission Secretary, Delaware River Basin Commission; Telephone (609) 883-9500.

**SUPPLEMENTARY INFORMATION:****Background and Rationale**

Leak detection and repair of public water supply systems is an effective water conservation measure which can significantly improve water supply system efficiency and can lead to substantial decreases in unaccounted-for water and the costs associated with lost water.

In order to undertake leak detection and repair programs, both source and service metering are needed to determine unaccounted-for water. On June 25, 1986 the Commission amended its Comprehensive Plan and Water Code by the addition of a requirement for basinwide source metering, recording and reporting of large surface and ground water withdrawals. However, current Commission policy on service metering applies only to new public water supply systems and extensions of existing public water supply systems.

Recognizing that complete and accurate metering of water withdrawn and delivered by public water supply systems, i.e., water supply systems serving the public (either publicly or privately owned), is integral to prudent water supply management, the Commission's Water Conservation Advisory Committee recommended on September 26, 1986 that the Commission expand its policy on service metering to ultimately require universal service metering. The Committee also recommended that the Commission adopt regulations requiring purveyors in the Basin to implement leak detection and repair programs.

The proposed leak detection and repair amendment would require all purveyors in the Basin distributing water supplies in excess of 100,000 gallons per day during any 30-day period to undertake leak detection and repair. The proposed service metering amendment, which would apply to the same group of purveyors, would expand current Commission policy on service metering to cover existing connections. The later proposal calls for a grace period of ten years for retroactive installation of service meters at existing connections.

The subjects of the hearing will be as follows:

Amendment to the Comprehensive Plan and Water Code of the Delaware River Basin Relating to Leak Detection and Repair.

**List of Subjects in 18 CFR Part 410**

Water pollution control.

**PART 410—[AMENDED]**

Article 2 of the *Water Code of the Delaware River Basin* includes

Commission policy relating to conservation, development and utilization of Basin water resources. It is proposed to:

Amend the Comprehensive Plan and Article 2 of the *Water Code of the Delaware River Basin*, which are referenced in 18 CFR Part 410 by the addition of a new subsection 2.1.6 to read as follows:

**2.1.6 Leak detection and repair.**

(1) Owners of water supply systems serving the public (purveyors) in the Delaware River Basin that distribute water supplies in excess of an average of 100,000 gallons per day (gpd) during any 30-day period shall develop and undertake a systematic program to monitor and control leakage within their water supply system. Such a program shall at a minimum include: periodic surveys to monitor leakage, enumerate unaccounted-for water, and determine the current status of system infrastructure; recommendations for rehabilitation and renewal required to maintain the system in good physical condition; and a schedule for the implementation of such recommendations. Each purveyor's program to monitor and control leakage shall be subject to review and approval by the designated agency in the state where the system is located.

"Unaccounted-for water" means water withdrawn by a purveyor at a source and not accounted for as being delivered to customers.

The designated state agencies are: Delaware Department of Natural Resources and Environmental Control; New Jersey Department of Environmental Protection; New York Department of Environmental Conservation, and Pennsylvania Department of Environmental Resources.

(2) Each purveyor that distributes in excess of one million gallons per day (mgd) shall submit its initial program to monitor and control leakage to the appropriate designated agency within two years and each purveyor that distributes between 100,000 gpd and 1 mgd shall submit its initial program to monitor and control leakage to the appropriate designated agency within five years of the effective date of this regulation or at such earlier date as shall be fixed by the designated state agency. Each purveyor shall prepare and submit a revised and updated program to monitor and control leakage every three years thereafter or at such earlier date as shall be required by the designated state agency. The designated state agency may require more frequent program submission from purveyors

with unaccounted-for water that is in excess of 15 percent.

(3) Any project approvals hereafter granted pursuant to Section 3.8 of the DRBC Compact or any renewal of a project approval shall be subject to the provisions of this regulation.

(4) To avoid duplication of effort and to insure proper enforcement of this regulation, the Executive Director shall enter into administrative agreements with each of the designated agencies authorizing such agencies to administer and enforce the provisions of this regulation to the extent practicable and to adopt such rules and regulations of procedure as may be necessary to insure the proper administration and enforcement of this regulation.

(5) This regulation shall be effective immediately.

Amendment to the Comprehensive Plan and Water Code of the Delaware River Basin Relating to Service Metering:

Amend the Comprehensive Plan and Article 2 of the *Water Code of the Delaware River Basin* which are referenced in 18 CFR Part 410 by the revision of subsection 2.50.1 to read as follows:

**2.50.1 Service metering.**

(1) Owners of water supply systems serving the public (purveyors) in the Basin that distribute water supplies in excess of an average of 100,000 gallons per day during any 30-day period shall install, or require to be installed, water meters incident to the provision or maintenance of service at the retail level.

(2) Meters shall be installed so as to record water use at all connections, including all commercial, industrial, municipal, institutional, and residential structures.

(3) Water use shall be recorded or measured by means of a metering device capable of measuring to within two percent of actual flow. Purveyors shall adopt and implement a program for periodic maintenance, calibration, and replacement of meters to ensure meter accuracy.

(4) Water charges collected by purveyors shall be based in part on metered usage.

(5) It is recommended that, at least once a year, each purveyor: (a) provide each metered residential customer with information on savings available through water conservation; and (b) explain different methods of residential water conservation and their cost-effectiveness, and the availability of water conservation devices.

(6) (a) All new connections shall be metered before occupancy of the

structure. (b) Unless otherwise provided by DRBC docket decision, installation of meters at existing connections shall be completed within ten years of the effective date of this regulation.

(7) To avoid duplication of effort and to insure proper enforcement of this regulation, the Executive Director shall enter into administrative agreements with the Delaware Department of Natural Resources and Environmental Control, New Jersey Department of Environmental Protection, New York Department of Environmental Conservation, and Pennsylvania Department of Environmental Resources, authorizing such agencies to administer and enforce the provisions of this regulation to the extent practicable and to adopt such rules and regulations of procedure as may be necessary to insure the proper administration and enforcement of this regulation.

(8) This regulation shall be effective immediately.

Delaware River Basin Compact, 75 Stat. 688.

Susan M. Weisman,

Secretary.

January 8, 1987.

[FR Doc. 87-972 Filed 1-15-87; 8:45 am]

BILLING CODE 6360-01-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

20 CFR Parts 626, 627, 628, 629, 630, and 631

#### Job Training Partnership Act: Implementation of Job Training Partnership Act Amendments of 1986 and Technical Corrections

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Employment and Training Administration announces its intention to go into rulemaking to implement the Job Training Partnership Act Amendments of 1986. The advance notice is intended to make interested persons cognizant of several specific issues relating to the new amendments. The rulemaking also will include a number of technical corrections and other clarifying rules.

**DATE:** Comments must be received on or before February 17, 1987.

**ADDRESS:** Written comments in response to this advance notice shall be mailed or delivered to the Assistant Secretary for Employment and Training,

U.S. Department of Labor, Room N4469, 200 Constitution Avenue NW., Room N4469, Washington, DC 20210, Attention: Mr. Robert N. Colombo, Director, Office of Employment and Training Programs. Commenters wishing the Department to acknowledge receipt of their comments must submit them by certified mail, return receipt requested.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert N. Colombo, Director, Office of Employment and Training Programs, Employment and Training Administration, U.S. Department of Labor, Room N4469, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 535-0577.

**SUPPLEMENTARY INFORMATION:** On October 13, 1982, the President signed the Job Training Partnership Act, Pub. L. 97-300 (JTPA or the Act). Amendments to JTPA were enacted in the Job Training Partnership Act, Amendments, Pub. L. 97-404 (December 31, 1982); the Carl D. Perkins Vocational Education Act, Pub. L. 98-524 (October 19, 1984); the Job Training Partnership Act Amendments of 1986, Pub. L. 99-496 (October 16, 1986); and the Homeless Eligibility Clarification Act, Title XI of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 (October 27, 1986). See also section 713(b) of Pub. L. 99-159, National Science, Engineering, and Mathematics Authorization Act of 1986, which contains technical amendments to the Carl D. Perkins Vocational Education Act that in turn amend JTPA.

Final regulations promulgated by the Department of Labor to implement the provisions of the Act were published in the *Federal Register* at 48 FR 11078 (March 15, 1983); 48 FR 48753 (October 20, 1983); 48 FR 49198 (October 24, 1983); and 48 FR 52438 (November 18, 1983). See 20 CFR Parts 626-636 and 684.

These regulations have been amended by *Federal Register* publication on two additional occasions: on April 26, 1985, at 50 FR 16473, as corrected on June 13, 1985, at 50 FR 24764; and on August 29, 1986, at 51 FR 30856. The recent enactment of the Job Training Partnership Act Amendments of 1986 establishes the need for further modification of the JTPA regulations to incorporate the revisions contained in the amended legislation.

#### Proposed Rulemaking and Other Actions

In order to provide comprehensive planning and policy guidance to States and service delivery areas (SDAs) regarding the JTPA amendments and other changes to the JTPA regulations, the Department of Labor (Department) intends to take the following actions:

1. A consolidated version of the Act, including the 1986 and previous amendments, with the Summary and Explanation of the JTPA Amendments of 1986 (Manager's Report), will be provided through a Training and Employment Information Notice (TEIN). This TEIN will be issued as soon as the consolidated version of the Act is available.

2. Administrative guidance will be provided on certain areas of the 1986 JTPA amendments where regulatory revisions are not required and early action is necessary or desirable. These include: (a) Issuance of a Training and Employment Guidance Letter (TEGL) to advise that the current two year Governor's Coordination and Special Services Plan (GCSSP) for Program Years (PY) 1986 and 1987 may be modified to address the use of JTPA section 202(b)(3) "six percent" funds consistent with the 1986 JTPA amendments for PY 1986, and that the current GCSSP must be modified to reflect the provisions of JTPA section 123 and of the amendments to JTPA made by the Homeless Eligibility Clarification Act, section 11004, for PY 1987; (b) Issuance of a TEGL providing guidance on the application of the "90 percent hold-harmless" in substate allocation of JTPA Title II-B funds and planning guidance pertaining to SDA plans for the Summer Youth Employment and Training Program, including the assessment of participants and the provision of basic and remedial education; (c) Issuance of a TEGL on Presidential awards for outstanding involvement in job training programs including the nature of the awards, criteria for qualification, and nomination procedures; and (d) Other issuances on provisions of the 1986 JTPA amendments not requiring regulatory revisions.

3. The Department's assessment is that only three areas addressed in the JTPA amendments of 1986 require rulemaking. Accordingly, rulemaking will be proposed in the following areas: (a) clarification on the uses of JTPA section 202(b)(3) "six percent" funds for technical assistance and post-program data collection; (b) requirements for SDAs' Title II-B Summer Youth Employment and Training Program plans; and (c) identification of dislocated workers under section 302(a)(4) of the Act regarding individuals who were self-employed (including farmers).

4. As programs and activities under the JTPA have developed and the States and SDAs have operated under the JTPA regulations, it has become clear

that certain sections of the regulations require clarification or technical changes. Rulemaking will be proposed to make needed technical changes, provide clarifications, or to address areas that have inadvertently resulted in problems. The proposed rulemaking may include such clarification, but will be limited to those items reflecting present policy or of a technical nature. Among the items to be considered are 20 CFR 629.1(b)(2), clarifying the applicability of the 45-day enrollment rule to JTPA Title II-B; 20 CFR 629.42, providing guidance to conform the regulations to the Single Audit Act of 1984, Pub. L. 98-502; and 20 CFR 629.45, dealing with closeout. This is not an exhaustive listing, and commenters are requested to identify additional areas that may require clarification or technical changes.

5. In addition to those areas to be addressed under item 4 above, there are other areas under the Act and regulations of a more substantive nature, which the Department intends to review given the opportunity presented by this more general need for regulatory revision. Proposed rulemaking may be published separately in the following areas: (a) fixed-unit price performance-based contracting; (b) reallocation of Title III funds; (c) minimum and maximum cost limitations; and (d) issues related to Section 205 of the Act.

#### Comments Invited

Interested persons are invited to submit such written data, views or arguments as they may desire on the overall approach and actions described above. Comments received on or before the closing date for comments will be considered as the Department proceeds with these actions. The proposals contained in this notice may be changed in light of comments received.

This advance notice is published as a method for consideration of the actions described above, particularly for the proposed rulemaking, by the public in general. By publishing this notice, the Department is not committing to the continuation, removal, or revision of the proposed course of action or proposed rulemaking.

Signed at Washington, DC, this 12th day of January, 1987.

Roger D. Semerad,  
Assistant Secretary of Labor.

[FR Doc. 87-1017 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-30-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 630

[Docket No. 86N-0027]

#### Additional Standards for Viral Vaccine; Poliovirus Vaccine Live Oral; Reopening of Comment Period

**AGENCY:** The Food and Drug Administration.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Food and Drug Administration (FDA) is reopening the comment period on a proposal to revise the existing biologics regulations governing the manufacture of Poliovirus Vaccine Live Oral. FDA is reopening the comment period to provide for the submission and consideration of written comments that may result from a meeting, announced elsewhere in this issue of the *Federal Register*, of FDA's Vaccines and Related Biological Products Advisory Committee to be held January 29, 1987, to discuss the proposed rule.

**DATE:** Written comments by February 13, 1987.

**ADDRESS:** Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

#### FOR FURTHER INFORMATION CONTACT:

Steve Falter, Center for Drugs and Biologics (HFN-362), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8046.

**SUPPLEMENTARY INFORMATION:** In the *Federal Register* of May 5, 1986 (51 FR 16620), FDA proposed to revise the regulations in 21 CFR 630.10 through 630.17 governing the manufacture of Poliovirus Vaccine Live Oral (oral poliovirus vaccine). FDA had reviewed these regulations and proposed amendments to update the regulations consistent with current scientific knowledge and to remove unnecessary regulatory burdens. FDA also proposed amendments that would make its standards more consistent with the requirements for manufacturing and testing oral poliovirus vaccine issued by the World Health Organization. The proposed amendments would facilitate the licensure for U.S. distribution of oral poliovirus vaccine currently meeting international standards of safety and effectiveness. Interested persons were given until July 7, 1986, to comment on the proposed rule. In response to a request by the licensed manufacturer of

oral poliovirus vaccine, FDA extended the comment period another 30 days, until August 6, 1986, by a notice published in the *Federal Register* of July 16, 1986 (51 FR 25710).

Among the comments submitted in response to the proposed rule, FDA received requests from the licensed manufacturer of oral poliovirus vaccine, from several scientists with expertise in vaccine manufacture and use, from two members of Congress that the proposed rule be presented for consideration by an advisory committee of experts. The comments contended that a meeting with an advisory committee would provide a public forum at which vaccine manufacturers and other experts could present their views regarding the rules and would offer an opportunity for experts to confirm that the proposed amendments will not impair the assurances of safety and effectiveness of oral poliovirus vaccine provided by the regulations. In fact, FDA had discussed the proposed amendments with FDA's Vaccines and Related Biological Products Advisory Committee (the Advisory Committee), on two occasions in sessions closed to the public. However, FDA has decided, in light of the public interest in the rulemaking and in response to these requests, to provide an opportunity for public discussion and consideration of the issues at an Advisory Committee meeting.

Elsewhere in this issue of the *Federal Register*, FDA is announcing a change in agenda of a previously announced meeting of the Advisory Committee to provide for a public discussion of the proposed rule at a meeting of January 29, 1987. Details of the meeting, including recommended procedures for those persons wishing to make an oral presentation to the Advisory Committee, are described in that notice.

FDA recognizes that new information may be received as a result of the Advisory Committee meeting that should be considered when the agency makes its final decision concerning the May 1986 proposed rule. In addition, FDA received several letters of comment after the end of the extended comment period. Accordingly, FDA is reopening the comment period for the May 1986 proposed rule for a period extending 2 weeks after the scheduled Advisory Committee meeting so that written comments received as a result of the meeting and comments already received after the closing of the earlier comment period may be available to FDA in its consideration of the rulemaking. Written comments already submitted either to the Docket Management Branch or to

other persons in FDA need not be resubmitted. Persons making oral presentations to the Advisory Committee should also submit their comments in writing as described below to assure full consideration by FDA.

Interested persons may, on or before February 13, 1987, submit to the Dockets Management Branch (address above) written comments regarding the May 1986 rule. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 14, 1987.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 87-1112 Filed 1-14-87; 2:38 pm]

BILLING CODE 4160-01-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[A-1-FRL-3142-9]

#### Approval and Promulgation of Implementation Plans; Rhode Island; Compliance Date Extension for Keene Corp.

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Rhode Island. This revision provides a final compliance date extension to control volatile organic compound (VOC) emissions from six paper coating lines at Keene Corporation in East Providence, Rhode Island.

This action is being taken in accordance with section 110 of the Clean Air Act.

**DATES:** Comments must be received on or before February 17, 1987.

**ADDRESSES:** Comments may be mailed to Louis F. Gitto, Director, Air Management Division, Room 2311, JFK Federal Building, Boston, MA 02203. Copies of the submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, JFK Federal Building, Room 2311, Boston, MA 02203; and the Department of Environmental Management, 75 Davis Street, Cannon Building, Room 204, Providence, RI 02908.

**FOR FURTHER INFORMATION CONTACT:** David B. Conroy, (617) 565-3252, FTS 835-3252.

**SUPPLEMENTARY INFORMATION:** On July 6, 1983 (48 FR 31026) EPA approved Rhode Island's Ozone Attainment Plan and incorporated it into the SIP. As part of Rhode Island's Ozone Attainment Plan, Rhode Island adopted Regulation No. 19, "Control of Volatile Organic Compounds from Surface Coating Operations." This regulation applies to facilities which emit more than 100 tons per year (TPY) of VOC emissions from paper, fabric or vinyl surface coating operations. Rhode Island's definition of VOC (Subsection 19.1.1) does not exempt any of the photochemically nonreactive solvents, including methylene chloride, which EPA allows to be exempted from VOC control. Since this definition does not exempt any of these solvents, Regulation No. 19 is more stringent than EPA's requirements for the control of VOC. A source subject to this regulation is required under subsection 19.3.1 to apply reasonably available control technology (RACT) to its VOC emitting processes by July 1, 1985. The RACT limitations specified in subsection 19.3.1 are equivalent to those specified in EPA's applicable Group I control techniques guideline (CTG) document.

On November 5, 1985, the Rhode Island DEM submitted a revision to its State Implementation Plan (SIP). This revision consists of a consent agreement between the DEM's Division of Air and Hazardous Materials and Keene Corporation (Keene) of East Providence, Rhode Island. This consent agreement was issued pursuant to provisions found in Rhode Island Regulation No. 19, subsection 19.3.3. The provisions found in subsection 19.3.3 allow the DEM to impose alternative compliance dates and emission limitations to those set forth in subsection 19.3.1 on a case-by-case basis.

Amendments to Rhode Island Regulation No. 19 which included subsection 19.3.3 were submitted to EPA by Rhode Island on May 14, 1982. EPA approved these amendments on July 6, 1983 (48 FR 31026) as part of Rhode Island's Ozone Attainment Plan. It was EPA's intention when approving subsection 19.3.3 that all compliance date extensions and emission limitation relaxations granted pursuant to this subsection by the DEM would be submitted to EPA as SIP revisions.

#### Summary of SIP Revision

Keene Corporation operates six existing paper coating lines (machine numbers 1, 2, 3, 4, 5, and tower coater) in East Providence, Rhode Island. The lines

are used for the coating of flexible circuit products, flexible electric insulators, computer control tapes, glass fabrics, and paper and polyester mats for flexible electrical insulators. Due to the nature of the substrates coated, Keene is subject to the control requirements of Rhode Island SIP Regulation No. 19, subsection 19.3.1 which requires that the VOC content of each coating employed at Keene be at or below 2.9 pounds VOC/gallon of coating (minus water) by July 1, 1985 except as provided in subsection 19.3.3. (Note: 2.9 pounds VOC/gallon of coating (minus water) is the emission limitation specified in EPA's CTG for such facilities.)

Pursuant to subsection 19.3.3, the Rhode Island DEM has submitted a revision providing an extension of the final compliance date for Keene. The DEM believes that the provisions of the consent agreement submitted as the SIP revision constitute an acceptable final compliance date extension for the source.

Keene has primarily employed solvent-based coatings in the coating lines. During 1979, the first year the regulation became effective, the VOC emissions from this source were 615 TPY. In 1985, the VOC emissions from this source were 474 TPY. Keene's emissions are primarily methylene chloride. Although EPA has stated that methylene chloride, because of negligible photochemical reactivity, can be exempted from VOC control in any SIP (44 FR 32042 and 45 FR 32424), the State of Rhode Island did not include methylene chloride as an exempt solvent in its approved Ozone Attainment Plan. Therefore, a surface coating source in Rhode Island which uses methylene chloride is subject to the same control requirements as those emitting photochemically reactive VOC. Under the proposed consent agreement, Keene will be required to implement alternative control technologies (i.e., hot melt application, aqueous coatings and high solids coatings) to meet the emission limitations in subsection 19.3.1 by December 1, 1989. This strategy should reduce approximately 90% of VOC emissions from this facility.

EPA realizes that the time frame Keene needs to implement these alternative control technologies generally exceeds what is considered to be expeditious under the Clean Air Act. However, as noted above, EPA has determined that methylene chloride has negligible photochemical reactivity and does not appreciably affect ambient ozone levels. Therefore, this compliance date extension will not interfere with

continued maintenance of the National Ambient Air Quality Standard (NAAQS) for ozone in Rhode Island. In addition, Keene emits less than 100 TPY of photochemically reactive VOC. Pursuant to EPA's VOC control policy for states that have demonstrated attainment of the NAAQS for ozone by December 31, 1982, Rhode Island is not required to adopt regulations which require the control of VOC emissions for facilities that emit less than 100 TPY of photochemically reactive VOC. Rhode Island Regulation No. 19 does not require controls from surface coating sources which emit less than 100 TPY of total VOC. Had Rhode Island exempted methylene chloride from VOC control as allowed by EPA policy, this source would emit less than 100 TPY of VOC and would be exempted from meeting the emission limits contained in Regulation No. 19, subsection 19.3.1. This compliance date extension is giving more time to Keene to come into compliance with a regulation that is presently more stringent than EPA's requirements. Therefore, it is EPA's position that the time frame outlined in the consent agreement is expeditious.

#### Proposed Action

EPA is proposing to approve the consent agreement submitted as a SIP revision request for Keene Corporation in East Providence, Rhode Island.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

The Administrator's decision to approve or disapprove the plan revision will be based on whether it meets the requirements of sections 110(a)(2)(A)-(K) and 110(a)(3) of the Clean Air Act, as amended, and EPA regulations in 40 CFR Part 51.

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

#### List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Hydrocarbons, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401-7642.

Dated: May 23, 1986.

Michael R. Deland,

Regional Administrator, Region I.

**Editorial Note:** This document was received at the Office of the Federal Register on January 13, 1987.

[FR Doc. 87-1011 Filed 1-15-87; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 52

[A-1-FRL-3142-8]

#### Approval and Promulgation of Implementation Plans; Rhode Island; Alternative RACT for Kenyon Piece Dyeworks

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Rhode Island. This revision provides an alternative reasonably available control technology (RACT) determination for control of volatile organic compound (VOC) emissions from twelve coating stations at Kenyon Piece Dyeworks in Kenyon, Rhode Island. The revision involves an extension of the final compliance date for four fabric coating stations and an alternative RACT emission limit for the other eight fabric coating stations. This has been determined to represent RACT for Kenyon by EPA. This alternative RACT determination is approvable because Kenyon Piece Dyeworks has demonstrated that it is economically infeasible to control its VOC emissions to the level set forth in the SIP and EPA's applicable control techniques guideline (CTG) document (EPA-450/2-77-008).

This action is being taken in accordance with Section 110 of the Clean Air Act.

**DATES:** Comments must be received on or before February 17, 1987.

**ADDRESSES:** Comments may be mailed to Louis F. Gitto, Director, Air Management Division, Room 2312, JFK Federal Building, Boston, MA 02203. Copies of the submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, JFK Federal Building, Room 2311, Boston, MA 02203; and the Department of Environmental Management, 75 Davis Street, Cannon Building, Room 204, Providence, RI 02908.

**FOR FURTHER INFORMATION CONTACT:** David B. Conroy (617) 565-3252, FTS 835-3252.

**SUPPLEMENTARY INFORMATION:** On July 6, 1983 (48 FR 31026), EPA approved Rhode Island's Ozone Attainment Plan and incorporated it into the SIP. As part of the attainment plan, Rhode Island adopted Regulation No. 19, "Control of Volatile Organic Compounds from Surface Coating Operations." This regulation applies to facilities which emit more than 100 tons per year (TPY)

of VOC emissions from either paper, fabric or vinyl surface coating operations. A source subject to this regulation is required under subsection 19.3.1 to apply RACT to its VOC emitting processes. The RACT limitations specified in subsection 19.3.1 are equivalent to those specified in EPA's applicable CTG document (EPA-450/2-77-008).

On November 5, 1985 and February 21, 1986, the Rhode Island DEM submitted a revision to its SIP. This revision consists of an administrative consent agreement between the DEM's Division of Air and Hazardous Materials and Kenyon Dyeworks (Kenyon) in Kenyon, Rhode Island. This consent agreement was issued pursuant to provisions found in Rhode Island Regulation No. 19, subsection 19.3.3. The provisions found in subsection 19.3.3 allow the DEM to impose alternative compliance dates and emission limitations to those set forth in subsection 19.3.1, on a case-by-case basis, provided that certain conditions are met. The process is commonly referred to as making an alternative RACT determination.

In order to qualify for an alternative RACT determination under subsection 19.3.3, a source must document at least 18 months prior to the final compliance date set forth in subsection 19.3.1 that the applicable emission limitations cannot be met. This documentation involves demonstrating both economically and technologically that neither coating reformulation nor the installation of a control system is feasible or even partially feasible.

EPA approved the provisions of subsection 19.3.3 for approval for alternative RACT determinations on July 6, 1983 (48 FR 31026) as part of Rhode Island's Ozone Attainment Plan. It was EPA's intention when approving subsection 19.3.3 that all compliance date extensions and emission limitation relaxations granted pursuant to this subsection by the DEM would be submitted to EPA as SIP revisions.

#### Summary of the Alternative RACT Determination

Kenyon operates fifteen fabric coating stations: Thirteen existing stations and two new stations. The VOC emissions from one of the existing stations is controlled with add-on control equipment, the twelve other existing stations are uncontrolled, and the two new stations installed in 1981 are controlled to meet the Lowest Achievable Emission Rate (LAER) requirements of Rhode Island's

approved new source review regulations.

Kenyon coats fabrics which are used in a variety of products such as clothing and outdoor equipment. Due to the nature of the substrates coated, Kenyon's existing coating stations are subject to Rhode Island SIP Regulation No. 19, subsection 19.3.1 which requires that the VOC content of each coating employed at Kenyon be at or below 2.9 pounds VOC/gallon of coating (minus water) by July 1, 1985. (Note: 2.9 pounds VOC/gallon of coating (minus water) is the emission limitation, or presumptive norm, specified in EPA's CTG document for such facilities.)

Pursuant to the provisions of subsection 19.3.3 for alternative RACT determinations, the Rhode Island DEM has submitted a revision providing Kenyon with an extension of the final compliance date for four fabric coating stations and an alternative emission limit for eight fabric coating stations.

The administrative consent agreement requires Kenyon to install add-on control equipment on four of its fabric coating stations by December 31, 1986. These four stations are required to meet the SIP Limit of 2.9 pounds VOC/gal coating (minus water) on a solids-applied basis. Further, the consent agreement requires Kenyon to maintain an emission limitation of 5.4 pounds VOC/gal coating (minus water) on its eight remaining, uncontrolled fabric coating stations by June 30, 1985.

EPA's review of extensive economic/financial information submitted by Kenyon has indicated that it is economically infeasible for Kenyon to control its VOC emissions by July 1, 1985 to a level equivalent to the presumptive norm set forth in EPA's applicable CTG document and subsection 19.3.1 of Rhode Island's fabric coating regulation.

Rather, EPA believes that the requirement for the application of add-on controls for four existing coating stations by December 31, 1986 and an emission limit of 5.4 pounds VOC/gallon coating (minus water) for the eight remaining uncontrolled stations as specified in the consent agreement constitute the application of RACT for Kenyon as expeditiously as practicable.

As further rationale for this action, it should be noted that Rhode Island has demonstrated that it has achieved sufficient VOC reductions necessary to show attainment of the National Ambient Air Quality Standard (NAAQS) for ozone by December 31, 1982. (However, the State of Rhode Island is still designated nonattainment due to transport of ozone from upwind sources into Rhode Island.) Therefore, this

variance for Kenyon will not interfere with "reasonable further progress" (RFP) towards attainment of the ozone standard in Rhode Island. Additionally, Rhode Island has determined there is an adequate margin for growth, below the level of emissions necessary to show attainment of the NAAQS for ozone, to absorb the increased emissions resulting from this alternative RACT. Each year Rhode Island recalculates that growth margin based on updated emission figures for all existing source and emissions from new sources. Rhode Island only allows increases in VOC emissions from its sources based on the availability of emissions in that growth margin.

#### Additional Provisions of the Consent Agreement

This consent agreement also contains a schedule which requires Kenyon to install add-on controls on the eight coating stations which are subject to the emission rate of 5.4 pounds VOC/gallon coating (minus water). This schedule is based on an analysis of when Kenyon will have the funds available to make the necessary capital expenditures to purchase and install add-on control equipment. The schedule proposes to install add-on control equipment in three phases. First, controls on four stations will be installed by December 31, 1988. Second, controls on two stations will be installed by December 31, 1989. Third, controls on the remaining two uncontrolled stations will be installed by June 30, 1990. At that point, all lines will be controlled and the alternative RACT limit will no longer apply.

EPA proposes to approve these additional provisions. The company and the State have agreed that the company can meet these additional requirements by the above specified dates. Therefore, EPA believes that they reflect the application of RACT as expeditiously as practicable.

#### Proposed Action

EPA is proposing to approve the administrative consent agreement submitted as a SIP revision by the DEM on November 5, 1985 and February 21, 1986, for Kenyon Piece Dyeworks in Kenyon, Rhode Island.

Under 5 U.S.C. section 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

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

The Administrator's decision to approve or disapprove the plan revision will be based on whether it meets the requirements of sections 110(a)(2)(A) through (k) and 110(a)(3) of the Clean Air Act, as amended, and EPA regulations in 40 CFR Part 51.

#### List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Hydrocarbons, Intergovernmental relations, Reporting and Recordkeeping requirements.

Authority: 42 U.S.C. 7401-7642.

June 9, 1986.

Michael R. Deland,  
Regional Administrator Region I.

Editorial Note: This document was received at the Office of the Federal Register on January 13, 1987.

[FR Doc. 87-1012 Filed 1-15-87; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 65

[Docket No. 9-86-34]; (A-10-FRL-3140-1)

#### State and Federal Administrative Orders Permitting a Delay in Compliance With State Implementation Plan Requirements; Proposed Delayed Compliance Order for Kwikset, Anaheim, CA

AGENCY: Environmental Protection Agency.

ACTION: Proposed Rule.

SUMMARY: EPA proposes to issue an administrative order to Kwikset. The Order requires the company to bring volatile organic compounds emissions from its metal parts coating lines in Anaheim, California into compliance with the South Coast Air Quality Management District's Rule 1107(6)(B), part of the federally-approved California State Implementation Plan (SIP). Because the company is unable to comply with these regulations at this time, the proposed order would establish an expeditious schedule requiring final compliance by March 15, 1987. Source compliance with the Order would preclude suits under the Federal enforcement and citizen suit provisions of the Clean Air Act for violation of the SIP regulations covered by the Order. The purpose of this notice is to invite public comment and to offer an opportunity to request a public hearing on EPA's proposed issuance of the Order.

DATES: Written comments and requests for a public hearing must be received on or before February 17, 1987. All requests

for a public hearing should be accompanied by a statement of why the hearing would be beneficial and a text or summary of any proposed testimony to be offered at the hearing. If there is a significant public interest in a hearing, it will be held twenty-one days after prior notice of the date, time, and place of the hearing has been given in this publication.

**ADDRESSES:** Comments and requests for a public hearing should be submitted to Chief of the Compliance Section, Air Management Division, U.S. EPA, 215 Fremont Street, San Francisco, California 94105. Material supporting the Order and public comments received in response to this notice may be inspected and copied (for appropriate charges) at this address during normal business hours.

**FOR FURTHER INFORMATION CONTACT:** Janet Crawford, Compliance Section, Air Management Division, U.S. EPA, 215 Fremont Street, San Francisco, California 94105 at (415) 974-0133.

**SUPPLEMENTARY INFORMATION:** Kwikset operates three metal parts coating lines in Anaheim, California. The proposed Order addresses volatile organic compounds (VOC) emissions from the coating lines at this facility, which are subject to the South Coast Air Quality Management District's (SCAQMD) Rule 1107, which is part of the Federally approved California SIP. Rule 1107 limits the VOC emissions from manufactured metal parts and products coatings. Rule 1107(6) specifies that Kwikset must be in compliance with the Rule by January 1, 1985. The Order requires final compliance with Rule 1107 by March 15, 1987 by conversion to the use of either complying liquid coatings or powder coatings, or by improving the efficiency of its existing paint application and emission control systems. Kwikset presently operates a thermal incinerator to control emissions from its paint spray booths and ovens. Ductwork and oven modification may be necessary to bring the source into compliance. In addition, existing electrostatic paint application systems may require modification to increase effectiveness. Kwikset will also continue its ongoing program of testing and evaluating complying coatings. The source has consented to the terms of this Order. The source has agreed to meet the Order's increments during the period of this informal rulemaking.

The proposed Order satisfies the applicable requirements of section 123(d) of the Clean Air Act (the Act). If the Order is issued, source compliance with its terms would preclude further EPA enforcement action under Section 113 of the Act against the source for

violations of the regulation covered by the Order during the period the Order is in effect.

Enforcement against the source under the citizen suit provisions of the Act (section 304) would be similarly precluded. However, Kwikset has been notified that it is subject to, and may be required to pay, a noncompliance penalty under Section 120 of the Act.

Comments received by the date specified above will be considered in determining whether EPA should issue the Order. Testimony given at any public hearing concerning the Order will also be considered. After the public comment period and any public hearing, the Administrator of EPA will publish in the **Federal Register** the Agency's final action on the Order in 40 CFR Part 65.

#### List of Subjects in 40 CFR Part 65

Air pollution control.

Source	Location	Order No.	SIP regulation involved	Date of FR proposal	Final compliance date
Kwikset Corp.	Anaheim, CA	9-86-34	South Coast AQMD Reg 4, Rule 1107.	1-16-87	Mar. 15, 1987.

[Note: The following appendix will not appear in the Code of Federal Regulations.]

#### APPENDIX

##### U.S. Environmental Protection Agency Region IX

In the matter of: Kwikset Corporation, Anaheim, California, Proceeding Pursuant to section 113(d) of the Clean Air Act, as Amended (42 U.S.C. 7413(d)), Order No. EPA86-\_\_\_\_\_.

This Order is issued this date pursuant to section 113(d) of the Clean Air Act, as Amended, 42 U.S.C. 7401 et seq. (hereinafter the "Act"), and contains a schedule for compliance, interim control requirements and reporting requirements. Public notice, opportunity for public comment and thirty days notice to the South Coast Air Quality Management District have been provided in accordance with section 113(d)(1) of the Act, 42 U.S.C. 7413(d)(1).

#### Findings

1. On October 30, 1985 the United States Environmental Protection Agency ("U.S. EPA", or "Agency") issued a Notice of Violation pursuant to section 113(a)(1) of the Act, 42 U.S.C. 7413(a)(1) to Kwikset for violation of the California State Implementation Plan (SIP), SCAQMD Rule 1107, at its coating lines at its Anaheim, California facility. Rule 1107(6)(B) prohibits any person from applying any coating to manufactured metal parts and products which contains

Dated: July 16, 1986.

John Wise,

Acting Regional Administrator, Region IX.

In consideration of the foregoing, it is proposed to amend 40 CFR Chapter 1, as follows:

#### PART 65—DELAYED COMPLIANCE ORDER

1. The authority citation for Part 65 continues to read as follows:

Authority: 42 U.S.C. 7413, 7601.

2. Section 65.90 is amended by revising the section heading and adding the following entry to the table to read as follows:

§ 65.90 Federal delayed compliance orders issued under section 113(d)(1), (3), and (4) of the Act.

volatile organic compound (VOCs) in excess of 275 grams per liter of coating, as applied, excluding water, when the coated products are dried at a temperature at or above 90 °C (194 °F). Rule 1107(6) requires that compliance with Rule 1107(6)(B) be achieved by January 1, 1985.

2. Kwikset owns and operates three coating lines which are subject to Rule 1107.

3. Pursuant to section 113(a)(4) of the Act, opportunity to confer with U.S. EPA representatives was extended to Kwikset, and a conference was held on November 15, 1985. At the conference the company described the progress it was making toward reducing VOC emissions from its coating lines by renovation of coating equipment, monitoring of its thermal incinerator, and other remedial steps.

4. The violation of SCAQMD Rule 1107 has continued beyond the 30th day after the date the Notice of Violation was received by the company.

5. It has been determined that although Kwikset has made significant efforts to achieve compliance with SCAQMD Rule 1107, it was not able to do so by the January 1, 1985 deadline in Rule 1107(6), and will be unable to achieve compliance prior to the dates set forth herein.

6. After a thorough investigation of all relevant facts, including the seriousness of the violations and the company's

good faith efforts to comply, and after opportunity for public comment, it has been determined that the schedule for compliance set forth in this Order is as expeditious as practicable, and that the terms of the Order comply with section 113(d) of the Act. Therefore, it is ordered and agreed that:

#### Compliance Program

A. Kwikset shall achieve and demonstrate compliance with Rule 1107 at the coating lines at its Anaheim, California facility. Kwikset shall comply by means of conversion to complying liquid coatings, modification or installation of new paint systems, continued operation of its thermal incinerator, or by means of the equivalency provision of Rule 1107(c) which provides for compliance by demonstrating that emission reductions obtained are at least equal to those which would be obtained by the use of coatings and operational techniques specified in Rule 1107.

B. Kwikset shall achieve and demonstrate compliance at its coating lines in accordance with the following schedule:

1. Investigate VOC capture efficiency for overall system.

a. Evaluate and repair all ductworks leading from ovens and spray booth to the thermal oxidizer—3/3/86.

b. Evaluate and test ovens for proper air circulation, proper amount of air makeup, heat distribution and mixing, etc.—4/3/86.

c. Evaluate existing electrostatic systems for proper grounding, voltage, etc.—5/5/86.

d. Evaluate, purchase and install paint application measuring equipment for all coating lines—6/16/86.

2. Implement modification for compliance.

a. Complete all modifications of ovens to improve overall VOC capture efficiency (This work will be concluded during Kwikset's annual shutdown period from July 21—August 1, 1986.)—8/4/86.

b. If necessary, complete installation of new electrostatic painting equipment. (Will also be installed during the annual shutdown period—8/4/86).

3. Review and measure efficiency of systems while in actual production operation; review of quality control of painted parts and scheduling of various tests, including transfer efficiency tests—10/6/86.

4. Conduct source test as approved by EPA to determine the percentage overall VOC capture efficiency—12/1/86.

5. Final modification, revisions and tests—1/15/87.

6. Second source test, if necessary—2/3/87.

7. Final compliance date—3/15/87.

8. Continued program for evaluation and testing of compliance coatings per SCAQMD Rule 1107—ongoing.

9. Continue evaluation of alternate coating systems, including powder coatings, water borne coatings, and other technologies—ongoing.

C. Every 30 days, commencing August 1, 1986 Kwikset shall submit to U.S. EPA a status report which states whether or not each compliance schedule milestone scheduled for completion during the previous month was achieved, and which contains a forecast of progress anticipated during the future month.

D. If final compliance is achieved by means of conversion to the use of complying coatings, either liquid or powder, Kwikset shall submit the following information to U.S. EPA: Identification of each coating material used, including the suppliers' name; costing identification code; coating density in pounds per gallon; solids content expressed as percent by weight; chemical composition of the volatile portion expressed as percent by weight of all solvents, both exempt and non-exempt; water content expressed as percent by weight of all solvents, both exempt and nonexempt; water content expressed as percent by weight; and total batch weight of as-received coating prior to solvent and/or solids addition at the coating line.

E. Notwithstanding other provisions to the contrary, Kwikset agrees that final compliance shall be expressly subject to a program of VOC testing to determine compliance with Rule 1107 in accordance with EPA instructions and procedures to be defined after the effective date of this Order. Kwikset agrees to promptly conduct such testing when the procedures have been issued by EPA.

F. Kwikset shall continue to maintain, at all times until final compliance is achieved, the level of emission reductions currently achieved at the time of the issuance of this Order.

G. All submittals, notifications, and reports to U.S. EPA pursuant to this Order shall be made to the Chief, Compliance Section, Air Management Division, U.S. EPA, 215 Fremont Street, San Francisco, California 94105.

H. Nothing contained in these Findings or Order shall affect the responsibility of Kwikset to comply with all other State or Local laws or regulations or other Federal laws or regulations.

I. Kwikset is hereby notified that its failure to comply with the dates specified in this Order may result in a

requirement to pay a noncompliance penalty in accordance with Section 120 of the Act, 42 U.S.C. 7420.

J. This Order shall be terminated in accordance with section 113(d)(8) of the Act if the Administrator or his delegate determines on the record, after notice and hearing, that an inability to comply with the applicable California SIP no longer exists.

K. Kwikset is protected by section 113(d)(10) of the Act against Federal enforcement action and citizen suits under section 304 of the Act for noncompliance with the California SIP until the date for final compliance in the Order is past, where Kwikset is in compliance with the terms of this Order.

L. Nothing herein shall be construed to be a waiver by the Administrator of any rights or remedies under the Clean Air Act, including, but not limited to section 303 of the Act, 42 U.S.C. 7503.

M. This Order is effective upon promulgation in the **Federal Register**.

Dated: December 15, 1986.

Judith E. Ayres,

Regional Administrator, U.S. Environmental Protection Agency.

[FR Doc. 87-449 Filed 1-15-87; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL MARITIME COMMISSION

### 46 CFR Part 580

[Docket No. 86-29]

#### Filing of Service Contracts and Availability of Essential Terms

**AGENCY:** Federal Maritime Commission.

**ACTION:** Proposed rule; further enlargement of time to comment.

**SUMMARY:** The Commission initiated this proposed rulemaking regarding service contract recordkeeping by **Federal Register** Notice of November 13, 1986 (51 FR 41132), and established January 12, 1987, as the date comments were due. This date was subsequently extended by the Commission until January 16, 1987. It has now come to our attention that certain conferences are having difficulty in resolving diverse membership views in their attempts to file comments responsive to this proposed rule. The suggestion has been made that an extension of 30 days for comments would be very beneficial for those parties and ultimately for the outcome of this proceeding. While the Commission believes that the availability of adequate service contract records is a matter of considerable urgency, we are willing to extend the

comment period until February 13, 1987, in the interest of reaching a final resolution of this proceeding more quickly and with the most meaningful input from affected interests.

**DATE:** Comments due on or before February 13, 1987.

**ADDRESS:** Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Rm. 11101, Washington, DC 20573.

**FOR FURTHER INFORMATION CONTACT:**

Robert D. Bourgoin, General Counsel, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5740.

Robert G. Drew, Director, Bureau of Tariffs, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5796.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-956 Filed 1-15-87; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[CC Docket 86-498; FCC 86-576]

#### Amendment of Rules Governing Procedures Regarding Formal Complaints Against Common Carriers

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FCC proposes to amend Part 1, Subpart E of its rules, which set forth procedures governing formal complaints against common carriers, to make them clearer, more understandable and efficient, and to develop a better record for disposition of complaints.

**DATES:** Comments must be received on or before February 17, 1987, and Reply Comments must be received on or before March 4, 1987.

**ADDRESS:** Federal Communication Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Deborah Lerner, (202) 632-4887.

This is a summary of the Commission's notice of proposed rulemaking, CC Docket No. 86-498, adopted December 24, 1986, and released, January 8, 1987.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, DC. The complete text of this decision

may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, Northwest, Suite 140, Washington, DC 20037.

#### Summary of Notice of Proposed Rulemaking

1. The Notice of Proposed Rulemaking proposes changes to the Commission's rules governing formal complaints which are filed against communications common carriers, now set forth in 47 CFR 1.721 *et seq.* The major changes proposed include permitting limited types of discovery in complaint cases, provision for requiring the filing of briefs and evidentiary submissions, formalizing the scheduling of status conferences in order to narrow issues or facilitate settlement, and inclusion of a section setting forth general pleading standards to require submission of legal and factual support in order to improve the overall quality of pleadings. The proposed revision also includes a reorganization and simplification of the major pleadings in such cases into complaints, answers (which incorporates a form of admissions and denials as to the truth of the matters raised), cross complaints, replies, and motions. The proposed rules are clearer than the present complaint rules, are easier to understand, and should promote a more complete record for prompt disposition of complaints with more efficient use of available staff resources. The improvements and clarifications to the procedural rules are indicated in the attached Appendix.

2. This is a nonrestricted notice and comment rulemaking proceeding. See § 1.1231 of the Commission's Rules, 47 CFR 1.1231, for rules governing permissible *ex parte* contacts.

3. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that the proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities because the proposed changes will not alter the existing obligations of parties to complaint proceedings to prove and support their positions.

4. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

#### Ordering Clauses

5. Accordingly, it is ordered, pursuant to sections 1, 4(i), 208 and 403 of the Communications Act of 1934, 47 U.S.C. 151, 154(j), 208 and 403, and section 553 of the Administrative Procedure Act, 5 U.S.C. 553, that there is issued a notice of proposed rulemaking.

6. It is further ordered, pursuant to § 1.415 of the Commission's Rules 47 CFR 1.415, that all interested persons may file comments on the matters discussed in the *Notice* and the proposed rule.

All relevant and timely comments and reply comments will be considered by the Commission before final action is taken with respect to the proposals contained herein. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

7. It is further ordered that, pursuant to §§ 1.51 and 1.419 of the Rules, 47 CFR 1.51 and 1.419, an original and five copies of all comments and replies, pleadings, briefs, or other documents shall be filed with the Commission. Copies of all filings will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street NW., Washington, DC 20554.

Federal Communications Commission.

William J. Tricarico,

Secretary.

#### Rules Changes

##### PART 1—[AMENDED]

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 1 would continue to read as follows:

**Authority:** Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

##### § 1.47 [Amended]

2. Section 1.47(b) would be amended to remove the phrase "including supplemental, cross, and amended complaints."

##### § 1.713 [Removed]

3. Section 1.713 would be removed.

4. The Table of Contents for Formal Complaints, §§ 1.720-1.734, is revised to read as follows:

## Formal Complaints

- Sec.  
 1.720 General pleading requirements.  
 1.721 Form and content.  
 1.722 Damages.  
 1.723 Joinder of complainants and causes of action.  
 1.724 Answers.  
 1.725 Cross complaints.  
 1.726 Replies.  
 1.727 Motions.  
 1.728 Formal complaints not stating a cause of action; defective pleadings.  
 1.729 Interrogatories to parties.  
 1.730 Other forms of discovery.  
 1.731 Other required written submissions.  
 1.732 Status conference.  
 1.733 Specifications as to pleadings, briefs, and other documents; subscription.  
 1.734 Copies; service; separate filings against multiple defendants.

5. Section 1.720 is added, §§ 1.721 through 1.734 are revised, and § 1.735 is removed to read as follows:

## § 1.720 General pleading requirements.

Complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards:

- (a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.
- (b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.
- (c) Facts must be supported by relevant documentation or affidavit.
- (d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.
- (e) Opposing authorities should be distinguished.
- (f) Copies should be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.
- (g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, should be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.
- (h) Specific reference should be made to any tariff provision relied upon in support of a claim or defense. Parties

are encouraged to provide copies of the tariff or relevant portions thereof.

## § 1.721 Form and content.

- (a) A formal complaint shall contain:
- (1) The name of each complainant and defendant;
  - (2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;
  - (3) The name, address, and telephone number of complainant's attorney, if represented by counsel;
  - (4) Citation to the section of the Communications act and/or order and/or regulation of the Commission alleged to have been violated;
  - (5) A complete statement of facts which, if proven true, would constitute such a violation;
  - (6) Complete identification or description, including relevant time period, of the communications, transmissions, services, or other carrier conduct complained of and nature of the injury sustained;
  - (7) The relief sought, including recovery of damages; and
  - (8) Whether suit has been filed in any court on the basis of the same cause of action.

(b) The following form may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

## Before the

## FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the matter of \_\_\_\_\_, complainant, v. \_\_\_\_\_, defendant.

File No. (To be inserted by the Common Carrier Bureau)

## Complaint

To: The Common Carrier Bureau

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows:

- (1) That (here state occupation, post office address, and telephone number of each complainant).
- (2) That (here insert the name, occupation and, to the extent known, address and telephone number of defendant).
- (3) That (here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

(Name of each complainant)

(Name, address, and telephone number of attorney, if any)

## § 1.722 Damages.

Damages will not be awarded in the event a complaint is granted unless specifically requested. Damages may be awarded, however, if a supplemental complaint is filed with the Commission, based on the finding of the Commission in the original proceeding:

- (a) Within the statutory periods of limitations as to actions contained in section 415 of the Communications Act; and
- (b) Within 60 days of a decision on the merits of the complaint.

## § 1.723 Joinder of complainants and causes of action.

(a) Two or more complaints may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.

(b) Two or more, grounds of complaints involving the same principle, subject, or statement of facts may be included in one complaint, but should be separately stated and numbered.

## § 1.724 Answers.

(a) Any carrier upon whom a copy of a formal complaint, supplemental complaint, amended complaint, or cross complaint is served under this subpart shall answer within 30 days of service of the pleading to which the answer is made, unless otherwise directed by the Commission.

(b) The answer shall advise the parties and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and a judgment may be entered against defendant in accordance with the allegations contained in the complaint.

(c) A party shall state concisely its defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny only the remainder. The pleader may make its denials as specific denials of designated averments or paragraphs, or may

generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits. When the pleader intends to controvert all averments, the pleader may do so by general denial.

(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are deemed to be admitted when not denied in the responsive pleading.

#### § 1.725 Cross complaints.

A cross complaint, seeking any relief within the jurisdiction of the Commission against any carrier which is a party (complainant or defendant) to the proceeding, may be filed by a defendant with its answer. For the purpose of this subpart, the term "cross complaint" shall include counterclaim.

#### § 1.726 Replies.

Within 10 days after service of an answer, a complainant may serve a reply which shall be responsive to matters contained in the answer or amended answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defenses set forth therein.

#### § 1.727 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

(b) Where the matter involved in the motion is one of procedure or discovery, the moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(c) A party opposing any motion concerning procedure or discovery shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(d) Oppositions and replies to oppositions shall be filed in accordance with the pleading and filing period requirements of § 1.45(a) and (b).

#### § 1.728 Formal complaints not stating a cause of action; defective pleadings.

(a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.

(b) Any other pleading filed in a formal complaint proceeding not in

conformity with the requirements of the applicable rules in this part may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

#### § 1.729 Interrogatories to parties.

(a) During the time period beginning with service of the complaint and ending 30 days from the date a reply is due to be filed, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. This procedure may be used for the discovery of any nonprivileged matter which is relevant to the complaint. Interrogatories may not be employed for the purpose of delay, harassment or to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the complaint.

(b) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission, except as provided in paragraph (c) hereof. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 14 days after service of the interrogatories, except that a defendant may serve answers or objections within 30 days after service of the complaint upon that defendant. On proper motion being made, the Commission may allow a shorter or longer time for the filing of answers or objections.

(c) Any party served with interrogatories may move the Commission for an order limiting or modifying the requested interrogatories within 10 days of service of such interrogatories, but shall respond within the period set forth in paragraph (b) above to any interrogatory not within the scope of this motion.

(d) Interrogatories and responses or objections thereto must be filed with the Commission in accordance with § 1.734.

#### § 1.730 Other forms of discovery.

(a) If a party believes it needs to engage in some form of discovery other

than by written interrogatories, such as the production of documents or the taking of depositions, the party may file a motion with the Commission requesting that such discovery be permitted. The motion should state with specificity the type of discovery requested, the information which is expected to be elicited, the relevance of such information to the resolution of the complaint, and must also comply with the requirements of § 1.727 hereof, pertaining to motions generally. Such motions will not be routinely granted except for good cause shown.

(b) The party from whom the discovery is sought may file an opposition to a motion seeking discovery within 10 days after the motion is filed. No reply is permitted.

(c) Motions seeking discovery may be filed only during the period beginning with the filing of the complaint and ending 30 days from the date a reply is due to be filed, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

#### § 1.731 Other required written submissions.

(a) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citation to the record, and supported by relevant authority and analysis.

(b) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

#### § 1.732 Status conference.

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of amendments to the pleadings, or of additional pleadings or evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of the matters in controversy by agreement of the parties;

(5) The necessity for and extent of discovery;

(6) The need and schedule for filing and exchanging briefs, and the date for further conferences; and

(7) Such other matters that may aid in the disposition of the complaint.

(b) While a conference normally will be scheduled after the replies has been filed, or after the filing date for replies if no reply has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(d) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

**§ 1.733 Specifications as to pleadings, briefs, and other documents; subscription.**

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by that party, or by the party's attorney. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose.

**§ 1.734 Copies; service; separate filings against multiple defendants.**

(a) Complaints may generally be brought against only one named carrier;

such actions may not be brought against multiple defendants unless the defendant carriers are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant must file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall supply three additional copies of the complaint for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The Commission will serve a copy of any formal complaint filed with it on the named defendant, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy the complaint or to answer the complaint in writing within the time specified in the notice.

(e) All subsequent pleadings and briefs filed in any formal complaint proceeding, including any supplemental, amended, or cross complaint, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceedings, together with a proof of such service in accordance with the requirements of § 1.47.

(f) The parties to any complaint proceeding may be required to file additional copies of any or all papers filed in the proceeding.

[FR Doc. 87-636 Filed 1-15-87; 8:45 am]

BILLING CODE 6712-01-M

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 20**

**Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands**

**AGENCY:** U.S. Fish and Wildlife Service, Interior.

**ACTION:** Notice of intent: request for proposals from Indian tribes desiring special migratory bird hunting regulations for the 1987-88 hunting season.

**SUMMARY:** The purpose of this notice is to request proposals from Indian tribes

that wish to establish special migratory bird hunting regulations for the 1987-88 hunting season, under the interim guidelines implemented for this purpose on September 3, 1985. The proposal should include the details described later in this document. The United States Fish and Wildlife Service also welcomes comments concerning this notice.

**DATE:** Proposals and comments should be submitted as soon as possible and must be received no later than June 10, 1987.

**ADDRESSES:** All proposals and comments should be submitted to: Director, FWS/MBMO, U.S. Fish and Wildlife Service, Department of the Interior, Room 536, Matomic Building, Washington, DC 20240.

A copy of the proposal should be sent to the appropriate Service Regional Office at the address shown near the end of this document. Also, tribes that request special hunting regulations for tribal members on ceded lands should send a copy of the proposal to official in the affected State(s).

**FOR FURTHER INFORMATION CONTACT:** Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240 (202) 254-3207.

**SUPPLEMENTARY INFORMATION:**

**Background**

In the September 3, 1985, *Federal Register* (50 FR 35762-35765), the United States Fish and Wildlife Service (Service) implemented interim guidelines for establishing migratory bird hunting regulations on Federal Indian reservations (including off-reservation trust lands) and ceded lands, and established special hunting regulations for certain tribes in the 1985-86 and 1986-87 hunting seasons.

The Service has kept the comment period open indefinitely on the guidelines but will employ them to establish special migratory bird hunting regulations for interested tribes for the 1987-88 hunting season.

The September 1985 guidelines for establishing special Indian hunting regulations were proposed on June 4, 1985 (50 FR 23459-23470 and particularly 23467-23468). They were developed in response to tribal requests for Service recognition of their reserved hunting rights, and for some tribes, recognition of their full wildlife management authority to regulate hunting by both tribal and nontribal members on their reservations. The guidelines include possibilities for: (1) On-reservation

hunting by both tribal and nontribal members, with hunting by nontribal members on some reservations to take place within Federal frameworks, but on dates different from those selected by the surrounding State(s); (2) on-reservation hunting by tribal members only, outside of usual Federal frameworks for season dates and length, and for daily bag and possession limits; and (3) off-reservation hunting by tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits. In all cases, the regulations established under the guidelines would have to be consistent with the closed season mandated by the 1916 Migratory Bird Treaty with Canada. The guidelines are capable of application to those tribes that have recognized reserved hunting rights on Federal Indian reservations (including off-reservation trust lands) and ceded lands. They also apply to establishing migratory bird hunting regulations for nontribal members on reservations and trust lands where tribes have gained full wildlife management authority through judicial decisions or by other means.

The Service generally believes that tribes have the authority to restrict hunting on their lands. The question of jurisdiction is more complex on reservations that include lands owned by non-Indians, and when the surrounding States may wish to establish regulations governing hunting by non-Indians on these lands. In such cases, the Service encourages the tribes and States to work toward mutually satisfactory regulations that would apply throughout the reservations. However, when appropriate, the Service will consult with a tribe and State with the aim of reaching mutually acceptable regulations. The Service also will consult jointly with tribal and State officials in the affected State(s) where tribes may wish to establish special hunting regulations for tribal members on ceded lands.

The Service recognizes that some changes in the guidelines may be necessary, and they should not be viewed as inflexible. Nevertheless, the Service believes that they provide

appropriate opportunity to accommodate the reserved hunting rights of Indian tribes while ensuring that the migratory bird resource receives necessary protection. The conservation of this important international resource is paramount.

The guidelines may be used by tribes desiring special migratory bird hunting regulations for tribal members. The guidelines are not required if a tribe wishes to observe the hunting regulations established by the State(s) in which the reservation is located. One of the guidelines provides for the continuation of subsistence harvest of waterfowl and other migratory game birds on reservations where it is a customary practice. The Service does not oppose this harvest, provided it does not take place during the closed period required by the status of the migratory bird resource. The Service will continue to consult with tribes that wish to reach a mutual agreement on hunting regulations for on-reservation hunting by tribal members. Two such agreements were reached with tribes for the 1986-87 hunting season.

#### Details Needed in Tribal Proposals

Tribes that wish to use the guidelines to establish special hunting regulations for the 1987-88 hunting season should submit a proposal that includes: (1) The requested hunting season dates and other details regarding regulations to be observed; (2) harvest anticipated under the requested regulations; (3) methods that will be employed to measure or monitor harvest (mail-questionnaire survey, bag checks, etc.); (4) steps that will be taken to limit level of harvest, where it could be shown that failure to limit such harvest would impact seriously on the migratory bird resource; and (5) tribal capabilities to establish and enforce migratory bird hunting regulations.

It should be noted that the regulations that will be established for Indian tribes will include both early and late hunting seasons. The early season begins on September 1 each year and includes species such as mourning doves and white-winged doves. The late season usually begins on or near October 1 and includes most waterfowl species. Because final regulations for tribes for

the 1987-88 hunting season must be established by September 1, 1987, the proposed and final rules for most tribal waterfowl seasons will be described in relation to the season dates, season length, and limits that will be permitted when final waterfowl hunting season frameworks are announced. For example, the daily bag and possession limits for ducks on most reservations in the Pacific Flyway will be shown as "Same as permitted Pacific Flyway States under final Federal frameworks". This procedure is necessary because the early season will be underway before final frameworks for the late season are announced. The final rule for tribes will include the actual season dates, bag limits, etc., for species included in the early season because the final Federal frameworks will be announced in time to include them in the final rule for tribes. In some instances, specific waterfowl regulations for a particular tribe or reservation also may be shown because they will be within the final Federal frameworks that will be established. However, for the reasons shown above, final regulations for most tribes will not include exact details for waterfowl.

A tribe that desires the earliest possible opening of the waterfowl season should specify this in the proposal, rather than request a date that might not be within the final Federal frameworks. Similarly, unless a tribe wishes to set more restrictive regulations than Federal regulations will permit, the proposal should request the same daily bag and possession limits and season length for ducks and geese that Federal regulations will permit the States in the flyway in which the reservation is located.

Pertinent details in proposals received from tribes will be published for public review in a later *Federal Register* document. Because of the time required for Service and public review, Indian tribes that desire special migratory bird hunting regulations for the 1986-87 hunting season should submit their proposals as soon as possible but not later than June 10, 1987. Tribal inquiries regarding the guidelines and proposals should be directed to the appropriate Service Regional Office.

## FISH AND WILDLIFE SERVICE REGIONAL OFFICES

[Address Regional Director, U.S. Fish and Wildlife Service]

States	Address	Telephone No.
California, Hawaii, Idaho, Nevada, Oregon, Washington.....	Lloyd 500 Bldg., Suite 1692, 500 NE Multnomah Street, Portland, OR 97232....	503/231-6118
Arizona, New Mexico, Oklahoma, Texas.....	P.O. Box 1306, 500 Gold Avenue SW—Room 1306, Albuquerque, NM 87103 ..	505/766-2321
Iowa, Illinois, Indiana, Michigan, Minnesota, Missouri, Ohio, Wisconsin.....	Federal Building, Fort Snelling, Twin Cities, MN 55111.....	612/725-3563
Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee.....	Richard B. Russell Federal Bldg., Room 1200, 75 Spring Street SW, Atlanta, GA 20303.....	404/331-3588
Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, Vermont, West Virginia.....	One Gateway Center, Suite 700, Newton Corner, MA 02158.....	617/965-5100
Colorado, Kansas, Montana, North Dakota, Nebraska, South Dakota, Utah, Wyoming.....	P.O. Box 25486, Denver Federal Center, Denver, CO 80225.....	303/236-7920
Alaska.....	1011 E. Tudor Road, Anchorage, AK 99503.....	907/786-3542

## List of Subjects in 50 CFR Part 20

Hunting, Wildlife.

Ronald E. Lambertson,

*Acting Director.*

Dated: January 9, 1987.

[FR Doc. 87-1033 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-55-M

# Notices

Federal Register

Vol. 52, No. 11

Friday, January 16, 1987

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

### Forest Service

#### Tongass National Forest AK; Record of Decision on 1986-90 Operating Period for the Alaska Pulp Corporation Long-term Sale Area and Final Environmental Impact Statement

##### The Decision To Be Made

This decision determines where and how 521 million board feet (mmbf) of timber will be made available for harvest to APC and the environmental consequences of those actions. The decisions include individual harvest unit, road, and terminal transfer facility (TTF) locations.

##### Existing Decisions

###### A. Alaska National Interest Lands Conservation Act (ANILCA)

ANILCA became law on December 12, 1980. Title VII of the Act designated Wilderness Areas on the Tongass National Forest, established a decadal timber supply goal from the Forest, and provided a funding mechanism for maintaining the timber supply. Title VIII required the Forest Service to evaluate the impacts of proposed actions on the subsistence use of the affected area.

###### B. Alaska Regional Guide

The Alaska Regional Guide was approved in December 1983. It established management direction and standards and guidelines for managing National Forest System land and resources within Alaska. The Regional Guide established a monitoring and evaluation program which is applicable to the 1986-90 operating period.

###### C. The Tongass Land Management Plan

The Tongass Land Management Plan (TLMP) was approved in 1979, and amended in 1982 and 1986. The TLMP contains the guiding land and resource management direction for the Tongass

National Forest. The TLMP, and accompanying final EIS, were prepared in conformance with the National Forest Management Act of 1976 and the National Environmental Policy Act of 1969. The TLMP established Land Use Designations (LUDs) for the Tongass National Forest. These LUDs reflect decisions that determined how the Tongass will be managed.

Management direction, as stated in the *Tongass Land Management Plan Amended Winter 1985-86* is:

##### Land Use Designation I (Wilderness)

*Purpose:* The original purpose of this designation was to recommend areas for inclusion in the National Wilderness Preservation System. Areas Designated by the Congress in 1980 under ANILCA as Wilderness will be managed as directed by the 1964 Wilderness Act, as amended.

##### LUD I Variation (Released Areas)

Areas Released from Wilderness Recommendation (LUD I)

These areas were considered by Congress for Wilderness designation during the development of ANILCA. Congress decided not to include these lands in the National Wilderness Preservation System, thus directing their release from LUD I status. The allocation of these areas to Land Use Designations will be determined through the land management planning process when this plan [TLMP] is revised. In the interim, these areas will be managed to permit their consideration for the full range of LUDs (including LUD I).

##### Land Use Designation II

*Purpose:* Areas allocated to LUD II are to be managed in a roadless state to retain their wildland character, but this would permit wildlife and fish habitat improvement and primitive recreation facility development.

##### Land Use Designation III

*Purpose:* Areas allocated to LUD III are to be managed for a variety of uses. The emphasis is on managing for both amenity and commodity oriented uses in a compatible manner to provide the greatest combination of benefits. These areas usually have high amenity values in conjunction with high commodity values. Allowances in calculated potential timber yield have been made to meet multiple-use coordination objectives.

##### Land Use Designation IV

*Purpose:* Areas allocated to LUD IV provide opportunities for intensive development of resources. Emphasis is primarily on commodity or market resources and their use. Amenity values are also provided for. When conflicts over competing resource uses arise, conflicts would most often be resolved in favor of commodity

values. Allowances in calculated potential timber yield have been made to provide for protection of physical and biological productivity.

The 825,150 acre 1986-90 final EIS study area is comprised of LUD I Released areas, LUD III areas, and LUD IV areas. The study area contains 1,651 acres designated LUD I Released, 141,600 acres designated for LUD III management and 681,899 acres designated for LUD IV management. Only a small portion of the 825,150 acres will be harvested.

This Record of Decision and the draft, supplemental draft, and final 1986-90 EIS tier to the decisions made in the TLMP; the TLMP final EIS and ROD; and the 1986 TLMP amendment with accompanying EA and Decision Notice. The TLMP, as amended, is the plan the Forest Service must implement.

##### D. The Long-term Timber Sale Contract

The 1986-90 final EIS, Appendix A, includes the Long-term Timber Sale Contract. In summary, the contract between the Forest Service and Alaska Pulp Corporation makes available for harvest 4.97 billion board feet of timber through the year 2011.

The Long-term Timber Sale Contract requires the Forest Service to make available approximately 521 MMBF of additional timber volume during the 1986-90 operating period and to schedule necessary support facilities necessary for timber harvest to take place.

Activities approved in earlier operating periods will continue. There is currently 145 mmbf of unharvested volume remaining from the 1976-81 and the 1981-86 Operating Periods. Of this unharvested volume, 66 mmbf, on Kuiv Island has been redesigned and analyzed for the 1986-90 operating period as new volume.

##### Alternatives Considered

Twenty alternatives were considered. Ten alternatives are outside of the scope of the decision to be made in the 1986-90 final EIS and were infeasible to implement, or otherwise unreasonable to consider in detail. Ten alternatives, considered in detail, disclose site specific proposals for harvest, road locations, and TTF locations.

##### A. Alternatives considered but eliminated from detailed study

Ten alternatives were eliminated from detailed study. For complete description of the alternatives and the reasons for not considering each in more detail see the 1986-90 final EIS, Section 2a. The

alternatives considered but eliminated are:

- Give Top Priority to Amenity Values.
- Reduce the level of harvest on the Tongass National Forest.
- Harvest timber volume class in direct proportion to their natural occurrence.
- Change TLMP Land Use Designations to maximize the use of specific resources.
- Add additional areas to the National Wilderness Preservation System.
- Do not schedule any timber harvest in Value Comparison Units (VCUs) 416, 417, 418, 419 or 420.
- Use Native Corporation timber to fulfill APC's needs.
- Select a no action alternative until existing carryover timber is harvested.
- Defer timber management and road construction activity in all areas where requested.
- Use the Tongass Timber Supply Funds to purchase logs from Native Corporations and use these logs to fulfill contractual obligations.

#### *B. Alternatives considered in detail*

Ten alternatives were considered in detail in the 1986-90 Final EIS. For a complete description of the alternatives refer to 1986-90 Final EIS, Section 2b. The alternatives are:

*Alternative A:* No Action defers new harvest and road building for the 1986-90 period.

*Alternative B:* Emphasizes the protection of anadromous fish habitat, deer winter range, other important wildlife habitats, and amenity resource values.

*Alternative C:* (proposed by Southeast Alaska Conservation Council) Minimizes new logging entry into VCUs within Kadashan; Poison and Fick coves; Deep, Ushk, and Patterson bays; Mud Bay; Finger Creek; North Arm of Hoonah Sound; and Lisianski.

*Alternative D:* (proposed by Alaska Pulp Corporation) Emphasizes short-term economic return to the purchaser by reentering previously roaded areas, enlarging existing units, and using highlead logging systems to reduce costs.

*Alternative E:* Combination of alternatives that maintain short-term economic return to the purchaser with an intermediate level of harvest in wildlife habitats and adjacent to Class I fish streams.

*Alternative F:* Similar to Alternative E except it schedules no harvest in Kadashan.

*Alternative G:* (proposed by the City of Hoonah and Huna Totem and

Sealaska Native Corporations) Emphasizes stabilizing the economy of Hoonah by reducing the volume of harvest in the north Chichagof area and optimizing volume transferred over the Long-Island transfer facility. In the remainder of the study area it emphasizes short unconnected road systems and more terminal transfer facilities.

*Alternative H:* (Developed in consultation between Alaska Pulp Corporation and the Forest Service) Provides the highest economic returns to the purchaser by proposing new areas for harvest, reentering previously roaded areas, redesigning carryover volume, enlarging clearcut size in higher volume stands, and reducing haul costs by proposing a road connection through VCU 405.

*Alternative I:* Emphasizes economic returns to the purchaser as in H but reduces the amount of harvest in select areas, for fisheries and wildlife habitat, recreation, and visuals. Responds to issues raised on the draft EIS.

*Alternative J:* (Preferred Alternative) Emphasizes the economic returns to the purchaser as in H but further reduces the amount of harvest in important areas, based on public concern for the potential impact of harvest on fisheries and wildlife habitat, recreation, and visual resources. Responds to issues raised during comment period on the supplemental draft EIS.

#### **Environmentally Preferable Alternative**

There is no single factor which can be used to indicate environmental preferability. Maintaining the basic productivity of the land and water is vitally important. Public comment on the 1986-90 final EIS related to environmental quality. Maintaining quality fisheries and wildlife habitat is of most concern. All the alternatives maintain soil, air, water and fisheries habitat quality.

The public and the Forest Service are interested in maintaining quality wildlife habitat for brown bear, Sitka black-tailed deer, and many other wildlife species. Timber harvest activities do alter the condition of these habitats. The primary concern expressed by public comment on the 1986-90 final EIS appears to be the effect on deer winter range. Deer winter range is recognized as the critical factor for maintaining deer populations during abnormally severe winters. All of the action alternatives propose some level of harvest in deer winter range. However, all alternatives maintain adequate habitat carrying capacity and include mitigation measures necessary to meet

current and projected needs of Southeast Alaskans.

If we took into consideration only potential effects to soil, air, water, and fish and wildlife habitat quality, the environmentally preferred alternative would be Alternative A, the No Action Alternative. The No Action Alternative defers all new timber harvest, road construction, and TTF development until after 1990.

#### **The Decision**

##### *A. Considerations in Deciding*

In reaching my decision, I considered a variety of factors. Included were: meeting the commitments of the government in accordance with the 50-year timber sale contract held by APC; the role of this timber sale in the economy of Southeast Alaska; the role of this timber sale in the implementation of TLMP and the continuing sound management of the National Forests; community stability; and the response by the public to this EIS including the comments received since the FEIS was issued. A more complete discussion of the issues and environmental impacts addressed in the 1986-90 Final EIS, which were all considered in reaching my decision, appears in that document.

The contract held by APC obligates the government to provide 4.97 billion board feet of timber over the 50-year life of the contract; approximately 104 million board feet annually or 521 million board feet for each 5-year operating period. This volume is to be offered from the area analyzed in this EIS. The study area is comprised of a primary sale area (known contractually as Allotments B&H) and a contingency area (portion of Kuiu Island and an area known contractually as Allotment A-1). The primary sale area considered in this EIS consists of Value Comparison Units (VCUs) 243 (part), 246, 247, 249, 262, 270, 280-285. The timber to be offered must come from some mix of cutting units in the primary sale area and the contingency area.

In arriving at this decision I carefully considered the stipulations for the primary sale area set forth in Sec. 7a of the contract. Because of Sec. 7a, I gave particular attention to Alternative D, Alternative H, and Alternative J as they related to the primary sale area. That is not to say that I did not consider other alternatives as they related to the primary sale area, but these alternatives were particularly significant since, in accordance with the contract, Alternative D represented the contractor's proposal, Alternative H represented the results of negotiations

between the contractor and the Forest Service, and Alternative J represented modification of Alternative H as a result of further public comment and additional resource considerations.

I was particularly concerned that this decision reflected the contractor rights and responsibilities; the government's interests and obligations; and insofar as possible, comments received from the public. This all to be achieved within the principles of sound land management, the Tongass Land Management Plan, Regional guide, and law and regulation.

In determining where and how to provide the supply of timber needed to meet the contractual commitments, the cost to the company of logging and the cost of investments, sale preparation, and sale administration to the government were important considerations. The timber sale contract ensures the long-term availability of timber for harvest; it does not, however, guarantee that timber made available be economic in all market conditions. The economics of the timber supply made available is an important factor in the maintenance of a healthy timber industry and the resulting contribution to the economy and community stability of Southeast Alaska. Obviously, though, the timber supply made available must comply with the principles of sound land management, and the laws, regulations, and guidelines that govern the long-term management of the National Forests.

The alternative identified in this decision minimized logging costs to the extent possible consistent with sound land management. For example, wherever possible, the size of clearcuts has been enlarged consistent with the Regional Guides, the volume per mile of road constructed has been increased by scheduling harvest areas along existing roads and the harvest areas have been located near existing logging camps.

The harvest activities and primary manufacturing associated with this 5-year operating plan is expected to provide about 550 jobs and is projected to generate annual wages in Southeast Alaska of approximately \$23 million and a total business income of slightly over \$100 million annually. This represents a significant contribution to the area's economy and emphasizes the importance of continued maintenance of a viable timber program in Southeast Alaska.

This operating plan continues the role played by the long-term contracts in the development and implementation of the Tongass Land Management Plan. The Plan was the basis of the timber supply provisions of ANILCA. The APC contract makes up about 23 percent (104 million board feet annual average) of the

ANILCA timber output goal. The remainder of the timber output goal is achieved through a 50-year contract with Ketchikan Pulp Company and an independent sale program serving other timber purchasers, as well as Ketchikan Pulp Company and APC.

The timber output goals are only one part of the carefully crafted balance of goals and objectives set forth in TLMP for the various resources of the National Forest. Resources output goals for recreation, fisheries, and timber resources all contribute significantly to the economy of Southeast Alaska.

I have analyzed the effects on communities within the area of influence of the long-term sale and have considered the effects that alternate management decisions may have on lifestyles, population, attitudes, beliefs, and values. I have also considered the effects on those communities that were dependent on the timber resource, commercial fisheries resource, and those communities with a subsistence lifestyle tied to traditional and customary uses of fish and wildlife resources. I carefully considered each alternative and potential effects each may have on the social and economic stability of the communities in the study area.

The communities of Hoonah, Sitka, Petersburg, and Wrangell are dependent on the timber industry as a major contributor to their economy. Hoonah expressed a concern that timber harvest be scheduled to prevent a boom and bust economy. Hoonah was concerned because the community realized that heavy timber harvest in the 5-year operating period would expand their economy for the short-term, but would not provide for long-term stability. Hoonah recommended Alternative G displayed in the supplemental draft and final EIS's, which proposed the harvest of 173.6 MMBF of new timber volume in the Hoonah area.

Alaska Pulp Corporation is a primary employer in the City and Borough of Sitka. They provide direct and indirect employment to Sitka as well as being an asset to other businesses through tax assessment.

The Wrangell sawmill is a primary contributor to the Wrangell economy. The mill receives nearly 100 percent of the timber it processes through this long-term timber sale contract. It is dependent on high quality sawlog timber, which it uses to produce cants for export. By-products from the canting process are chipped. Chips are transported by barge to Sitka and used as raw material in pulp production. About half of the timber in the study area is sawlog quality and half is pulp quality. I considered in my evaluation of

alternatives the type of timber included in each, a combination of high value Sitka spruce sawlogs and pulp material would be the best choice to maintain both aspect of the Southeast Alaska timber market.

Petersburg supplies goods and services to logging operations on Kuiu and surrounding islands. The sawmill in Petersburg contributes to the community's economic well-being. Lumber by-products from the mill in Petersburg are sometimes sold to the APC pulpmill in Sitka.

The remaining communities in the study area have little direct dependency on the timber industry, and many of the individuals in these communities see timber harvest as a threat to their lifestyles.

All of the communities in and near the study area, Angoon, Elfin Cove, Excursion Inlet, Gustavus, Hoonah, Juneau, Kake, Mt. Bether Bible Center, Pelican, Petersburg, Point Baker/Port Protection, Port Alexander, Sitka, Tenakee Springs, and Wrangell, are dependent to some extent on commercial fish harvest, and utilize fish and wildlife resources in a subsistence lifestyle or recreation. The management of the renewable natural resources of timber, fish, habitat, wildlife habitat and recreation can be accomplished in a compatible manner. In many instances the management is not just compatible but is synergistic. I have a commitment to proper multiple-use management and intend to maintain and enhance anadromous fish habitat, while providing a timber resource base. I have also carefully considered wildlife habitat needs. It is my intent to ensure that there is no significant restriction of opportunity for rural residents to carry on a subsistence lifestyle as a result of implementing actions proposed in this Record of Decision. Available information confirms that no significant restriction will occur as a result of implementing the alternative I have selected.

There was considerable public comment received during the comment periods provided. The comments received ranged from form letters with check-off comments to emotional, handwritten letters representing a broad cross section of publics; individuals, other federal and state agencies, local communities, the contractor, and various special interest organizations.

I carefully considered how to provide the needed timber, how to respond to the goals of local communities, and how to protect the environment on the National Forest.

A number of comments suggested changing land allocations to add more land to the 5.4 million acres of Congressionally designated Wilderness. Others stopped short of suggesting wilderness classification but did request deferral of many areas. Examples include the request of the community of Tenakee Springs to defer all harvesting in Tenakee Inlet, an area some 45 miles long and 15 miles wide. Another example is the request of the community of Pelican to defer harvest in the Lisianski River drainage. Reasons cited included concern for deer winter range, visual quality, fisheries, and impacts of subsistence lifestyle, as well as the less tangible emotional or esthetic dislike by some for logging in general. In some cases the concerns identified actual resource conflicts while in other cases it was a matter of perception and the perceived conflicts were not scientifically valid. It was possible in some cases to accommodate deferral requests while in others it was not. A number of comments requested that units be selected for harvest that provided the most economically efficient timber. Again, in some cases it was possible to accommodate the requests and other cases it was not.

Finally, in arriving at this decision I also considered comments which were received since the FEIS was issued from the contractor, SEACC, and the Greater Sitka Chamber of Commerce, Inc., as well as others. I have responded to these comments to the extent possible.

#### B. Alternative J

My decision is to implement Alternative J as displayed in the 1986-90 Operating Period for the Alaska Pulp Corporation Long-term Sale Area Final Environmental Impact Statement, with exceptions in VCUs 202, 212, 213, 214, 215, 237, 249, 262, 279, 280, 283, and 419 as described in the specific discussion for each VCU.

This decision schedules for harvest 525.6 MMBF of timber from 298 cutting units. This represents a harvest of 19,981 acres of a total of 825,000 acres considered or 2.4 percent of the study area. It schedules 169 miles of road construction, and selects 2 new TTF sites. General harvest areas are displayed on Map 1. Site specific timber harvest unit and road locations and TTF locations are displayed in 1986-90 Operating Period for the Alaska Pulp Corporation Long-term Sale Area Final Environmental Impact Statement Maps, document.

Construction of the TTF in VCU 213, which was identified in the 1981-86 Operating Period analysis is not being scheduled.

Alternative J, as modified by this decision, provides the best combination of resource uses when considering: commitments of the Long-term Timber Sale Contract, providing for community stability, and opportunity to respond to deferral requests. This has enabled me to respond to many concerns and still defer harvest in many controversial areas.

The decision complies with the conditions and intent of the APC Long-term Contract. Alternative J as modified by this decision differed from the negotiated Alternative H due to changes made to respond to public concern, deer, winter range and fisheries habitat protection, and for other resource considerations. The changes made to get from the negotiated Alternative H to modified Alternative J include deferral of units in Allotments B and H that APC did not agree with. Implementation of this change is accomplished as a reservation under the authority given the Regional Forester in Sections 1c and 1d5 of the timber sale contract. The units reserved include all harvest units shown in the final EIS for Alternative J in VCU 249 and 262. These reserved units may be available for harvest in future five-year operating periods.

To replace the reserved volume in Allotments B and H, I have revised Alternative J as noted in the detail discussion for each VCU, after carefully considering and determining that these added units can be harvested in an environmentally and sound manner.

Alternative J as modified is the second best alternative in terms of financial feasibility.

VCUs were selected and harvest units modified to protect fish and wildlife habitat. The continuation of the opportunity for subsistence uses by rural residents of Alaska is ensured by Alternative J as modified.

The decision proposes a minor increase, about 12 MMBF, over the level of harvest of new timber proposed in Alternative G. I believe this level of harvest meets the community of Hoonah objectives to maintain economic stability.

#### C. General Harvest Map.<sup>1</sup>

##### D. Chichagof Island

Hoonah Area (VCUs 192, 193, 194, 195, 196, 197, 198, 200, 201, 202, 203, 204, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, and 218). Alternative J as modified within this area, will result in a harvest of about 185 MMBF.

<sup>1</sup> Map available from the Office of the Regional Forester or any National Forest office in Alaska.

Harvest and Road Construction in VCUs 192, 193, 194, 195, 196, 197, 198, and 200 (North West Chichagof: Goose Island, Mud Bay, Loon Lakes, Point Adolphus, Chicken Creek, Flynn Cove and Humpback Creek Areas) are deferred for the 1986-90 Operating Period. Volume in these VCUs is not currently needed to maintain existing logging camps, and is economically less efficient than other volume available in the Hoonah Area.

VCU 201, (Neka Bay), Harvest 7.6 MMBF of timber and build .2 miles of road.

VCU 202 (Port Frederick), Revise by adding harvest unit 12 from Alternative D for an additional volume of 3.3 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 13.9 MMBF of timber and involves construction of 2.5 miles of road.

VCU 203 (Seagull Creek), Harvest 18.9 MMBF of timber and build 7.7 miles of road.

VCU 204 (Game Creek), Harvest 18.3 MMBF of timber and build 11.5 miles of road.

VCU 208 (First No. 2), Harvest .5 MMBF of timber along previously planned roads.

VCU 209 (Whitestone Harbor), Harvest 11.4 MMBF of timber and build .5 miles of road.

VCU 210 (Iyouktug), Harvest 37.6 MMBF of timber and build 16.3 miles of road.

VCU 211 (Point Augusta), Defer harvest and road construction for the 1986-90 Operating Period.

VCU 212 (Gypsum Creek), Revise by adding harvest units 12, 13, and 14 from Alternative D for an additional volume of 3.4 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 37.6 MMBF of timber and involve construction of 15.8 miles of road.

VCU 213 (Iyoukeen Peninsula), Revise by adding harvest units 3 and 4 from Alternative D for an added volume of 1.8 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 4.2 MMBF of timber and involve construction of 2.5 miles of road. Construction of the TTF displayed in the 1981-86 Operating Period analysis is not scheduled.

VCU 214 (Seal Creek), Harvest 7.3 MMBF of timber along the existing road. Build one mile of road west from unit 10 which is a change from Alternative J. This will permit linking the existing road in VCU 215 (Freshwater Road system) to the existing road in VCU 214.

VCU 215 (Freshwater Bay), Revise by adding harvest units 12, 13, and 17 from Alternative H for an added volume of 3.6 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 13.2 MMBF of timber and involve construction of 7.2 miles of road. Included is construction of a road from the existing road in VCU 215, Freshwater Road system, to the existing road in VCU 214. Concern was expressed during the development of the final EIS that the road would encroach on a number of eagle nest buffer zones. Road location fieldwork indicates that the road will not encroach on the eagle nest buffer zones.

VCU 216 (Freshwater Creek), Harvest 4.3 MMBF of timber and build 1.7 miles of road. There is considerable controversy over connecting the Game Creek road system out of Hoonah, with the Indian River road system, near Tenakee Springs. The two road systems will not be connected as part of the 1986-90 operating period decision. Any decision on whether to complete the connection will not be made until further environmental analysis is completed as part of the TLMP revision EIS or APC 1991-95 operating period EIS process. Further analysis and a decision regarding the connection may have to occur sooner if reasonable access to the Indian River drainage from the existing Indian River road is closed.

VCU 217 (Kennel Creek), Harvest 3.0 MMBF of timber and build .5 miles of road.

VCU 218 (Pavlof River), Harvest 8.3 MMBF of timber and build 1.1 miles of road.

Tenakee Inlet (VCUs 219, 230, 235, 236, and 237) Tenakee Springs has requested that all harvesting in Tenakee Inlet be deferred. I have accommodated their request to the extent possible.

VCU 219 (East Point), Harvest 2.4 MMBF of timber and build 1.1 miles of road.

VCU 230 (In-between), Defer harvest and road construction for the 1986-90 operating period.

VCU 235 (Kadashan), Defer further harvest and road construction for the 1986-90 operating period. The partly completed road to the False Island-Sitkoh Bay area from Corner Bay will be completed if resolution of the current lawsuit regarding this road allows. Limited timber salvage harvest may occur along this road during the 1986-90 period after further environmental analysis.

VCU 236 (Corner Bay), Harvest 4.6 MMBF of timber and build 1.9 miles of road.

VCU 237 (Trap Bay), Revise by adding harvest unit 13 from Alternative H for an added volume of 0.8 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 5.2 MMBF of timber along previously planned roads. The previously planned TTF in VCU will not be constructed.

Kook Lake, Sitkoh Bay (VCUs 238, 239, 242, 243)

VCU 238 (South Passage), Harvest 13.1 MMBF of timber and build .8 miles of road.

VCU 239 (Kook Lake), Harvest 11.3 MMBF of timber and build 6.8 miles of road. The road construction in this VCU will connect existing roads in the Corner Bay road system with the previously planned roads in Trap Bay, allowing construction deferral of the TTF in Trap Bay.

VCU 242 (White Rock), Defer harvest and road construction for the 1986-90 Operating Period.

VCU 243 (Sitkoh Bay), Defer harvest and road construction for the 1986-90 Operating Period. The Forest Service decision to defer timber harvest and road construction in Kadashan Drainage make the timber volume in VCU 243 economically inefficient. Deferring VCU 243 was proposed by APC September 25, 1985. The Forest Service concurred.

Poison Cove to South Arm of Hoonah Sound Area, (VCUs 246, 247, 279, 280, 281, 282, 283, and 285). This area is controversial, and each of the VCUs has been requested for deferral. This area is also part of the APC Contract Allotment Areas B and H, in which APC has certain rights to select areas for harvest. I have decided to defer activity in several of these VCUs and have made other changes to accommodate other resources.

VCU 246 (Broad Island), Defer harvest and road construction for the 1986-90 operating period. Timber harvest and road construction, for the 1986-90 Operating Period, was deferred at the request of APC. APC stated, on September 25, 1985, the volume is not economically efficient.

VCU 247 (Finger Creek), Defer harvest and road construction. Timber harvest and road construction was deferred for the 1986-90 Operating Period at the request of APC. APC stated, on September 25, 1985, the volume is not economically efficient.

VCU 279 (Poison Cove), Revise by deleting harvest units 1, 2, 4, and 5 from J and adding harvest units 1, 2, 3, and 4 from Alternative D for an added harvest volume of 1.1 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 7.1 MMBF

and will involve construction of 3.3 miles of roads and construct a TTF at Site 1 on the south side of the Cove.

Concerns regarding riparian and fisheries habitat in harvest unit 3 will be protected during on the ground layout of the unit.

VCU 280 (Deep Bay), Revise by deleting harvest units 6 and 7 and substituting harvest units 6 and 7 from Alternative D for an added volume of 1.7 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest volume for this VCU will be 17.6 MMBF and will involve 11.9 miles of road construction. There are potential conflicts with a Native Allotment Claim near the head of Deep Bay. To avoid conflicts, harvest of units and the roads and the log transfer facility associated with those units for the 1986-90 operating period are deferred. Timber harvested in Deep Bay will be hauled to the TTF in Poison Cove. The road systems between Deep Bay and Poison Cove were connected. To make the road connection and related timber harvest more economically efficient, additional harvest units have been added in developing Alternative J.

VCU 281 (Ushk Bay), Defer timber harvest, and TTF construction. Build .5 miles of road for the 1986-90 operating period, to facilitate harvest in VCU 280.

VCU 282 (Fick Cove), Defer harvest and road construction for the 1986-90 operating period.

VCU 283 (Patterson Bay), Revise by deleting harvest unit 1 and substituting harvest unit 1 from Alternative H for an added volume of 0.6 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest volume for this VCU will be 26.0 MMBF and involves construction of 14.0 miles of road; and construct a terminal transportation facility at site 1, the Fish and Wildlife Service preferred location.

VCU 285 (South Arm of Hoonah Sound) Harvest 3.1 MMBF of timber and build 3.0 miles of road.

Unit 1, as displayed in the negotiated Alternative was reduced from 36 acres to 21 acres, to protect riparian vegetation and to maintain a wildlife corridor at the head of South Arm Hoonah Sound.

Lisianski River Area (VCUs 249 and 262). This Area is part of the primary sale Area. Proposals to harvest in this Area have resulted in the greatest expression of concern of any area proposed. I have decided to not schedule any harvest activity in this area for this operating period in order to

allow for further comprehensive discussion of resource uses in this Area.

The contractor would not agree to defer harvest in this Area. I have reserved the Area in accordance with Sec. 1C of the contract, and have provided substitute volume as described below. The substitution provides a slight improvement of the economics of the timber supply made available to the contractor as displayed in Alternative J and does not significantly change the over-all environmental impacts. The environmental impacts associated with harvesting the substituted Areas are discussed in the 86-90 Operating Period EIS.

Allotment area	VCU	Volume MMBF
B, H	279	1.1
B, H	280	1.7
B, H	283	0.6
A-1	202	3.3
A-1	212	3.4
A-1	213	1.8
A-1	215	3.6
A-1	237	0.8
Contingency Area	419	7.7
		24.0

#### E. Kuiu Island

The primary change from Alternative H on Kuiu Island, is selection of the Alecks Lake road instead of the Salt-Lagoon route which was cleared in the 81-86 FEIS.

*North Kuiu*, (VCUs 399, 400, 402 and 421).

VCU 399, Harvest 22.8 MMBF of timber and build 3.9 miles of road.

VCU 400, Harvest 16.0 MMBF of timber and build 6.0 miles of road.

VCU 402, Harvest 15.9 MMBF of timber and build 5.5 miles of road.

VCU 420, Harvest 15.1 MMBF of timber and build 1.3 miles of road.

VCU 421, Harvest 13.9 MMBF of timber and build 2.9 miles of road.

*East Kuiu*, (VCUs 405, 416, 417, 418, and 419). There was substantial comment about deferring east Kuiu from

harvest for the 1986-90 operating period. There are previously approved roads and cutting units which are a priority for harvest in these VCUs. Simply not scheduling new harvest in these VCUs will not defer harvest activity. To select other areas to make up for volume (carryover and new) resulting from deferring east Kuiu could place unnecessary impacts on other resources and communities by potentially concentrating in other equally controversial areas. Harvest activities will be conducted on east Kuiu. Except for the portion of VCU 405 (LUD I release) within the 1986-90 study area, all these VCUs were allocated to LUD IV in TLMP, providing opportunities for intensive development of resources.

VCU 405, Construct 3.3 miles of haul road through VCU 405 instead of constructing a 10.7 mile haul road on the previously approved Salt Lagoon route. The Alecks Lake Road will go through a section of LUD I released land. TLMP policy states that the allocation of LUD I released areas "will be determined through the land management planning process when this Plan is revised. In the interim, these areas will be managed to permit their consideration for their full range of LUDs (including LUD I)."

My decision to construct the Alecks Lake road requires an amendment to this TLMP direction, to the extent the construction of the road precludes future consideration of including the entirety of this LUD I release in the existing Tebenkof Wilderness Area. (See the Tongass Land Management Plan Consistency and Amendment Section of this Record of Decision.) The reasons for this decision include:

Decisions concerning the 1,651 acre released area in VCU 405 will not have a significant effect on Tongass-wide land allocation considerations. This distinguishes this area from the other much larger LUD I released areas on the Tongass.

Change in the designation of land uses on both sides of the road are not being

made by this decision. Approximately 1120 acres of the area will be adversely affected for consideration for wilderness recommendation at the time of the revision of TLMP as a result of the road construction activities. Approximately 530 acres adjacent to the wilderness boundary will not be adversely affected for future Wilderness recommendation as a result of the road construction.

The LUD I released area was not included in the final Congressionally designated Tebenkof Bay Wilderness. This exclusion allows the option of constructing a road on this route with this subsequent environmental analysis.

The Alecks Lake route is the environmentally preferred route because potential overall environmental effects of building the road through the LUD I released area are less than the potential overall environmental effects of building on the alternative route along the Salt Lagoon.

The Alecks Lake route significantly reduces the haul costs of removing the timber from the area compared to the Salt Lagoon route.

This action is consistent with Section 708(b)(3) of ANILCA.

VCU 416, Harvest 62.9 MMBF of timber and build 10.4 miles of road.

VCU 417, Harvest 45.2 MMBF of timber and build 12.0 miles of road.

VCU 418, Harvest 50.5 MMBF of timber and build 7.0 miles of road.

VCU 419, Revise by deleting harvest units 8, 9, and 10 and substituting harvest units 8, 9, 10, and 11 from Alternative D for an added volume of 7.7 MMBF as replacement volume for deletion of harvest in the Lisianski River Area. Total revised harvest for this VCU will be 16.8 MMBF and will involve construction of 6.2 miles of road.

#### Units Scheduled for Harvest by Acres and Volume Class

Table 1 displays additional information concerning acres of harvest by VCU.

TABLE 1.—UNITS SCHEDULED FOR HARVEST BY ACRES AND VOLUME CLASS FOR EACH VCU

Total VCU	Vol. sched. (MMBF)	Number of units	Volume class—acres				Acres sched. 86-90	VCU acres
			8-20	20-30	30-50	50-		
192	0	0	N/A	N/A	N/A	N/A	0	12,836
193	0	0	N/A	N/A	N/A	N/A	0	36,519
194	0	0	N/A	N/A	N/A	N/A	0	8,880
195	0	0	N/A	N/A	N/A	N/A	0	9,146
196	0	0	N/A	N/A	N/A	N/A	0	15,564
197	0	0	N/A	N/A	N/A	N/A	0	3,004
198	0	0	N/A	N/A	N/A	N/A	0	4,308
200	0	0	N/A	N/A	N/A	N/A	0	11,076
201	7.6	6	44	104	128	0	276	39,578
202	13.9	9	151	306	104	0	561	16,619
203	18.9	7	124	529	87	0	740	8,785
204	18.3	9	225	242	256	0	723	22,405
208	0.5	2	33	0	0	0	33	5,025
209	11.4	12	210	166	112	0	488	15,512
210	37.6	18	742	625	227	38	1,632	20,698

TABLE 1.—UNITS SCHEDULED FOR HARVEST BY ACRES AND VOLUME CLASS FOR EACH VCU—Continued

Total VCU	Vol. sched. (MMBF)	Number of units	Volume class—acres				Acres sched. 86-90	VCU acres
			8-20	20-30	30-50	50+		
211	0	0	N/A	N/A	N/A	N/A	0	4,688
212	37.6	19	317	1,026	163	0	1,506	13,330
213	4.2	4	130	43	31	0	204	3,831
214	7.3	5	80	226	0	0	306	6,853
215	13.2	12	134	360	47	0	541	23,143
216	4.3	2	30	143	0	0	173	10,760
217	3.0	4	117	44	0	0	161	10,232
218	8.3	15	76	139	103	0	318	18,866
219	2.4	3	77	14	24	0	115	5,980
230	0	0	N/A	N/A	N/A	N/A	0	9,639
235	0	0	N/A	N/A	N/A	N/A	0	33,641
236	4.6	3	163	74	0	0	237	10,930
237	5.2	8	62	95	51	0	208	6,446
238	13.1	25	312	220	69	0	601	9,946
239	11.3	4	42	356	37	0	435	17,007
242	0	0	N/A	N/A	N/A	N/A	0	11,334
243	0	0	N/A	N/A	N/A	N/A	0	27,748
246	0	0	N/A	N/A	N/A	N/A	0	17,145
247	0	0	N/A	N/A	N/A	N/A	0	15,918
249	0	0	0	0	0	0	0	19,521
262	0	0	0	0	0	0	0	8,844
279	7.1	5	230	110	14	0	354	7,637
280	17.6	16	384	416	11	0	811	17,612
281	0	0	N/A	N/A	N/A	N/A	0	20,770
282	0	0	N/A	N/A	N/A	N/A	0	15,641
283	26.0	17	525	284	311	0	1,120	30,605
285	3.1	3	134	0	29	0	163	3,795
399	22.8	9	106	190	261	104	661	23,987
400	16.0	8	139	147	225	24	535	28,040
402	15.9	5	5	138	310	0	453	31,392
405	0	0	N/A	N/A	N/A	N/A	0	1,651
416	62.9	17	482	431	955	124	1,992	17,989
417	45.2	22	961	780	164	103	2,008	12,535
418	50.5	14	209	620	368	296	1,493	10,766
419	16.8	7	174	154	268	0	596	19,406
420	5.1	4	11	74	79	0	164	33,955
421	13.9	4	48	95	197	50	390	33,612
Total	525.6	298	6,477	8,151	4,631	739	19,981	825,150
Percent of Total			32.3	40.8	23.2	3.7	100	100

## Public Involvement

The public was provided with considerable opportunity to be involved with the 1986-90 Operating Period environmental analysis process. Notices were published in the Federal Register of our intent to prepare and EIS and a supplement to the draft EIS. Various publics have been involved in scoping, development of alternatives, and evaluation of those alternatives. The public has been kept informed through news releases, planning updates, letters, phone calls, attending public meetings held by interested groups, and conducting open-house meetings in the various communities. Issues raised have been addressed in the final EIS.

### A. Open House Meetings

Open-House meetings were held on both the draft EIS and the supplement to the draft EIS, to facilitate understanding of the project and to solicit comment on the project.

The draft was filed May 17, 1985 and the public comment period ended on July 17, 1985. Prior to and during the 60-day public review and comment period open house meetings were held in: Angoon, Hoonah, Juneau, Pelican, Sitka, Tenakee Springs, and Whitestone and 8-Fathom logging camps.

The supplemental draft EIS was filed March 10, 1986 and the public comment period ended on May 9, 1986. During the 60 day public review and comment period on the supplement to the draft EIS open house meetings were held in: Angoon, Elfin, Cove, Hoonah, Juneau, Pelican, Petersburg, Point Baker, Sitka, Tenakee Springs, Whitestone logging camp, and Wrangell.

### B. Coordination with other Agencies

The planning process was coordinated with State and Federal agencies. The Alaska Department of Management and Budget, Department of Governmental Coordination has been the primary State coordinator. When necessary and appropriate we consulted directly with other State agencies including the Alaska Department of Fish and Game, Alaska Department of Commerce and Economic Development, State of Alaska Historic Preservation Office, and Alaska Department of Environmental Conservation.

Federal agencies which have provided expertise and comment during the 1986-90 project include: U.S. Fish and Wildlife Service; National Marine Fisheries Service; Environmental Protection Agency; Bureau of Land Management; Bureau of Indian Affairs; U.S. Army

Corps of Engineers; and National Park Services.

### Implementation, Prescriptions, Monitoring, and Mitigation

Implementation of actions involving floodplains and wetlands will not begin until at least 30 days after this Record of Decision. This action schedules activity in floodplains and wetlands as disclosed in the final EIS.

Through agreement with APC, implementation of this project will begin in determining the timber volume to be appraised for harvest for the 1986-90 operating period. Timber to be appraised carryover volume from the 1981-86 and 1976-81 operating plans and volume cleared under the 1986-90 final EIS and this decision.

Standards and Guidelines for activities that affect fish habitat and water quality found in Section 2 of the final EIS apply to layout of Harvest Units Requiring Fisheries Habitat Prescription as found in Appendix C, Final EIS.

All practicable means to avoid and minimize environmental harm from the selected alternative have been adopted. Mitigation measures presented in Section 2 of the final EIS are adopted. Measures have also been included to

protect, enhance, and restore resources affected by this action. Monitoring and reporting requirements contained in Forest Service Manuals and Handbooks will be sufficient to ensure mitigation measures are applied during project activity and that the mitigation measures are achieving the results anticipated. Activities will be monitored during and after implementation to insure that they are carried out as planned, and that the prescriptions used are effectively meeting their intent. If during monitoring of activities, resource objectives are not being met, appropriate actions will be taken to correct the situation. The Forest Service has authority, through contract and permit requirements and other means, to enforce and implement all adopted mitigation measures and monitoring necessary to ensure the effectiveness of mitigation. Funding for such measures is provided by section 705a of ANILCA. Monitoring and mitigation measures are disclosed in section 2c in the final EIS.

#### Determinations

##### A. Alaska Regional Guide

All management activities disclosed in the final EIS and all decisions displayed in this record of decision are consistent with the Alaska Regional Guide. Harvest method and the size of created openings are as prescribed in the Alaska Regional Guide. The analysis has incorporated multi-entry layout planning described in the Alaska Regional Guide.

All activities conform to the Management Direction displayed in Chapter 3 of the Alaska Regional Guide.

##### B. Tongass Land Management Plan—Consistency and Amendment

This action is tiered to the 1979 Tongass Land Management Plan, as amended, and further amends the Plan. Long-term sale commitments were recognized when TLMP was developed. With the exception of the Alecks Lake road construction in VCU 405, all management activities are consistent with the 1979 TLMP, as amended. My decision to construct the Alecks Lake Road requires further amendment to TLMP direction, to the extent the construction of the road precludes future consideration of a portion of VCU 405 for LUD I designation under the TLMP revision process.

The TLMP management direction for LUD I release areas is hereby amended to allow construction, maintenance and use of the Alecks Lake Road only, as a specific exception to general LUD I release area management direction.

This amendment is an adjustment to management direction for LUD I release area, limited to Alecks Lake Road and vicinity. The adjustment results from further site specific analysis indicating that the Alecks Lake Road is clearly environmentally preferable to the Salt Lagoon route previously approved in the 1981-86 operating period Record of Decision. The adjustment will not cause significant changes in the long-term multiple-use goals and objectives because of its limited area and impact. As such, it has been determined to be an insignificant amendment of the Forest Plan (see Federal Register, Volume 51, Number 8, Monday, January 13, 1986, at page 1477). This Record of Decision and the 1980-90 Final EIS discuss the reasons for this action and associated environmental impacts in more detail.

This amendment will be incorporated into TLMP documents along with changes to TLMP activity schedules incorporated in this Record of Decision.

Activities scheduled, with the exception noted for the Alecks Lake Road, are those permitted to occur within the represented Land Use Designations. Some of the activities scheduled represent changes from original TLMP activities schedules. All of these adjustments are changes in location or timing of previously approved activities within the same category of Land Use Designation, which do not cause significant changes in the long-term multiple-use goals and objectives for land and resource management. As such, these changes have also been determined to be an insignificant amendment of the Forest Plan. Each of the scheduled management activities conform to the management purposes, implications and constraints of the Land Use Designation in which the activity is scheduled. (See Federal Register, Volume 51, Number 8, for Monday, January 13, 1986, Notices, at page 1477).

In July 1986, TLMP was amended. The 1986-90 operating period activities are consistent with the applicable amending actions disclosed in the decision notice and finding of no significant impact for the 1985-86 Tongass Land Management Plan Amendments. The activities approved as a part of this record of decision will be incorporated into the TLMP activity schedules as described on pages 16 and 17 of the amended plan.

##### C. Endangered Species Act

None of the Federally listed threatened or endangered species are known to occur in the APC Long-term Sale Area. However, the endangered American peregrine falcon and the threatened Arctic peregrine falcon may

pass through portions of Southeast Alaska during their migration. The humpback whale is the only endangered marine mammal that may occur near the Sale Area. My determination is that the implementation of the decision will not affect the three species listed above. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service concur with my determination.

In the event that species are added to the Federal list during the implementation of this decision or listed species are encountered, provisions of the Endangered Species Act will be followed.

##### D. Army Corps of Engineers Permits

Development of terminal transportation facilities will be subject to Corps of Engineers 404 dredge and fill and EPA 402 waste-water discharge permitting procedures. These permits are jointly administered by the Corps and EPA under a 1985 Memorandum of Agreement (MOA). This MOA defines the procedures for permit application; a public notice and comment process; guidelines and conditions for siting new log-transfer facilities; permit compliance and monitoring requirements; and permit expiration and renewal provisions for existing facilities.

##### E. US Fish & Wildlife Service, Forest Service Memorandum of Understanding

A Memorandum of Understanding (MOU) between the US Fish and Wildlife Service (USFWS) and the Forest Service (FS) dated 1984, outlines the agreements and actions for both agencies in situations where bald eagle nest trees, are near proposed land use activity. If a planned activity could encroach within the 330-foot-radius management zone surrounding a nest tree, the USFWS is contacted by the FS and a determination is made on whether or not to grant a variance. Variances granted include agreed upon management recommendations.

For the three bald eagle nest trees which would be encroached upon with implementation of the decision, the USFWS has been contacted and has granted variances. Any additional nest trees not known of at the time of decision will also be handled in accordance with the MOU.

##### F. National Historic Preservation Act

The Forest Service program for compliance with the National Historic Preservation Act of 1966 as amended, 1980, (PL 96-515), includes locating, inventorying, and nominating all cultural properties that may be directly or indirectly affected by scheduled

activities. The State Historic Preservation Officer has been consulted. No ground-disturbing activities associated with this action will be initiated before a cultural resource clearance for that particular area has been given.

#### *C. Coastal Zone Management Act*

Federal lands are excluded from the coastal zone as prescribed in the Coastal Zone Management Act of 1976. However, the Act does require the Forest Service, when conducting activities or undertaking development directly affecting the coastal zone, to insure that the activities or development be consistent with the approved Alaska Coastal Management Program to the maximum extent practicable.

Regulations under the Alaska Forest Resources and Practices Act of 1979 are incorporated into the Alaska Coastal Management Program as the applicable standards and guidelines for timber harvest and processing. The Forest Service management standards, guidelines, mitigation measures, and requirements under the APC contract pertaining to the 1986-90 operating period are fully in accord with the State regulations. In many cases the Forest Service requirements are more stringent than those of the State.

Based on the findings in the EIS and my review of the relevant State standards and guidelines, I have determined that the action authorized by this decision is consistent with the Alaska Coastal Management Program to the maximum extent practicable.

#### **Subsistence Finding: ANILCA 810 Summary**

During development of the 1986-90 EIS, I encouraged public involvement and several public meetings were held for the purpose of obtaining public comment relating to the proposed action as well as on subsistence.

Available subsistence information was analyzed. This includes information on the communities, the resources, and the effects anticipated from implementation of any of the ten alternatives.

I have evaluated the effects of these proposed actions on subsistence uses and needs; the availability of other lands for the purpose of timber harvest for the 1986-90 operating period; and have considered other alternatives that would reduce or eliminate timber harvest activities from lands needed for subsistence. My finding is that none of the alternatives considered in detail would have a significant restriction on subsistence opportunities of rural residents.

#### **Right to Appeal**

This decision is subject to appeal in accordance with the provisions of 36 CFR 211.18. Notice of appeal must be in writing and submitted to: Michael A. Barton, Regional Forester, Region 10, USDA Forest Service, P.O. Box 021628, Juneau, AK 99802.

The notice of appeal, a statement of reasons to support the appeal, and any request for oral presentation must be filed within 45 days after the date of this decision.

An appeal of this decision does not halt implementation of the 1986-90 long-term sale operating plan. A stay of the decision must be requested. A stay may be requested at any time during the appeal period.

Dated: December 31, 1986.

Michael A. Barton,  
Regional Forester,

[FR Doc. 87-887 Filed 1-15-87; 8:45 am]

BILLING CODE 3410-11-M

#### **DEPARTMENT OF COMMERCE**

##### **National Bureau of Standards**

##### **National Bureau of Standards' Visiting Committee; Meeting**

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App., notice is hereby given that the National Bureau of Standards' Visiting Committee will meet Wednesday, February 11, 1987, from 8:30 a.m. to 5:30 p.m., in Lecture Room A, Administration Building, National Bureau of Standards, Gaithersburg, Maryland.

The NBS Visiting Committee is composed of five members prominent in the fields of science and technology and appointed by the Secretary of Commerce.

The purpose of the meeting is to review the efficiency of the Bureau's scientific work and the condition of its equipment in order to assist the Committee in reporting to the Secretary of Commerce as required by law.

The public is invited to attend, and the Chairman will entertain comments or questions at an appropriate time during the meeting. Any person wishing to attend the meeting should inform Peggy Webb, Office of the Director, National Bureau of Standards, Gaithersburg, MD 20899, telephone 301-975-2411.

Dated: December 31, 1986.

Ernest Ambler,  
Director.

[FR Doc. 87-996 Filed 1-15-87; 8:45 am]

BILLING CODE 3510-13-M

#### **COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS**

##### **Establishing an Import Limit for Certain Cotton Textile Products Produced or Manufactured in the People's Republic of China**

January 8, 1987.

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 January 16, 1987. For further information contact Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of this limit, please refer to the Quota Status Reports which are posted on the bulletin boards of each Customs port or call (202) 566-6828. For information on embargoes and quota reopenings, please call (202) 377-3715. For information on categories on which consultations have been requested call (202) 377-3740.

##### **Background**

On November 4, 1986, a notice was published in the *Federal Register* (51 FR 40058), which established an import restraint limit for cotton handbags in Category 369-H (only TSUSA numbers 706.3640 and 706.4106), produced or manufactured in China and exported to the United States during the ninety-day period which began on August 28, 1986 and extended through November 26, 1986. The notice also stated that the Government of the People's Republic of China is obligated under the Bilateral Cotton, Wool and Man-Made fiber Textile Agreement, effected by exchange of notes dated August 19, 1983, as amended, if no mutually satisfactory solution is reached on levels for this category during consultations, to limit its imports during the twelve-month period immediately following the ninety-day consultation period to 5,283,545 pounds.

No solution has been reached in consultation on a mutually satisfactory limit for this category. The United States Government has decided, therefore, to control imports of cotton textile products in Category 369-H, exported during the twelve-month period which began on November 27, 1986 and extends through November 26, 1987, at the level described above. The United States remains committed to finding a solution concerning this category.

Should such a solution be reached in consultations with the Government of the People's Republic of China, further notice will be published in the **Federal Register**.

In the event the limit established for the ninety-day period has been exceeded, such excess amount, if allowed to enter, will be charged to the level established for the designated twelve-month period.

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), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386) and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1986).

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

January 8, 1987.

**Committee for the Implementation of Textile Agreements**

Commissioner of Customs,  
Department of the Treasury, Washington, DC 20229

Dear Mr. Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1986; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement, effected by exchange of notes dated August 19, 1983, as amended, between the Governments of the United States and the People's Republic of China; and in accordance with the provisions of Executive order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 16, 1987, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textile products in Category 369-H<sup>1</sup>, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on November 27, 1986 and extends through November 26, 1987, in excess of 5,283,545 pounds.<sup>2</sup>

Textile products in Category 369 pt. which are in excess of the ninety-day level previously established shall be subject to this directive.

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

<sup>1</sup> In Category 369, only TSUSA numbers 706.3640 and 706.4106.

<sup>2</sup> The level has not been adjusted to account for any imports exported after August 27, 1986.

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), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386) and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1986).

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

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 (a)(1).

Sincerely,

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 87-1041 Filed 1-15-87; 8:45 am]

BILLING CODE 3510-DR-M

**Import Restraint Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Haiti Effective on January 9, 1987; Correction**

January 8, 1987.

On January 13, 1987, a notice was published in the **Federal Register** (52 FR 1371), which established import restraint limits for certain specified categories of cotton and man-made fiber apparel products, produced or manufactured in Haiti and exported during the twelve-month period which began on January 1, 1987 and extends through December 31, 1987.

In the letter to the Commissioner of Customs which follows that notice, the following level should be included:

Category	Twelve-month level
350.....	32,000 dozen

Ronald I. Levin,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 87-1042 Filed 1-15-87; 8:45 am]

BILLING CODE 3510-DR-M

**CONSUMER PRODUCT SAFETY COMMISSION**

**Interagency Committee on Cigarette and Little Cigar Fire Safety; Technical Study Group Meeting**

**AGENCY:** Interagency Committee on Cigarette and Little Cigar Fire Safety.

**ACTION:** Notice of meeting.

**SUMMARY:** The Technical Study Group on Cigarette and Little Cigar Fire Safety

will meet on February 12 and 13, 1987, in Washington, DC to review the status of major projects undertaken to implement the Cigarette Safety Act of 1984.

**DATE:** The meeting will be on February 12 and 13, 1987, from 9:30 a.m. to 5:00 p.m. each day.

**ADDRESS:** The meeting will be in Room 703-A of the Hubert Humphrey Building, 200 Independence Avenue, SW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**

Terri Buggs, Office of Program Management and Budget, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 492-6554.

**SUPPLEMENTARY INFORMATION:** The Cigarette Safety Act of 1984 (Pub. L. 98-567, 98 Stat. 2925, October 30, 1984) created the Technical Study Group on Cigarette and Little Cigar Fire Safety to prepare a final technical report to Congress concerning the technical and commercial feasibility of developing cigarettes and little cigars with minimum propensity to ignite upholstered furniture and mattresses.

The Technical Study Group will meet on February 12 and 13, 1987, to review the status of major projects undertaken to implement the Cigarette Safety Act. Technical experts who have provided assistance with the preparation of a cost-benefit analysis will present their final reports.

The meeting will be open to observation by members of the public, but only members of the Technical Study Group may participate in the discussion.

Dated: January 9, 1987.

Colin B. Church,

*Federal Employee Designated by the Interagency Committee on Cigarette and Little Cigar Fire Safety.*

[FR Doc. 87-997 Filed 1-15-87; 8:45 am]

BILLING CODE 6355-01-M

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulatory Council; Meeting**

**AGENCY:** Department of Defense (DoD).  
**AGENCY:** Notice of meeting.

**Cross Reference**

See the Proposed Rules in Part V of this **Federal Register** for a related document (FR Doc. 87-993) by DoD on Technical Data.

**SUMMARY:** The Defense Acquisition Regulatory Council will meet for discussion of proposed DoD FAR Supplement coverage on Technical Data.

Time and date: 9:00 a.m. to 11:30 a.m.,  
January 30, 1987.

Place: GSA Central Office, Main  
Auditorium, 18th and F Streets NW.,  
Washington, DC.

Status: Open.

Matters to be Discussed: Proposed  
DoD FAR Supplement coverage on  
Technical Data. This proposed coverage  
was published in the *Federal Register* of  
January 16, 1987.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. Charles W. Lloyd, Executive  
Secretary, DAR Council, 202/697-7267.  
Charles W. Lloyd,

*Executive Secretary, Defense Acquisition  
Regulatory Council.*

[FR Doc. 87-991 Filed 1-15-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. CP83-211-001 et al.]

#### Natural Gas Certificate Filings; Columbia Gulf Transmission Co. et al.

January 12, 1987.

Take notice that the followings filings  
have been made with the Commission:

##### 1. Columbia Gulf Transmission Company

[Docket No. CP83-211-001]

Take notice that on December 22,  
1986, Columbia Gulf Transmission  
Company (Columbia Gulf), P.O. Box 683,  
Houston, Texas 77001, filed in Docket  
No. CP83-211-001 a petition to amend  
the order issued on February 17, 1984, in  
Docket No. CP83-211-000 pursuant to  
Section 7(c) of the Natural Gas Act to  
authorize the transportation and  
delivery of volumes being transported  
by Columbia Gulf for companies other  
than Columbia Gulf Transmission  
Corporation (Columbia Gas) at the inlet  
of the Blue Water gas plant, Acadia  
Parish, Louisiana, for processing by  
Exxon Company, USA (Exxon) for the  
recovery of liquefiable hydrocarbons, all  
as more fully set forth in the application  
which is on file with the Commission  
and open to public inspection.

Pursuant to a certificate issued on  
February 17, 1984, in Docket No. CP83-  
211-000, Columbia Gulf states that it is  
authorized to deliver up to 170,000 Mcf  
of natural gas per day to Exxon's Blue  
Water gas plant for processing. The  
natural gas volumes that are currently  
delivered for processing are owned by  
Columbia Gas, but are from various  
sources selected by Exxon, it is stated.  
These deliveries by Columbia Gulf to

Exxon were made pursuant to a  
December 13, 1982, processing agreement  
between Exxon and Columbia Gas, it is  
further stated. Columbia Gulf asserts  
that the volumes transported by  
Columbia Gulf for companies other than  
Columbia Gas are not currently included  
in the natural gas volumes to be  
processed.

Columbia Gas proposes that the  
Commission amend the current  
authorization issued in the February 17,  
1984, order for Docket No. CP83-211-  
000. By an agreement dated August 7,  
1986, between Columbia Gas, Columbia  
Gulf and Exxon, Exxon would continue  
to have the right to process up to 170,000  
Mcf of natural gas per day for the  
removal of liquefiable hydrocarbons.  
However, it is proposed that the natural  
gas volumes to be delivered to Exxon  
also include the natural gas transported  
by Columbia Gulf for companies other  
than Columbia Gas. Such volumes  
would be subject to selection of sources  
by Exxon and would be transported and  
delivered to Exxon through Columbia  
Gulf's share of capacity in the Blue  
Water Pipeline, it is alleged.

Columbia Gulf states that as  
consideration for making volumes  
available for processing pursuant to the  
amending agreement dated August 7,  
1986, Exxon has agreed to reimburse  
Columbia Gulf and Columbia Gas for  
the acquisition cost or equivalent of all  
natural gas removed as shrinkage and  
for use as fuel at the Blue Water plant,  
referred to as plant volume reduction  
(PVR), and has renegotiated certain gas  
purchase and sales agreements with  
Columbia Gas covering the sale and  
purchase of gas from various fields. As  
stated in the application, if Columbia  
Gas has title to the volumes to be  
processed Exxon would pay monthly to  
Columbia Gas for the PVR the actual  
cost per million Btu payable by  
Columbia Gas to the gas sellers under  
each pertinent gas purchase and sales  
agreement applicable to the volumes  
that are processed; if Columbia Gas  
does not have title to the gas being  
processed then Exxon would pay the  
weighted average price for PVR paid  
where the gas is purchased by Columbia  
Gas. In lieu of the described payment for  
PVR, it is stated that Exxon has the  
option to furnish gas from other sources  
available to Exxon for delivery to  
Columbia Gulf at the Blue Water plant  
or at mutually agreeable points up to the  
extent of the million Btu contained in  
the PVR allocated pursuant to the  
August 7, 1986, agreement. Instead of  
furnishing gas from other sources  
available to it, Exxon, it is stated, could  
also identify a specific source of "PVR  
make-up volumes" and request that

Columbia Gulf transport such volumes  
in accordance with Columbia Gulf's  
certificate granted in Docket No. CP86-  
239-000 pursuant to the Commission's  
Order No. 436 program and the order  
granting such authorization dated  
February 25, 1986.

Columbia Gulf states that Exxon's  
option to deliver gas in kind to Columbia  
Gulf in lieu of cash payment for the PVR  
could be viewed as an exchange.  
Columbia Gulf, therefore, requests  
authorization to implement an exchange  
of natural gas volumes with Exxon.

*Comment date:* February 2, 1987, in  
accordance with the first subparagraph  
of Standard Paragraph F at the end of  
this notice.

##### 2. Arkla Energy Resources, a division of Arkla, Inc.

[Docket No. CP87-126-000]

Take notice that on December 12,  
1986, Arkla Energy Resources, a division  
of Arkla, Inc. (AER), P.O. Box 21734,  
Shreveport, Louisiana 71151, filed in  
Docket No. CP87-126-000 a request  
pursuant to Section 157.205 of the  
Regulations under the Natural Gas Act  
(18 CFR 157.205) for authority to  
construct and operate a new town  
border station and to abandon facilities  
and services under the certificate issued  
in Docket No. CP82-384-000 and CP82-  
384-001 pursuant to Section 7(c) of the  
Natural Gas Act, all as more fully set  
forth in the request on file with the  
Commission and open to public  
inspection.

AER requests authority to construct  
and operate a new town border station  
at the existing interconnection of AER's  
Line F and Line FM-19, located in  
Bossier Parish, Louisiana. AER also  
requests authority to abandon and  
transfer to Arkansas Louisiana Gas  
Company's, a division of Arkla, Inc.  
(ALG's) distribution business 4.23 miles  
of 4-inch and 2-inch pipeline (AER's  
Lines FM-19 and FM-45) located  
downstream of the proposed town  
border station, an existing town border  
station and taps used to deliver gas to  
ALG, and the jurisdictional services  
currently rendered from such facilities.

AER states that it provides a portion  
of ALG's Bossier City, Louisiana  
requirements through delivery points on  
AER's Lines FM-19 and FM-45. AER  
further states that when these facilities  
were installed, the load ALG served in  
the area was relatively small. In recent  
years, the Bossier City area has grown  
substantially, not only increasing ALG's  
service area and the number of  
residential and commercial loads served  
by ALG, but also requiring service by  
ALG to larger commercial and industrial

end users, it is explained. It is further explained that because of these expanded requirements, the current location of the town border station is an impediment to the efficient distribution of gas by ALG.

AER states that the proposed abandonment would not have an impact on service to existing customers. AER further states that relocating the town border station is necessary for ALG to extend into new areas as they develop and to provide additional supplies to ALG's distribution systems, thereby making more efficient the distribution of natural gas in the Bossier City, Louisiana area.

*Comment date:* February 26, 1987, in accordance with Standard Paragraph G at the end of this notice.

### 3. Colorado Interstate Gas Company

[Docket No. CP87-141-000]

Take notice that on December 23, 1986, Colorado Interstate Gas Company (CIG), Post Office Box 1087, Colorado Springs, Colorado 80944, filed an application in Docket No. CP87-141-000 pursuant to Section 7(c) of the Natural Gas Act for authorization to transport gas for Cheyenne Light, Fuel and Power Company; Western Gas Supply Company; and Public Service Company of Colorado (collectively, PSCo), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, CIG requests authority to transport, on an aggregate firm and interruptible basis, up to 125,000 Mcf of natural gas per day and up to 22,500,000 Mcf of natural gas annually for PSCo. CIG proposes to receive the transportation volumes for PSCo's account at five receipt points in Weld County, Colorado; Park, Converse and Sweetwater Counties, Wyoming; Morton County, Kansas; and at other points PSCo may designate. CIG intends to deliver thermally equivalent volumes, less fuel and unaccounted-for gas, to PSCo in Adams, Arapahoe, Denver, Douglas, Morgan, Pueblo and Weld Counties, Colorado. The requested authority would allow for CIG to transport the natural gas which K N Energy, Inc. (K N), proposes to sell to PSCo in its pending applications in Docket Nos. CP86-643-000 and CP86-643-001, and from other sources of supply for which PSCo has requested CIG to provide transportation service. CIG proposes to charge PSCo a monthly reservation charge equal to the nominated firm daily volumes multiplied by an initial rate of \$3.07 per Mcf and an initial transportation rate of 30.6 cents per Mcf for the first 40,000 Mcf per day

transported and 18 cents per Mcf for volumes transported above that level. The term of the proposed transportation service is from October 1, 1986, until September 30, 1996, and year-to-year thereafter. CIG also proposes to install minor facilities at its interconnection with K N in Weld County, Colorado. These facilities would be installed pursuant to CIG's blanket certificate authority issued in Docket No. CP83-21-999.

*Comment date:* February 2, 1987, in accordance with Standard Paragraph F at the end of this notice.

### 4. K N Energy, Inc.

[Docket No. CP87-137-000]

Take notice that on December 22, 1986, K N Energy, Inc. (K N), Post Office Box 15265, Lakewood, Colorado 80215, filed in Docket No. CP87-137-000 a request pursuant to Sections 157.205 and 157.211 of the Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct and operate two sales taps for one small commercial and one domestic customer, under the certificate issued in Docket Nos. CP83-140-000 and CP83-140-001, as amended in Docket No. CP83-140-002, pursuant to the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

K N proposes to construct and operate sales taps in order to sell approximately 600 Mcf of natural gas per year to Murfin Drilling Co. in Decatur County, Kansas, and approximately 120 Mcf of natural gas per year to Kent D. O'Neil in Washington County, Colorado. It is stated that these two new customers would be served directly from K N's general system supply. It is estimated that these proposed facilities would cost \$1,700.

K N indicates that the addition of the new sales taps would have no significant impact on K N's peak day and annual deliveries. K N further indicates that it would charge these customers a price in accordance with the currently filed rate schedules authorized by the applicable state or local regulatory body having jurisdiction.

*Comment date:* February 26, 1987, in accordance with Standard Paragraph G at the end of this notice.

### 5. National Fuel Gas Supply Corporation

[Docket No. CP87-144-000]

Take notice that on December 24, 1986, National Fuel Gas Supply Corporation (National Fuel), Ten Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP87-144-000 an application pursuant to section 7(c)

of the Natural Gas Act for a limited-term certificate of public convenience and necessity authorizing the interruptible transportation of up to 84,260 Mcf of natural gas per day on behalf of National Fuel Gas Distribution Corporation (Distribution) for the account of 101 end users for the period ending December 31, 1988. In addition, National Fuel requests authorization to transport up to 3,167 Mcf per day of additional volumes on behalf of Distribution and/or modify receipt points with respect to certain end-users presently covered by National Fuel's certificate in Docket No. CP85-608-008, all as more fully set forth in the appendices hereto and in the application which is on file with the Commission and open to public inspection.

Appendix A attached hereto indicates the maximum daily volume for each of the 101 end-users of Distribution proposed to be served herein, and Appendix B indicates the modifications in service to those end-users presently receiving transportation service under authorization granted in Docket No. CP85-608-008. Details such as receipt points and sellers are available in National Fuel's application.

National fuel states that it would receive the subject transportation volumes at existing receipt points on its system and would deliver the volumes to Distribution at existing points of delivery. National Fuel requests that the Commission continue to allow it to add or delete receipt points without further authorization. National Fuel adds that the proposed transportation service would aid industries in western New York and western Pennsylvania in reducing energy costs and maintaining employment levels and aid Distribution in retaining its industrial market.

National Fuel states that it would charge Distribution pursuant to its T-1 Rate Schedule which currently provides for a rate of 26.82 cents per Mcf of gas and 2 percent shrinkage.

End User	Maximum daily volume (Mcf)
Abex Corp., Meadville, PA	500
Acme Electric Corp., Olean, NY	180
Ajax Cooper Energy Services, Cory, PA	450
Amcast Industrial Corp., Meadville, PA	251
American Brass, Buffalo, NY	3,000
American Malting, Buffalo, NY	400
American Olean Tile, Olean, NY	500
Ampco-Pittsburgh Corp.:	
Buffalo Plant	450
Cheektowaga Plant	200
BTL Specialty Resins Corp., Niagara Falls, NY	600
Blackstone Corp., Jamestown, NY	1,333
Brockway Clay Co., Brockway, PA	800
Buffalo Airport Center Assoc., Cheektowaga, NY	2,000
Buffalo China, Buffalo, NY	700

End User	Maximum daily volume (Mcf)
Buffalo Color, Buffalo, NY	2,500
Buffalo Hilton, Buffalo, NY	140
Buffalo News, Buffalo, NY	250
Buffalo Pumps, North Tonawanda, NY	115
Buffalo Sewer Authority, Buffalo, NY	2,100
Buffalo Wire Works Co., Buffalo, NY	95
Channellock, Inc., Meadville, PA	200
Cliffstar Corp., Dunkirk, NY	375
Cummins Engine, Inc., Lakewood, NY	360
Cyclops Corp., Sawhill Tubular Div., Sharon, PA	500
Cyclops Corp. Pipe Plant, Sharon, PA	500
Cytemps Specialty Steel Corp., Sharon, PA	1,000
Dinaire Corporation, Buffalo, NY	160
E.I. DuPont DeNemours & Co.: 2251 Buffalo Ave, Niagara Falls, NY	200
Adams Street, Niagara Falls, NY	3,000
Sheridan Dr. & River Rd., Buffalo, NY	2,000
Electralloy Corp.	467
Erie Plating Co., Erie, PA	208
Erie Press system, Erie, PA	162
Exotic Metals, Inc., Ridgway, PA	112
FMC Corp., Buffalo, NY	1,000
Fenestra Corp., Erie, PA	200
Franklin Steel, Franklin, PA	1,200
Frontier Foundries: Packard Road, Niagara Falls, NY	110
1500 Military Rd., Niagara Falls, NY	40
1520 Military Rd., Niagara Falls, NY	100
GTE Products Corp., St. Mary's, PA	550
General Electric, Erie, PA	200
General Mills, Norenco Div., Buffalo, NY	1,800
Gioia Pasta Co., Buffalo, NY	126
Greater Buffalo Press, Buffalo, NY: Hamburg, NY Plant	80
Buffalo, NY Plant (2)	90
Greenville Steel Car Co., Greenville, PA	630
Haysite Reinforced Plastics, Erie, PA	87
Hospital Council of Western PA (New York Members): Children's Hosp. of Bflo., Buffalo, NY	515
Cuba Memorial Hosp., Cuba, NY	60
DeGraft Memorial Hosp., North Tonawanda, NY	340
Jamestown General Hosp., Jamestown, NY	110
Jones Memorial Hosp., Wellsville, NY	55
Kenmore Mercy Hosp., Kenmore, NY	300
Lake Shore Hosp., Irving, NY	20
Mercy Hosp., Buffalo, NY	555
Olean General Hosp., Olean, NY	110
St. Jerome Hosp., Batavia, NY	165
Salamanca District Hosp., Salamanca, NY	35
Tri-County Memorial Hosp., Gowanda, NY	35
W.C.A. Hosp., Jamestown, NY	155
Westfield Memorial Hosp., Westfield, NY	20
Total	1,850
Hyatt Regency, Buffalo, NY	150
I Squared Element Co., Niagara Specialty Co.	35
International Multifoods, Buffalo, NY	115
Jamestown Electroplate, Jamestown, NY	100
Jpseph T. Ryerson & Son, Inc., Buffalo, NY	190
Joy Manufacturing Co., Franklin, PA	1,000
Keystone Carbon Co., St. Mary's PA	400
Lakeview Forge Co., Erie, PA	70
Lord Corp.: Cambridge Springs, PA, Saigertown, PA	480
MRC Bearings, Inc.: Jamestown, NY, Falconer, NY	350
Mallinckrodt, Inc.	305
Mayer Bros. Constr. Co., Inc., Erie, PA	170
McCormick Constr. Co., Erie, PA	135
Molded Fiber Glass Tray Co., Linesville, PA	140
Mooney Chemicals, Inc., Franklin, PA	235
Morrison Industries, Inc., Buffalo, NY	120
Motion Control Industries, Ridgway, PA	600
National Grinding Wheel, Inc., North Tonawanda, NY	325
Niagara Machine & Tool Works, Buffalo, NY	175
O-AT-KA Milk Products Cooperative, Inc.: Collins Center, NY	300
Batavia, NY	700
O-Cel-O (Division of General Mills Inc.), Tonawanda, NY	550
Occidental Chemical Corp.: Durez Plastics Plant, North Tonawanda, NY	1,500
Energy From Waste Facility, Niagara Falls, NY	10,000
Oglevee Mercor, Inc., Fredonia, NY	500
Parker White Metal Co., Fairview, PA	535
Pennsylvania Pressed Metals, Emponium, PA	525
Reed Mfg. Co., Inc.	104
Ridgway Color Co., Ridgway, PA	525
Riley-Stoker Corp., Erie, PA	345
Rockwell, Int'l, DuBois, PA	375

End User	Maximum daily volume (Mcf)
Sharon Steel Company, Sharon, PA	20,000
Sharon Tube Co., Sharon, PA	1,000
Sherango, Inc., Sharpsville, PA	500
Skinner Engine Co., Erie, PA	138
Smith Meter, Inc., Erie, PA	240
Sohio, Inc., Niagara Falls, NY	400
St. Mary's Carbon Co., St. Mary's, PA	150
The Redwing Co., Dunkirk, NY	1,700
Triangle Auto Spring, DuBois, PA	350
True Temper, Lake City, PA	175
Urick Foundry, Inc., Erie, PA	340
Vac Air Alloys Corp., Frewsburg, NY	100
Weber Knapp Co., Jamestown, NY	200
Wothington Compressor Div., Buffalo, NY	150
Zurn Industries	1,237

**Appendix B—Schedule of End-Users Seeking Modification to Authorization Granted in Docket No. CP85-608-008**

**1. End-Users for which National Fuel Seeks New Receipt Point**

- Airco Carbon Div. of BOC, Inc., Niagara Falls, NY
- Airco Carbon Div. of BOC, Inc., St. Mary's, PA
- AlTech Specialty Steel Corp., Dunkirk, NY
- American Brass, Buffalo, NY
- Aneglica Healthcare Service Group, Batavia, NY
- Arco Metals Co.
- Darling & Co., Cheektowaga, NY
- Goodyear Tire & Rubber Co., Niagara Falls, NY
- Hammermill Paper Co., Erie, PA
- Hopes Architectural Products, Jamestown, NY
- McInnes Steel Co., Corry, PA
- PPG Industries, Pittsburgh, PA
- Ralston Purina Co., Dunkirk, NY
- Stackpole Corp. (The), St. Mary's, PA
- Wheatland Tube, Wheatland, PA

**2. End-Users for which National Fuel Seeks to Increase Transportation Service**

End-users	Existing authorized trans. vol. (Mcf/day)	Proposed max. daily trans. vol. (Mcf/day)	Proposed max. annual trans. vol. (Mcf/day)
PPG Industries, Pittsburgh, PA	7,000	7,500	2,700,000
National Forge Co., Irvine, PA	3,333	4,000	1,440,000
Bethlehem Steel Corp., Buffalo, NY	7,000	9,000	3,240,000

*Comment date:* February 2, 1987, in accordance with Standard Paragraph F at the end of this notice.

**6. Natural Gas Pipeline Company of America**

[Docket No. CP87-149-000]

Take notice that on January 2, 1987, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street,

Lombard, Illinois 60148, filed in Docket No. CP87-149-000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing Natural to transport gas on an interruptible basis for Shell Offshore Inc. (Shell), a producer, under a gas transportation agreement with Shell from an existing receipt point in Wharton County, Texas, to existing delivery points in Cameron and Vermilion Parishes, Louisiana, and Montgomery County, Texas, and to a proposed delivery point pending Commission authorization in Cameron Parish, Louisiana, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Natural states that it has entered into a gas transportation agreement with Shell to provide on an interruptible basis transportation of up to a maximum of 150 billion Btu equivalent per day of gas for Shell for a primary term of two years from date of first delivery.

It is stated that Natural would receive gas at an existing receipt point in Wharton County, Texas. It is further stated that Natural would redeliver volumes of gas for Shell's account at two existing delivery points and one proposed delivery point (for which certificate authority has been requested in Docket No. CP87-45-000) in Cameron Parish, Louisiana, at an existing delivery point in Vermilion Parish, Louisiana, and at an existing point in Montgomery County, Texas (the latter to be used only at the discretion of Natural).

Natural proposes to charge Shell a transportation rate consistent with its Rate Schedule TRT-1 maximum rate levels effective July 1, 1986, of 9.6 cents per million Btu equivalent. Natural also proposes to charge Shell the currently effective Gas Research Institute surcharge, if required.

Natural asserts that no certificate authority is requested herein to construct facilities for the service to be provided. However, Natural requests authorization to add and delete receipt points as required to support the transportation service. It is explained that the construction of such receipt points added to implement the arrangement would be done under Natural's Order No. 234 blanket construction authorization in Docket No. CP82-402-000.

*Comment date:* February 2, 1987, in accordance with Standard Paragraph F at the end of this notice.

### 7. Northwest Central Pipeline Corporation

[Docket No. CP87-138-000]

Take notice that on December 22, 1986, Northwest Central Pipeline Corporation (Northwest Central), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP87-138-000, a request pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 C.F.R. 157.205 and 157.216) for authorization to abandon certain measuring, regulating and appurtenant facilities serving a residential customer in Wilson County, Kansas, and the transportation of natural gas through the subject facilities under the authorization issued in Docket No. CP82-479-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northwest Central states that it was previously authorized to abandon by reclaim, sale, and in place approximately 5.2 miles of 8-inch lateral pipeline in Wilson and Neosho Counties, Kansas, and to abandon transportation service to two residential customers located on the lateral pipeline. Such authorization was granted pursuant to Northwest Central's request under blanket certificate filed in Docket No. CP85-17-000 on October 9, 1984, it is stated. Northwest Central alleges that at the time of filing Docket No. CP85-17-000, it had overlooked the fact that a third residential customer was also served by the lateral pipeline to be abandoned. Since this customer had no alternative supply of fuel, Northwest Central states that it left approximately ten feet of 8-inch lateral line and the measuring and regulating facilities in operation in order to maintain service to the one residential customer.

Subsequently, Northwest Central alleges that it and the residential customer have agreed to the abandonment of natural gas service and to the implementation of an alternate fuel source. Northwest Central now seeks authorization to abandon transportation service to the residential customer and to abandon in place the remainder of the 8-inch lateral pipeline and to reclaim the measuring and regulating facilities. Northwest Central estimates that the cost to reclaim these facilities would be \$280.00 with an estimated salvage value of \$10.00.

*Comment date:* February 26, 1987, in accordance with Standard Paragraph G at the end of this notice.

### 8. Northwest Pipeline Corporation

[Docket No. CP85-116-006]

Take notice that on December 22, 1986, Northwest Pipeline Corporation (Petitioner), 295 Chipeta Way, Salt Lake City, Utah 84108, filed in Docket No. CP85-116-006 a petition to amend further the Commission order pursuant to Section 7(c) of the Natural Gas Act issued May 8, 1985, in Docket No. CP85-116-000, as amended, to authorize Petitioner to continue to transport natural gas for The Washington Power Company (Water Power) for an extended term, expiring November 30, 1988, all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

It is stated that the Commission's May 8, 1985, order authorized Petitioner to transport, on an interruptible basis, up to 6,600 million Btu equivalent of natural gas per day for the account of Water Power pursuant to a gas transportation agreement (transportation agreement) dated November 7, 1984. Under the transportation agreement, Petitioner transports gas from the Canadian border at Sumas, Washington, to two delivery points in Spokane County, Washington, where thermally equivalent volumes, less fuel, are redelivered to Water Power for subsequent resale to two large end-users, Fairchild Air Force Base and Northwest Alloys, Inc.

It is explained that Petitioner was authorized to perform the subject transportation service for a one year term, extending through March 10, 1986. Petitioner was authorized to continue the transportation of natural gas for Water Power for an additional one year term, expiring March 11, 1987.

It is stated that, by an amendment dated December 10, 1986, to the transportation agreement, Petitioner and Water Power have agreed to extend the term of the transportation agreement for an additional period, expiring on November 30, 1988.

Petitioner requests the Commission to amend its May 8, 1985, order as amended on February 28, 1986, to authorize it to continue to transport natural gas for Water Power under the transportation agreement, as amended, for an additional period expiring on November 30, 1988. It is alleged that, other than the extension of term, no change is proposed in the terms and conditions of the existing transportation service.

*Comment date:* February 2, 1987, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

### 9. Transcontinental Gas Pipe Line Corporation

[Docket No. CP87-124-000]

Take notice that on December 12, 1986, Transcontinental Gas Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, filed in Docket No. CP87-124-000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing Transco to transport natural gas on behalf of Shell Offshore Inc. (Shell), all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Transco requests authorization to transport on behalf of Shell, on an interruptible basis, quantities of natural gas produced by Shell in the Brazos Area, Blocks A-19, A-20, and A-23, offshore Texas (Brazos A-19, 20, 23). Such quantities, it is indicated, have been released from purchase by Columbia Gas Transmission Corporation (Columbia Gas) and can be transported in part by Columbia Gulf Transmission Company (Columbia Gulf). Transco proposes to transport such gas pursuant to the transportation agreement dated June 26, 1986, as amended, between Transco and Shell.

Transco states that, pursuant to the transportation agreement, it would receive at the existing point of interconnection between the jointly owned facilities of Transco and Columbia Gulf and the facilities of the Central Texas Gathering System (CTGS) in Brazos Block 538 (Brazos 538 Receipt Point) any quantities of gas from Brazos A-19, 20, and 23 which have been released by Columbia Gas and which do not exceed 35,000 dt equivalent per day. Transco further states that it would also receive at the terminus of the CTGS near the inlet of Transco's Compressor Station No. 30 in Wharton County, Texas (Station 30 Receipt Point) any quantities of gas from Brazos A-19, 20, and 23 which have been released by Columbia Gas and which, when combined with the quantities transported for Shell from the Brazos 538 Receipt Point and any quantities of Brazos A-19, 20, and 23 gas which Transco may then be transporting for Columbia Gas or Columbia Gulf, do not exceed 120,000 dt equivalent per day.

Transco avers that it would redeliver, on an interruptible basis, equivalent quantities (less quantities retained for compressor fuel and line loss make-up, less fuel for dehydration, and less a reduction in volume and Btu content due to processing, if any) at (1) the jointly-owned facilities of Transco, Columbia

Gulf and ANR Pipeline Company (ANR), near Station No. 30, Wharton County, Texas (Station 30 Delivery Point), (2) the existing point of interconnection with Trunkline Gas Company (Trunkline) at Katy, Fort Bend County, Texas (Katy Delivery Point), and (3) the existing point of interconnection with Trunkline at Ragley, Beauregard Parish, Louisiana (Ragley Delivery Point).

For this transportation service, Transco proposes to initially retain for compressor fuel and line loss make-up six tenths percent of the quantities delivered at the Station 30 and Katy Delivery Points and two and four-tenths percent of the quantities delivered at the Ragley Delivery Point. Such percentages, it is explained, are based on the

applicable fuel retention factor reflected on Original Sheet No. 19 of Transco's FERC Gas Tariff, Second Revised Volume No. 1. Transco also proposes to retain initially an additional 0.03 percent of the quantities which are received at the Brazos 538 Receipt Point and passed through the Markham Plant in Matagorda County, Texas to compensate for the gas that is used as fuel in that plant's flash gas compressor.

It is stated that Transco proposes to charge Shell the applicable transportation rates based on the maximum rates set forth in Original Sheet No. 19 of Transco's FERC Gas Tariff, Second Revised Volume No. 1, as such rates may be amended or superceded from time to time. Such rates are currently as follows:

Receipt point	Delivery point	Mileage	Rate (cent/dt)
(a) Brazos 538	Station 30	79.04	9.6
(b) Brazos 538	Katy	122.13	12.0
(c) Brazos 538	Ragley	293.55	26.8
(a) Station 30	Station 30		
(b) Station 30	Katy	43.09	4.8
(c) Station 30	Ragley	214.51	21.6

Transco states that the subject transportation arrangement would remain in force for a primary term of five years from the date of initial deliveries, and year-to-year thereafter unless and until terminated by either party giving proper notice.

*Comment date:* February 2, 1987, in accordance with Standard Paragraph F at the end of this notice.

#### 10. Transcontinental Gas Pipe Line Corporation and Marengo Corporation

[Docket No. CP85-390-003]

Take notice that on December 16, 1986, Transcontinental Gas Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, and Marengo Corporation (Marengo), P.O. Drawer 888, Oneonta, Alabama 35121, filed in Docket No. CP85-390-003 a petition to amend the order issued in Docket Nos. CP85-390-000 and CP85-390-001 on December 20, 1985, issuing a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA), which petition includes a request of Marengo that the Commission issue to it a declaration of exemption pursuant to NGA section 1(c) (15 U.S.C. 717(c)) and Part 152 of the Commission's Regulations (18 CFR Part 152), all as more fully set forth in the petition and request on file with the Commission and open to public inspection.

Pursuant to the December 20, 1985 certificate, Transco is presently transporting for James River-Norwalk,

Inc. (JR-N), on an interruptible basis, up to an aggregate maximum daily of 16,560 dt equivalent of natural gas per day from various points of receipt in Amite, Clarke, Jefferson Davis, Jones, Pike and Walthall Counties, Mississippi, and from Eugene Island Area, Block 80, offshore Louisiana, to a point of delivery to Marengo in Choctaw County, Alabama. Also pursuant to such certificate, Marengo then transports the subject gas to the Naheola, Alabama, pulp mill of JR-N, where it is used for machine drying fuel, lime kiln fuel, and boiler fuel.

Transco and Marengo state that two recent developments require amendments to the present certificate authorization:

1. By agreement dated June 17, 1986, Transco and JR-N have amended their Gas Transportation Agreement of December 27, 1984, as amended, to increase the aggregate maximum daily quantity of gas to be transported from 16,560 dt per day to 21,000 dt equivalent per day, which increase is necessitated by an expansion of the Naheola mill. Transco requests authorization to transport this increased quantity.

2. On August 5, 1986, the Alabama Public Service Commission (APSC) issued an order issuing a Certificate of Public Convenience and Necessity authorizing Marengo to perform transportation service wholly within the state of Alabama (including specifically its services for JR-N) and approving

Marengo's effective tariffs, rates and charges. In light of this action the Commission is requested to issue Marengo a declaration of exemption pursuant to NGA Section 1(c), and in conjunction therewith, to vacate Marengo's NGA Section 7(c) certificate authorizations associated with its facilities and services, including those contained in the subject order of December 20, 1985.

In addition to its above-described transportation for JR-N, Marengo states, it also transports gas to JR-N's Naheola, Alabama mill from a connection with Southern Natural Gas Company in Sumter County, Alabama; and it transports gas for Gulf States Paper Company (Gulf States) from a point of connection with Transco in Marengo County, Alabama, to Gulf States' mill at Pennington, Marengo County. It is averred that all gas transported by Marengo flows through facilities located wholly within the state of Alabama and that such gas is consumed within that state. Also, it is stated, because all of Marengo's natural gas rates, services and facilities are now subject to regulations by the APSC, Marengo is eligible for an exemption from NGA jurisdiction under Section 1(c) of the NGA.

Transco states that by filing the subject petition, it is not electing "nondiscriminatory access" as such term is described and defined in §§ 284.8(b) and 284.9(b) of the Regulations (promulgated in Order No. 436, Docket No. RM85-1-000).

Marengo claims that each of the elements necessary for an exemption from the provisions of the NGA exist, and requests that the Commission issue an exemption pursuant to Section 1(c) of the NGA.

*Comment date:* February 2, 1987, in accordance with Standard Paragraph F at the end of this notice.

#### 11. Valley Gas Transmission, Inc.

[Docket No. CP87-155-000]

Take notice that on January 8, 1987, Valley Gas Transmission, Inc. (Valley), P.O. Box 799099, San Antonio, Texas 78279-9099 filed in Docket No. CP87-155-000 a prior notice request pursuant to Sections 157.205 and 284.223 of the Commission's regulations. Valley seeks authorization to transport natural gas on behalf of Pend Oreille Oil & Gas Company (Pend Oreille) under Valley's blanket transportation certificate issued in Docket No. CP86-171-000, and as more fully set forth in the prior notice request, which is on file with the Commission and open to public inspection.

Valley states that, pursuant to a transportation agreement dated October 2, 1986, Valley proposes to transport natural gas on behalf of Pend Oreille on Valley's system in Live Oak County, Texas. Valley states that peak day volumes under this agreement would not exceed 11,154 million Btu, annual volumes would not exceed 2,190.2 billion Btu, and the average daily volume would be 6,084 million Btu.

Valley states that it is not aware of any relationship that exists between Pend Oreille and Valley. Valley also indicates that no facilities need be constructed to implement the service. Also, Valley states that it commenced a transportation service for Pend Oreille on October 2, 1986, pursuant to the automatic 120-day authorization permitted by Section 284.223(a) of the Commission's regulations.

*Comment date:* February 26, 1987, in accordance with Standard Paragraph G at the end of this notice.

*Standard Paragraphs:*

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) 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 filing 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 the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

**Kenneth F. Plumb,**

*Secretary.*

[FR Doc. 87-988 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

**Anthony Oil & Gas Co. et al.; Notice of Applications for Abandonment, Limited-Term Abandonment and Blanket Limited-Term Certificates With Pregranted Abandonment**

January 9, 1987.

Take notice that the Applicants listed herein have filed applications pursuant to Section 7 of the Natural Gas Act for abandonment, limited-term abandonment and for blanket limited-term certificates with pregranted abandonment to sell natural gas for resale in interstate commerce, as described herein.

The circumstances presented in the applications meet the criteria for consideration on an expedited basis, pursuant to Section 2.77 of the Commission's rules as promulgated by Order No. 436 and 436-A, issued October 9, and December 12, 1985, respectively, in Docket No. RM85-1-000, all as more fully described in the applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before 15 days after the date of publication of this notice in the **Federal Register**, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest 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. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's Rules.

**Kenneth F. Plumb,**

*Secretary.*

Docket No. and date filed	Applicant	Purchaser and location	Price per 1,000 ft <sup>3</sup>	Pressure base
CI87-96-000, B, Oct. 31, 1986.....	Anthony Oil & Gas Co., Route 2, Lake Village, AR 71653.	Arkla Energy Resources, a Division of Arkla, Inc., Ada Field, Webster and Bienville Parishes, Louisiana.	( <sup>1</sup> )	
CI87-124-000, B, Nov. 20, 1986.....	Jerome P. McHugh, 650 S. Cherry, Suite 1225, Denver, CO 80222.	Northwest Pipeline Corporation, Basin Dakota, Wild Horse, Gallup, and Tapacito P.C. Fields, Rio Arriba County, New Mexico.	( <sup>2</sup> )	

Docket No. and date filed	Applicant	Purchaser and location	Price per 1,000 ft <sup>3</sup>	Pressure base
CI87-125-000, B, Nov. 20, 1986.....	.....do.....	El Paso Natural Gas Company, Basin Dakota, Ignacio Blanco, Dakota, Gallegos Gallup, Ballard P.C., Blanco P.C. South, Gavilan Pictured Cliffs, WAW Fruitland P.C., Undesignated P.C. and Choza Mesa Gallup Fields, San Juan and Rio Arriba Counties, New Mexico, and La Plata County, Colorado.	( <sup>5</sup> )	
CI87-131-000, (CI83-20-000 B, Nov. 21, 1986.	Union Exploration, Partners, LTD. P.O. Box 7600, Los Angeles, CA 90051.	United Gas Pipe Line Company, Block 32, Eugene Island Area, Off-shore Louisiana.	( <sup>5</sup> )	
CI87-135-000, (C164-1085), B, Nov. 24, 1986.	Union Oil Co., of California, P.O. Box 7600, Los Angeles, CA 90051.	El Paso Natural Gas Company, Gomez and Worsham-Bayer Fields, Pecos and Reeves Counties, Texas.	( <sup>6</sup> )	
CI87-139-000, A, Nov. 28, 1986.....	Union Exploration Partners, LTD., P.O. Box 7600, Los Angeles, CA. 90051.	Various Purchasers, Block 32, Eugene Island Area, Offshore Louisiana.	( <sup>8</sup> )	
CI87-140-000, A, Nov. 28, 1986.....	Union Oil Co., of California, P.O. Box 7600, Los Angeles, CA. 90051.	Various Purchasers, Gomez and Worsham-Bayer Fields, Pecos and Reeves Counties, Texas.	( <sup>9</sup> )	
CI87-144-000, B, Nov. 28, 1986.....	Tremade Corp., c/o David L. Smelley, Esq., P.O. Box B, Shreveport, LA. 71161-0010.	Arkla Energy Resources, A Division of Arkla, Inc., Sibley Field, Webster Parish, Louisiana.	( <sup>11</sup> )	
CI87-160-000, B, Dec. 1, 1986.....	Lewis B. Burleson, Inc., P.O. Box 2479, Midland, TX 79702.	El Paso Natural Gas Co., Lea County, New Mexico.	( <sup>13</sup> )	

<sup>1</sup> Applicant, a small producer certificate holder in Docket No. CS87-11-000, requests authorization for a limited-term abandonment of all sales of gas to Arkla for a period of two years to the extent that such gas is surplus to the needs of Arkla and is not taken by Arkla under the contract.

In support of its application Applicant states that the contract dated March 1, 1985, has a primary term which expires March 1, 2000. Applicant is subject to substantially reduced takes without payment. The wells involved, NGPA price category and deliverability are shown below:

Well	NGPA price category	Estimated deliverability (Mcf/day)
D SU N; Davis Q No. 1-D.....	104 Replacement.....	8
D SU M; Stark No. B-1.....	104 Replacement.....	23.3
Hill SU Y; Stark No. B-2.....	108 Stripper.....	1
D SU L; Walker No. C-1.....	104 Replacement.....	5.6
Hill SU Z; Walker No. C-2.....	104 Replacement.....	.03
D SU I; Woodard No. A-1.....	104 Replacement.....	3
Hill SU P; Woodard A No. 2-D.....	104 Replacement.....	1.3
PET SU K; Woodard B No. 1-D.....	104 Replacement.....	12.6
D SU P; Woodard No. E-1.....	104 Replacement.....	7.7
D SU J; Woodard No. E-2.....	104 Replacement.....	1.2
HOSS A RA SU F; Walker No. M-1.....	104 Post-1974.....	57
HOSS A RA SU Y; Walker F.....	104 Replacement.....	1
HOSS A RA SU Z; Walker D.....	104 Replacement.....	0
HOSS A RA SU Z; Walker D No. 1-D.....	104 Replacement.....	0
D SU O; Butler No. 1-D.....	104 Replacement.....	7.6
D SU F; Cook No. 1-D.....	104 Replacement.....	38.7
D SU C; Harvey No. 2.....	104 Replacement.....	62.47
C SU F; Cook No. 1.....	104 Replacement.....	36.6
C SU C; Harvey No. 3.....	104 Replacement.....	5.3
HILL SU E; Butler No. 2.....	104 Replacement.....	18.6
		291.0

Applicants interest in the Hoss B RA SU 2; Walker D and the HOSS A RA SU Z; Walker D No. 1-D wells is an after-payout interest and these wells have not reached payout as of this filing. Furthermore, these wells are not reasonably anticipated to reach payout during the two-year limited-term abandonment period. Applicant states that it proposes to find alternate markets for the released gas and requests pregranted limited-term abandonment for any sales for resale in interstate commerce of any released gas sold under its small producer certificate.

<sup>2</sup> Applicant, which operates under a small producer certificate in Docket No. CS72-365-000, requests authorization to permanently abandon a sale of NGPA section 108 stripper gas to Northwest. By letter dated October 27, 1986, Northwest advised Applicant it would not oppose the abandonment application.

In support of its application Applicant states that upon the issuance of an abandonment order Northwest will be relieved of any take-or-pay obligations it might have. Applicant is subject to substantially reduced takes without payment.

Applicant proposes to seek an alternate market for this gas.

<sup>3</sup> Applicant, who operates under a small producer certificate in Docket No. CS72-365-000, requests authorization to permanently abandon a sale of NGPA section 108 stripper gas to El Paso. By letter agreement dated September 30, 1986, El Paso agreed to terminate the contract as to this gas upon issuance of abandonment authorization.

In support of its application Applicant states that upon the issuance of an abandonment order El Paso will be relieved of any take-or-pay obligation it might have. Applicant is subject to substantially reduced takes without payment.

Applicant states that it will seek to sell this gas in an alternate market.

<sup>4</sup> Additional information received December 8, 1986.

<sup>5</sup> Applicant requests authorization to permanently abandon a sale of gas to United Gas Pipe Line Company. Applicant states in support of its application that United notified Applicant by letter dated November 6, 1986, that it has elected to cancel the contract. Applicant is subject to substantially reduced takes without payment and the gas involved is NGPA section 104 (1973-1974) Biennium gas at approximately 100 Mcf/day, section 104 (Post-1974) gas at approximately 1,300 Mcf/day, and section 106(a) gas at approximately 6,200 Mcf/day. Applicant desires to sell this gas to new purchasers.

<sup>6</sup> Applicant requests authorization to permanently abandon a sale of gas to El Paso Natural Gas Company. Applicant states in support of its application that El Paso notified Applicant by letter dated September 30, 1986, that the February 24, 1964, agreement was terminated effective December 1, 1986. Applicant is subject to substantially reduced takes without payment and the gas involved is NGPA section 104—flowing gas at approximately 15,000 Mcf/day, section 104—Post-1974 gas at approximately 600 Mcf/day, and section 108 stripper gas at approximately 170 Mcf/day. Applicant desires to sell this gas to new purchasers.

<sup>7</sup> Application received November 21, 1986. Filing date is date of receipt of filing fee.

<sup>8</sup> Applicant requests a three-year limited-term blanket certificate with pregranted abandonment to make sales for resale in interstate commerce of gas which is subject to the permanent abandonment in Docket No. CI87-131-000. Applicant requests that the requirement of Part 154 of the Commission's Regulations be waived.

<sup>9</sup> Applicant requests a three-year limited-term blanket certificate with pregranted abandonment to make sales for resale in interstate commerce of gas which is subject to the permanent abandonment in Docket No. CI87-135-000. Applicant requests that the requirement of Part 154 of the Commission's Regulations be waived.

<sup>10</sup> Additional information received December 3, 1986.

<sup>11</sup> Applicant, a small producer certificate holder in Docket No. CS75-555, requests permanent abandonment authorization for its sale of gas to Arkla covered under a gas sales contract dated July 10, 1975, which expires on July 10, 1995. In support of its application Applicant states that the parties have, by letter dated November 24, 1986, canceled the contract. Applicant is subject to substantially reduced takes without payment, the gas is NGPA section 104 (1973-1974 Biennium-small producer) gas, and the deliverability is approximately 1,500 Mcf/day. Applicant plans to seek other meaningful markets for the gas.

<sup>12</sup> Additional information received December 18, 1986.

<sup>13</sup> Applicant, a small producer certificate holder in Docket No. CS69-36, requests authorization for a three-year limited-term abandonment of certain sales of gas to El Paso. Applicant further requests pregranted abandonment authorization of sales of the subject gas under Applicant's small producer certificate for a period of three years.

In support of its application Applicant states El Paso is not buying the gas and is not paying for volumes not taken. The gas involved is NGPA section 104 recompletion and post-1974 gas and section 108 stripper gas. Potential deliverability is 838 Mcf/d. Applicant proposes to sell the gas in interstate commerce in the spot market.

Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Amendment to delete acreage; E—Total Succession; F—Partial Succession.

[FR Doc. 87-982 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI87-112-000]

**Courtaulds North America, Inc.; Notice of Application for Abandonment**

January 9, 1987.

Take notice that the Applicant listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to abandon service as described herein.

The circumstances presented in the application meet the criteria for

consideration on an expedited basis, pursuant to § 2.77 of the Commission's rules as promulgated by Order No. 436 and 436-A, issued October 9, and December 12, 1985, respectively, in Docket No. RM85-1-000, all as more fully described in the application which is on file with the Commission and open to public inspection.

Accordingly, any person desiring to be heard or to make any protest with reference to said application should, on or before 15 days after the date of publication of this notice in the **Federal Register**, file with the Federal Regulatory Commission, Washington,

DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). 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. Any person wishing to become a party to the proceeding herein must file a petition to intervene in accordance with the Commission's Rules.

**Kenneth F. Plumb,**  
*Secretary.*

Docket No. and date filed	Applicant	Purchaser and location	Price per 1,000 ft <sup>3</sup>	Pressure base
CI87-112-000, B, <sup>1</sup> Nov. 17, 1986.....	Courtaulds North America Inc., P.O. Box 2684, Mobile, AL. 36652.	Arkla, Energy Resources, a division of Arkla, Inc., South Pine Hollow Field, Hughes County, Oklahoma.	(?)	

<sup>1</sup> Additional material received November 24, 1986, January 6, 1987.

<sup>2</sup> Applicant, which has applied for a small producer certificate in Docket No. CS87-23-000, requests authorization to abandon service to Arkla from the Eckles 1-27 gas well for a term extending through August 1, 1987, under an agreement dated July 2, 1986. Applicant also requests pregranted abandonment with respect to any sale for resale that it makes during the limited-term abandonment sought herein.

In support of its application Applicant states that Arkla's takes from the subject well have been substantially reduced without payment. Arkla's takes have been so low as to render the operation of the well commercially unviable, and as a result the well has been shut in. Applicant proposes to use the subject gas in its own plant in Mobile, Alabama, or for sale in the spot market. The gas involved is NGPA section 104, post-1974 gas with a deliverability of approximately 200 Mcf/day.

Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Amendment to delete acreage; E—Total Succession; F—Partial Succession.

[FR Doc. 87-984 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. EF85-2011-003 and EF85-2021-003]

**U.S. Department of Energy-Bonneville Power Administration; Notice of Filing of Withdrawal of Request for Confirmation and Approval of Proposed Rates**

January 9, 1987.

Take notice that on January 8, 1987, Bonneville Power Administration (BPA) of the United States Department of Energy withdrew its request for approval of two rates currently under Commission consideration. BPA withdrew its request for approval of the 1985 share-the-savings (SS-85) rate schedule. This rate was granted interim approval by the Commission June 28, 1985. BPA has determined that withdrawal of its request for approval of the SS-85 schedule is warranted because the rate has not been used and will not be used for the duration of the rate period.

BPA also withdrew its request for approval of a proposed alternative modification of its 1985 Nonfirm Energy (NF-85) rate. On April 2, 1986, BPA requested approval in the alternative of two proposed modifications to the NF-85 rate: (1) NF-85 (Modified) and (2) NF-85 (Contract rate modification). The Commission granted interim approval of NF-85 (Modified) on May 1, 1986. *U.S. Department of Energy, Bonneville Power Administration*, 35 FERC ¶61,143 (1986). The NF-85 Contract rate modification was never approved. BPA has determined that there is no need for approval of the NF-85 Contract rate modification because the Commission approved BPA's NF-85 (Modified) rate.

Any person desiring to be heard or to protest this application should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Section 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before January 23, 1987. Persons who have already intervened in Docket NO. EF85-2011-000 need not file an additional petition to intervene. 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 motion to intervene. Copies of this application are on file with the

Commission and are available for public inspection.

Kenneth F. Plumb,

*Secretary.*

[FR Doc. 87-983 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER87-199-000]

**Illinois Power Co.; Notice of Filing**

January 9, 1987.

Take notice that Illinois Power Company (Illinois Power) on December 29, 1986, tendered for filing a change in its transmission charge which supersedes the charge currently on file with the Federal Energy Regulatory Commission. The proposed change will allow the Company to charge less than the cost supported charges and thereby enhance sales and an efficient supply of electricity in a competitive electricity market.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before January 22, 1987. 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 motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

*Secretary.*

[FR Doc. 87-985 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. FA86-23-001]

**Montaup Electric Co.; Notice Establishing Intervention and Shortened Briefing Procedures**

January 9, 1987.

By letter order dated October 21, 1986,<sup>1</sup> in this docket, the Commission issued a report summarizing the results of a staff audit of the books and records of Montaup Electric Company (Company). The letter order noted the Company's disagreement with certain matters contained in the report and directed the Company to notify the

Commission whether it consents to the disposition of the contested matters<sup>2</sup> under the shortened procedures set forth in Part 41 of the Commission's regulations.<sup>3</sup>

On November 7, 1986, the Company notified the Commission that it consented to the disposition of the contested matters under the shortened procedures.

The following schedule is hereby established:

(A) Any person desiring to participate in this docket should file a protest or a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214 (1986)). All such protests or motions should be filed within 30 days after publication of this notice in the *Federal Register*. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make any protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene.

(B) Montaup Electric Company, any interested party and the Commission trial staff shall file with the Commission within 30 days of the date of publication of this notice in the *Federal Register* a memorandum of facts and arguments addressing the contested matters noted herein in accordance with Part 41 of the Commission's regulations under the Federal Power Act.

(C) Reply memoranda shall be filed with the Commission within 20 days thereafter.

Kenneth F. Plumb,

*Secretary.*

[FR Doc. 87-986 Filed 1-15-87; 8:45 am]

BILLING CODE 6717-01-M

**ENVIRONMENTAL PROTECTION AGENCY**

[OAR-FRL-3142-7]

**Approvals of PSD Permits and Extensions of PSD Permits; Region 6; Warren Petroleum Co. et al.**

Notice is hereby given that the Environmental Protection Agency (EPA), Region 6, has issued Prevention of Significant Deterioration (PSD) permits to the following:

<sup>2</sup> An explanation of the contested matters is set forth in the letter order.

<sup>3</sup> 18 CFR Part 41 (1986).

<sup>1</sup> 37 FERC ¶ 61,047 (1986).

1. *PSD-TX-696—Warren Petroleum Company*: This permit, issued on July 3, 1986, authorizes the construction of a cogeneration unit at the existing natural gas fractionation plant located on Highway 146 in Mont Belvieu, Chambers County, Texas.

2. *PSD-TX-650M-1—Northern Cogeneration One Company*: Natural gas fired cogeneration facility located at the intersection of Grant Avenue and Fifth Avenue South in Texas City, Galveston County, Texas. PSD-TX-650M-1 modifies PSD-TX-650 to authorize an increase in emissions of nitrogen oxide, carbon monoxide, volatile organic compounds, sulfur dioxide and particulate matter. It also authorizes the firing of the heat recovery steam generators at all times. This modified permit was issued on July 15, 1986.

3. *PSD-TX-474M-2—Exxon Company, U.S.A.*: Petroleum refinery located at 2800 Decker Drive, Baytown, Harris County, Texas. PSD-TX-474M-2 modifies PSD-TX-474M-1 to authorize the additional firing of 44MM Btu/hr of fuel gas in the Hydroformer 3 furnaces, and increased carbon monoxide emissions for the gas turbine/waste heat boiler. This modified permit was issued on August 6, 1986.

4. *PSD-LA-538—Gulf States Utilities Company*: This permit, issued on August 7, 1986, authorizes the addition of two gas turbine heat recovery steam generators at the existing Power Station 1 located immediately west of Scenic Highway and south of Gulf State Road in Baton Rouge, East Baton Rouge Parish, Louisiana.

5. *PSD-LA-537—American Hoechst Corporation*: This permit, issued on August 8, 1986, authorizes the modification of boilers #7 and #12 for the combustion of styrene tar at the existing styrene manufacturing facility located at 11911 Scenic Highway, approximately seven miles northwest of Baton Rouge, East Baton Rouge Parish, Louisiana.

6. *PSD-TX-709—Shell Western E&P, Incorporated*: This permit, issued on August 8, 1986, authorizes the construction of two 4000 horsepower natural gas fired turbines at the existing Houston Central gas processing plant located approximately five miles southwest of Sheridan, Colorado County, Texas.

7. *PSD-TX-690—Chevron Chemical Company*: This permit, issued on August 12, 1986, authorizes the construction of a natural gas fired cogeneration unit at the existing polyethylene plant located on FM Road 1006, approximately three miles south of West Orange, Orange County, Texas.

8. *PSD-TX-692—Arco Oil and Gas Company*: This permit, issued on August 21, 1986, authorizes the construction of an air separation unit at the existing Block 31 Pressure Maintenance Plant located on FM Road 1601, approximately four miles northwest of Crane, Crane County, Texas.

9. *PSD-TX-695—Stauffer Chemical Company*: This permit, issued on August 27, 1986, authorizes the expansion of the existing sulfuric acid plant located at 3439 Park Street, Baytown, Harris County, Texas.

10. *PSD-LA-520M-1—PPG Industries, Incorporated*: Chemical plant located on Columbus Southern Road adjacent to Highways 10 and 210 in Lake Charles, Calseieu Parish, Louisiana. PSD-LA-520M-1 modifies PSD-LA-520 to authorize the elimination of the gas firing of the two heat recovery steam generators. It also authorizes the deletion of Specific Conditions 3, 4, and 5. This modified permit was issued on August 27, 1986.

11. *PSD-TX-256M-2—United States Gypsum Corporation*: Lime manufacturing plant located on Wald Road, approximately five miles south of New Braunfels, Comal County, Texas. PSD-TX-256M-2 modifies PSD-TX-256M-1 to authorize a change in the nitrogen oxide emission rate from 77.5 to 77.2 pounds per hour, and a change in the carbon monoxide emission rate from 50 to 72.1 pounds per hour based on 1.03 pounds per ton of feed. This modified permit was issued on August 28, 1986.

12. *PSD-TX-604—Hill Petroleum Company*: This permit, issued on September 25, 1986, authorizes the construction of a cogeneration facility to be located at the existing refinery located at 9701 Manchester in Houston, Harris County, Texas.

13. *PSD-TX-693—Texaco, Incorporated*: This permit, issued on September 25, 1986, authorizes the construction of a natural gas sweetening and dehydration plant to be located approximately 7.5 miles west of George West, Live Oak County, Texas.

14. *PSD-TX-630M-3—Amoco Production Company*: Slaughter Gasoline Plant located approximately four miles west of Sundown, Hockley County, Texas. PSD-TX-630M-3 modifies PSD-TX-630M-2 to authorize the addition of a Phase II CO<sub>2</sub> Recovery Plant to the Phase I Mallet CO<sub>2</sub> Plant. The modified permit was issued on September 26, 1986.

15. *PSD-LA-117M/2—Southwestern Electric Power Company*: Lignite fired electric power generating station located on Highway 84, approximately ½ mile southwest of Naborton, DeSoto Parish, Louisiana. PSD-LA-117M-2 modifies

PSD-LA-117M-1 to authorize changes in the opacity limit. The modified permit was issued on September 30, 1986.

These permits have been issued under EPA's Prevention of Significant Deterioration of Air Quality Regulations at 40 CFR 52.21, as amended August 7, 1980. The time period established by the Consolidated Permit Regulations at 40 CFR 124.19 for petitioning the Administrator to review any condition of the permit decisions has expired. Such a petition to the Administrator is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action. No petitions for review of these permits have been filed with the Administrator.

Notice is hereby given that the Environmental Protection Agency (EPA), Region 6, has extended the expiration date of the following Prevention of Significant Deterioration (PSD) permits:

1. *PSD-TX-633—Power Systems Engineering, Incorporated*: This permit, effective on March 14, 1985, authorizes the construction of a gas turbine cogeneration facility to be located on Battleground Road, approximately ¼ mile northwest of LaPorte, Harris County, Texas. The company has postponed construction due to financial considerations which have resulted in several schedule delays. The extension was granted on July 15, 1986, to a new expiration date of March 14, 1988.

2. *PSD-TX-340—Southwestern Electric Power Company*: This permit, effective on February 1, 1983, authorizes the construction of a lignite fired electric generating plant to be located approximately two miles southwest of State Route 247 and nine miles northwest of Huntsville, Walker County, Texas. The company has postponed construction due to changes in load growth projection. The additional extension was granted on July 22, 1986, to a new expiration date of August 1, 1987.

3. *PSD-TX-471—Kirby Forest Industries, Incorporated*: This permit, effective on June 24, 1983, authorizes the construction of a Kraft pulp and paper mill, to be located approximately 1.5 miles west of Bon Weir, Newton County, Texas. The company has postponed the start of construction due to unfavorable economic conditions. This additional extension was granted on August 1, 1986, to a new expiration date of December 24, 1987.

4. *PSD-NM-418—Plains Electric Generation and Transmission Cooperative, Incorporated*: This permit, effective on January 4, 1982, authorizes the modification of the existing Algodones Power Plant located on

Highway 85, approximately 7.5 miles northeast of Bernalillo, Sandoval County, New Mexico. The company has postponed construction due to significant declines in industrial and agricultural activities, which have delayed the need for both new base load and peaking load generation. This additional extension was granted on August 7, 1986, to a new expiration date of January 4, 1988.

5. *PSD-NM-350—Southern Union Refining Company*: This permit, effective on November 8, 1981, authorizes the modification of the existing petroleum refinery located on Highway 18, approximately five miles south of Lovington, Lea County, New Mexico. The company has postponed the completion of construction due to the deterioration of economic conditions. This additional extension was granted on August 12, 1986, to a new expiration date of April 1, 1987.

6. *PSD-TX-464M-1—Warren Petroleum Company*: This permit, effective on August 5, 1982, authorizes the modification of the Sand Hills natural gas processing plant located off FM Road 1053, approximate 27 miles northwest of Crane, Crane County, Texas. The company has postponed the construction of the sixth compressor engine due to contract negotiations with gas producers. The permit was extended on September 19, 1986, to a new expiration date of December 31, 1987.

The PSD regulation at 40 CFR 52.21(r)(2) states that the Administrator may extend the 18-month period in which construction must commence if the company shows that an extension is justified.

A notice of EPA's proposed action to extend these PSD permits was published in a newspaper in the affected area of each facility.

Documents relevant in the above actions are available for public inspection during normal business hours at the Air, Pesticides and Toxics Division, U.S. Environmental Protection Agency, Region 6, 1201 Elm Street, Dallas, Texas 75270. Any questions concerning this notice can be addressed by contacting Donna Ascenzi at (214) 767-1594.

Under section 307(b)(1) of the Clean Air Act, judicial review of the approval of these actions is available, if at all, only by the filing of a petition for a review in the United States Fifth Circuit Court of Appeals for sources in Texas and Louisiana, and in the Tenth Circuit Court of Appeals for sources in New Mexico, on or before March 17, 1987. Under section 307(b)(2) of the Clean Air Act, the requirements which are the subject to today's notice may not be

challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

This notice will have no effect on the National Ambient Air Quality Standards.

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

Dated: December 22, 1986.

Frances E. Phillips,

Acting Regional Administrator (6A), Region 6.  
[FR Doc. 87-1010 Filed 1-15-87; 8:45 am]

BILLING CODE 6560-50-M

[ER-ERL-3143-3]

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared December 29, 1986 through January 2, 1987 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act (CAA) and Section 102(2)(c) of the National Environmental Policy Act (NEPA) as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5076/73. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the *Federal Register* dated February 7, 1986 (51 FR 4804).

#### Draft EISs

ERP No. D-AFS-L65104-OR, Rating EC2, Ochoco Nat'l Forest (ONF) and Crooked River Nat'l Grassland (CRNG), Land and Resource Mgmt. Plan, OR. **SUMMARY:** EPA's concern is that the Plan be consistent with Oregon's adopted Statewide Water Quality Management Plan for Forest Practices required by the Clean Water Act. The Plan and draft EIS should reference Oregon's Forest Practices Act and Rules and indicate how they will be compiled with in the Plan. This is necessary to ensure that appropriate coordination occurs between the ONF and CRNG and Oregon's Departments of Environmental Quality and Forestry, and that beneficial uses are protected.

ERP No. D-DOE-J08022-MT, Rating LO, Conrad-Shelby 230 kV Transmission Line Project, Construction, Operation, and Maintenance, MT. **SUMMARY:** EPA does not object to the project as proposed. However, EPA expects that any impacts to wetlands from encroachment will be properly mitigated.

ERP No. DS-FRC-L05193-WA, Rating EO2, Hamma Hamma River

Hydroelectric Project, Construction and Operation, Salient Cumulative Impact Issues, Evaluation and Conclusion, Licenses, WA. **SUMMARY:** EPA agreed with the draft supplement EIS conclusion that cumulative fishery impacts are significant both for construction and operation of the three hydro projects in the Hamma Hamma basin. Construction effects may be more significant than described in the EIS and mitigation measures may not work. EPA recommended a more thorough evaluation of the no-action alternative.

#### Final EISs

ERP No. F-AFS-F65015-IL, Shawnee Nat'l Forest, Land and Resource Mgmt. Plan, IL. **SUMMARY:** EPA's review resulted in no objections to the proposed action. Implementation of a water quality monitoring program was strongly encouraged.

ERP No. F-BLM-K70001-CA, California Desert Conservation Area Plan, Eastern San Diego County, Mgmt. Framework Plan, 1985 Amendment, Approval or Disapproval, CA. **SUMMARY:** EPA has no objections to the project as proposed. The final EIS adequately discussed the concerns EPA had raised on the draft EIS.

ERP No. F-COE-L36099-ID, Salmon River Flood Damage Reduction Study, Construction, ID. **SUMMARY:** EPA agreed with the decision to select the No Action alternative, but was concerned that some version of a channelization alternative may be proposed in the future. If this should occur, the existing EIS would have to be formally supplemented to adequately support such a proposal. EPA requested that the Record of Decision specify that the undetermined, adequacy of mitigation measures for the potentially significant adverse impacts to wetlands and aquatic resources are additional reasons for the No Action selection.

ERP No. F-FWH-J40113-MT, Bozeman Arterials Development; North 19th Ave., Kagy Blvd., and Oak Street; Construction; 404 Permit; MT. **SUMMARY:** The final EIS responded adequately to EPA's comments and questions on the draft EIS.

#### Amended Notice

The following review was completed during the week of December 15, 1986 through December 19, 1986 and should have appeared in the *Federal Register* Notice published on January 2, 1987.

ERP No. DD-SCS-G34037-LA, Rating LO, Bell City Watershed Protection and Flood Control, Additional Channel Work, LA. **SUMMARY:** EPA expresses no

objections to the project modifications as described.

Dated: January 13, 1987.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 87-1053 Filed 1-15-87; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3143-2]

### Environmental Impact Statements; Notice of Availability

#### Responsible Agency

Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075.

Availability of Environmental Impact Statements Filed January 5, 1987 Through January 9, 1987 Pursuant to 40 CFR 1506.9.

EIS No. 870001, Final, COE, WA, Elliott Bay Small Craft Harbor and Marina Development, King County, Due: February 17, 1987, Contact: Stephen Martin (206) 764-3625.

EIS No. 870002, DSUpl, FHW, CA, CA-710/Long Beach Freeway Construction, I-10/San Bernardino Freeway to I-210/Foothill Freeway, Meridian Variation Alternative, Los Angeles County, Due: March 30, 1987, Contact: Glenn Clinton (916) 551-1310.

EIS No. 870003, Final, FHW, KY, Blankenbaker Road/I-64 Interchange Improvement, KY-1819 at Jefferson town to US 60 at Middleton, Jefferson County, Due: February 18, 1987, Contact: Robert Johnson (502) 227-7321.

EIS No. 870007, Draft, BLM WY, Hickey Mountain-Table Mountain Oil and Gas Field Development, Leasing, Uinta County, Due: March 2, 1987, Contact: Wally Mierzejewski (307) 382-5350.

EIS No. 870009, Drevised, COE, CA, Lower San Joaquin River and Tributaries Flood Control Plan, Channel Clearing and Snagging, Modifications, Due: March 2, 1987, Contact: Jeff Groska (916) 551-1860.

EIS No. 870010, Draft, COE, CO, Metropolitan Denver Water Supply, Two Forks Dam/Reservoir and Williams Fork Gravity Collection System, Construction, 404 Permit, Due: April 16, 1987, Contact: Richard Makinen (202) 272-0166.

Dated: January 14, 1987.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 87-1052 Filed 1-15-87; 8:45 am]

BILLING CODE 6560-50-M

### FEDERAL HOME LOAN BANK BOARD

[No. AC-545]

#### First Federal Savings Bank Dickson, TN.; Final Action Approval of Conversion Application

Date: December 23, 1986.

Notice is hereby given that on November 12, 1986, the Office of General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the general Counsel or his designee, approved the application of First Federal Savings Bank, Dickson, Tennessee, for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Secretariat of said Corporation, 1700 G Street, NW., Washington, DC 20552 and at the Office of the Supervisory Agent of said Corporation at the Federal Home Loan Bank of Cincinnati, 2000 Atrium Two, 221 E. 4th Street, Cincinnati, Ohio 45202.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Acting Secretary.

[FR Doc. 87-1047 Filed 1-15-87; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-546]

#### Reisterstown Federal Savings and Loan Association Reisterstown, MD; Final Action Approval of Conversion Application

Date: December 23, 1986.

Notice is hereby given that on December 12, 1986, the Office of General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of Reisterstown Federal Savings and Loan Association, Reisterstown, Maryland for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Secretariat of the Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent of the Federal Home Loan Bank of Atlanta, P.O. Box 105565, Atlanta, Georgia 30348.

By the Federal Home Loan Bank Board.

Nadine Y. Washington,

Acting Secretary.

[FR Doc. 87-1048 Filed 1-15-87; 8:45 am]

BILLING CODE 6720-01-M

### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Alcohol, Drug Abuse, and Mental Health Administration

#### Reestablishment of National Institute on Alcohol Abuse and Alcoholism Board of Scientific Counselors

Pursuant to the Federal Advisory Committee Act of October 6, 1982 (Pub. L. 92-463, 86 Stat. 770-776) and the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570, section 501(j)), the Administrator, Alcohol, Drug Abuse, and Mental Health Administration (ADAMAH), announces the reestablishment, effective January 29, 1987, of the following committee:

Board of Scientific Counselors, National Institute on Alcohol Abuse and Alcoholism.

The duration of this committee is continuing unless formally determined by the Administrator, ADAMHA, that termination would be in the best public interest.

Dated: January 12, 1987.

Donald Ian Macdonald,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 87-1001 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-20-M

### Food and Drug Administration

[Docket No. 86M-0496]

#### SciMed Life Systems, Inc.; Premarket Approval of the SciMed Percutaneous Transluminal Coronary Angioplasty Catheter (TRAC™, PLUS™, MicroTRACT™, and MicroTRACT (PLUS™ Models)

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing its approval of the application by SciMed Life Systems, Inc., Minneapolis, MN, for premarket approval, under the Medical Device Amendments of 1976, of the SciMed Percutaneous Transluminal Coronary Angioplasty Catheter (TRAC™, TRAC PLUS™, MicroTRACT™, and MicroTRACT PLUS™ Models). After reviewing the recommendation of the Circulatory System Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant of the approval of the application.

**DATE:** Petitions for administrative review by February 17, 1987.

**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, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Lynne A. Reamer, 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 May 23, 1986, SciMed Life Systems, Inc., Minneapolis, MN 55441, submitted to CDRH an application for premarket approval of the SciMed Percutaneous Transluminal Coronary Angioplasty Catheter (TRAC™, TRAC PLUS™, MicroTRAC™, and MicroTRAC™ PLUS Models). The catheters are indicated in patients with coronary artery disease who are acceptable candidates for coronary artery bypass graft surgery, in addition to meeting one or more of the criteria listed below:

1. Single-vessel atherosclerotic coronary artery disease that is concentric, discrete, subtotal, noncalcified, and accessible to a dilatation catheter.
2. Multiple-vessel coronary artery disease under certain circumstances.
3. Coronary artery disease of the native coronary arteries and/or coronary artery bypass grafts of some patients who have previously undergone coronary artery bypass graft surgery, have recurrence of symptoms, and (a) progression of disease, or (b) stenosis and closure of the grafts.

On October 24, 1986, the Circulatory System Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On November 28, 1986, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office 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 CDRH—contact Lynne A. Reamer (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 CDRH'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 CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (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 February 17, 1987, 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.

This notice is issued under the Federal Food, Drug, and Cosmetics Act (secs. 515(d), 520(h), 90 Stat. 554-555, 571 (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: January 9, 1987.

John C. Villforth,

Director, Center for Devices and Radiological Health.

[FR Doc. 87-1004 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-01-M

#### Veterinary Medicine Advisory Committee; Request for Nominations for Voting Members

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Veterinary Medicine Advisory Committee in FDA's Center for

Veterinary Medicine. Two vacancies will occur on the committee on October 31, 1987.

**DATE:** No cutoff date is established for receipt of nominations.

**ADDRESS:** All nominations for membership should be submitted to Max L. Crandall (address below).

**FOR FURTHER INFORMATION CONTACT:** Max L. Grandall, Center for Veterinary Medicine (HFV-4), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3450.

**SUPPLEMENTARY INFORMATION:** FDA is requesting nominations of voting members on the Veterinary Medicine Advisory Committee. The function of the committee is to: (1) Review and evaluate available information concerning the safety and effectiveness of marketed and investigational new animal drugs, feeds, and devices for use in the treatment and prevention of animal disease and increased animal production; and (2) make appropriate recommendations to the Commissioner of Food and Drugs.

#### Criteria for Members

Persons nominated for membership on the advisory committee described above shall have adequately diversified experience appropriate to the work of the committee in such fields as companion animal medicine; food animal medicine, avian medicine, microbiology, biometrics, toxicology, pathology, pharmacology, animal science, and chemistry. The specialized training and experience necessary to qualify the nominee as an expert suitable for appointment is subject to review, but may include experience in medical practice, teaching, and/or research relevant to the field of activity of the committee. The term of office is 4 years.

#### Nomination Procedures

Any interested person may nominate one or more qualified persons for membership on the advisory committee. Nominations shall state that the nominee is willing to serve as a member of the advisory committee and appears to have no conflict of interest that would preclude committee membership. FDA asks potential candidates to provide detailed information concerning such matters as employment, financial holdings, consultancies, and research grants or contracts in order to permit evaluation of possible sources of conflict of interest.

FDA has a special interest in assuring that women, minority groups, and the physically handicapped are adequately

represented on advisory committees and, therefore, extends particular encouragement to nominations for appropriately qualified female, minority, and handicapped candidates.

This notice is issued under Federal Advisory Committee Act (Pub. L. 94-263, 86 Stat. 770-776 (5 U.S.C. App. I)) and 21 CFR Part 14, relating to advisory committees.

Dated: January 9, 1987.

Ronald G. Cheshmore,  
Acting Associate Commissioner for  
Regulatory Affairs.

[FR Doc. 87-1005 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-04-M

[Docket No. 86M-0501]

**Alcon Laboratories, Inc., Premarket Approval of Scanlens™ 75 (Scafilcon A) Soft (Hydrophilic) Contact Lens**

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing its approval of the application by Alcon Laboratories, Inc., Fort Worth, TX, for premarket approval, under the Medical Device Amendments of 1976, of the spherical SCANLENS™ 75 (scafilcon A) Contact Lens for daily wear and extended wear. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant of the approval of the application.

**DATE:** Petitions for administrative review by February 17, 1987.

**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, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** David M. Whipple, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7940.

**SUPPLEMENTARY INFORMATION:** On May 30, 1985, Alcon Laboratories, Inc., Fort Worth, TX 76101, submitted to CDRH an application for premarket approval of the SCANLENS™ 75 (scafilcon A) Soft (Hydrophilic) Contact Lens. The spherical SCANLENS™ 75 (scafilcon A) Soft (Hydrophilic) Contact Lens is indicated for daily wear and extended wear from 1 to 30 days between removals for cleaning and disinfection as recommended by the eye care

practitioner. The lens is indicated for the correction of visual acuity in non-aphakic persons with nondiseased eyes that are myopic or hyperopic. The lens may be worn by persons who may exhibit astigmatism of 2.00 diopters (D) or less that does not interfere with visual acuity. The lens ranges in powers from -20.00 D to +10.00 D and is to be disinfected using either a heat or chemical lens care system.

On May 23, 1986, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On November 28, 1986, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office 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 CDRH—contact David M. Whipple (HFZ-460), address above.

The labeling of the SCANLENS™ 75 (scafilcon A) Soft (Hydrophilic) Contact Lens states that the lens is to be disinfected using either a heat or chemical disinfection system. The restrictive labeling informs new users that they must avoid using certain products, such as solutions intended for use with hard contact lenses only. The restrictive labeling needs to be updated periodically, however, to refer to new lens solutions that CDRH approves for use with approved contact lenses made of polymers other than polymethylmethacrylate, to comply with the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 et seq.), and regulations thereunder, and with the Federal Trade Commission Act (15 U.S.C. 41-58), as amended. Accordingly, whenever CDRH publishes a notice in the *Federal Register* of approval of a new solution for use with an approved lens, each contact lens manufacturer or PMA holder shall correct its labeling to refer to the new solution at the next printing or at any other time CDRH prescribes by letter to the applicant.

**Opportunity for Administrative Review**

Section 515(d)(3) of 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 CDRH'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 CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (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 February 17, 1987, 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.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h), 90 Stat. 554-555, 571 (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: January 9, 1987.

John C. Villforth,  
Director, Center for Devices and Radiological Health.

[FR Doc. 87-1007 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 86M-0502]

**Stericon Laboratories, Inc.; Premarket Approval of Stericon™ Saline Solution**

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing its approval of the application by Stericon Laboratories, Inc., San Jose, CA, for premarket approval, under the Medical Device Amendments of 1976, of the

Stericon™ Saline Solution. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant of the approval of the application.

**DATE:** Petitions for administrative review by February 17, 1987.

**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, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** David M. Whipple, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7940.

**SUPPLEMENTARY INFORMATION:** On September 24, 1985, Stericon Laboratories, Inc., San Jose, CA 95120, submitted to CDRH an application for premarket approval of the Stericon™ Saline Solution for use in the rinsing, heat disinfection, and storage of soft (hydrophilic) contact lenses.

On January 24, 1986, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On November 28, 1986, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office 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 CDRH—contact David M. Whipple (HFZ-460), address above.

The labeling of the Stericon™ Saline Solution states that the solution is indicated for use in the rinsing, heat disinfection, and storage of soft (hydrophilic) contact lenses. Manufacturers of soft (hydrophilic) contact lenses that have been approved for marketing are advised that whenever CDRH publishes a notice in the *Federal Register* of the approval of a new solution for use with an approved soft contact lens, each contact lens manufacturer or PMA holder shall correct its labeling to refer to the new solution at the next printing or at any other time CDRH prescribed by letter to the applicant.

#### 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 CDRH'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 CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (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 February 17, 1987, 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.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h), 90 Stat. 554-555, 571 (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: January 9, 1987.

John C. Villforth,

Director, Center for Devices and Radiological Health.

[FR Doc. 87-1006 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-01-M

#### Advisory Committee; Amendment of Notice

**AGENCY:** Food and Drug Administration.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is amending an advisory committee meeting notice of the Vaccines and Related Biological Products Advisory Committee to reflect changes in location, time of the open public hearing agenda, and in the committee discussion agenda scheduled on the first day of the meeting. Notice of the meeting was published in the *Federal Register* of December 22, 1986 (51 FR 45816). The location and agendas are revised as follows:

*Date, time, and place.* January 29, 8:30 a.m., Holiday Inn, 8120 Wisconsin Ave., Bethesda, MD, and January 30, 8:30 a.m., Bldg. 29, Rm. 115, 8800 Rockville Pike, Bethesda, MD.

*Type of meeting and contact person.* Open public hearing, January 29, 8:30 a.m. to 10 a.m., unless public participation does not last that long; open committee discussion, 10 a.m. to 5 p.m. It may be necessary to close this portion of the meeting for a brief period if FDA were to conclude that disclosures of trade secret and/or confidential commercial information are required; open committee discussion, January 30, 8:30 a.m. to 11:30 a.m.; closed committee deliberations, 11:30 a.m. to 2:30 p.m.; Jack Gertzog, Center for Drugs and Biologics (HFN-31), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-5455.

*General function of the committee.* The committee reviews and evaluates available data on the safety and effectiveness of vaccines and related biological products intended for use in the diagnosis, prevention, or treatment of human diseases. The committee also reviews and evaluates the quality and relevance of FDA's research program which provides scientific support for the regulation of these products.

*Agenda—open public hearing.* Interested persons requesting to present data, information or views, orally or in writing on issues pending before the committee should notify the contact person on or before January 22. A copy or summary statement of the information to be presented before the committee must be received by the contact person on or before January 22. This is required: (a) So that it can be determined if the information is relevant to issues pending before the committee at this meeting; and (b) to allow sufficient time to provide the information to committee members prior to the meeting.

*Open committee discussion.* On January 29, the committee will discuss the proposed rule published in the *Federal Register*, Vol. 51, No. 86, May 5, 1986 (Docket No. 86N-0027) on

Additional Standards for Viral Vaccines; Poliovirus Vaccine Live Oral. On January 30, the committee will discuss influenza vaccine formulation for the 1987-1988 influenza season.

*Closed committee deliberations.* If FDA concludes that the committee will review trade secret and/or confidential commercial information relevant to the proposed rule or relevant to pending license applications and investigational new drugs (IND's), it may be necessary to close portions of the meeting to prevent public disclosure of this information (5 U.S.C. 552b(c)(4)).

Dated: January 14, 1987.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 87-1113 Filed 1-14-87; 2:38 pm]

BILLING CODE 4160-01-M

## Health Care Financing Administration

[BERC-418-CN]

### Medicare Program; Revised Area Designations for the Schedule of Cost Limits on Home Health Agencies and Skilled Nursing Facilities

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Notice of correction.

**SUMMARY:** Recently, we were notified by one of our fiscal intermediaries that there were differences in urban/rural designations of wage indexes in certain Federal Register notices for home health agency (HHA) and skilled nursing facility (SNF) cost limits. Upon review, we found that within the New England County Metropolitan Areas (NECMAs), some constituent county designations were in error. These designations did not conform to the most recent Office of Management and Budget NECMA definitions that were effective June 30, 1983. Therefore, we are making corrections to the urban/rural area designations in the wage indexes of the schedules of cost limits for HHAs and SNFs in the following Federal Register documents:

- FR Doc. 85-15965 of the July 5, 1985 issue.
- FR Doc. 86-7132 of the April 1, 1986 issue.
- FR Doc. 85-7131 of the April 1, 1986 issue.
- FR Doc. 86-12279 of the May 30, 1986 issue.

These corrections will affect only a small number of HHAs and SNFs located in the specified constituent counties. We have informed the appropriate fiscal intermediaries of

these changes so that they may notify affected HHAs and SNFs.

**FOR FURTHER INFORMATION CONTACT:** Steven Kirsh, (301) 594-9465.

#### SUPPLEMENTARY INFORMATION:

##### A. July 1, 1985 HHA Cost Limits

In FR Doc. 85-15965 beginning on page 27734 in the issue of July 5, 1985, make the following corrections:

1. On page 27744, in the first column, in the tenth line from the bottom of the page, remove "Litchfield, CT" from the Hartford-New Britain-Middleton-Bristol, CT urban area.

2. Also on page 27744, in the third column, in the eighth line from the bottom of the page, remove "Merrimack, NH" from the Manchester-Nashua, NH urban area. Note that in the ninth line "Hillsboro, NH" is corrected to read "Hillsborough, NH".

3. On page 27745, in the first column, in the nineteenth line from the bottom of the page, remove "West Haven" from the New Haven-West Haven-Waterbury-Meriden, CT urban area. This change reflects a correction of the official NECMA title only.

4. Also on page 27745, in the third column, in the second and third lines from the top of the page, remove "Sagadahoc, ME" and "York, ME" respectively, from the Portland, ME urban area. In the seventeenth and nineteenth lines from the top of the page, remove "Newport, RI" and "Statewide, RI" respectively, from the Providence-Pawtucket-Woonsocket, RI urban area.

##### B. July 1, 1984 SNF Cost Limits

In FR Doc. 86-7132 beginning on page 11234 in the issue of April 1, 1986, make the following corrections:

1. On page 11248, in the second column, in the thirty-third line from the bottom of the page, remove "Litchfield, CT" from the Hartford-New Britain-Middleton-Bristol, CT urban area.

2. On page 11249, in the second column, in the seventeenth line from the top of the page, remove "Merrimack, NH" from the Manchester-Nashua, NH urban area. Note that in the sixteenth line "Hillsboro, NH" is corrected to read "Hillsborough, NH".

3. Also on page 11249, in the third column, in the twenty-ninth line from the top of the page, remove "West Haven" from the New Haven-West Haven-Waterbury-Meriden, CT urban area. This change reflects a correction of the official NECMA title only.

4. On page 11250, in the second column, in the fifth and sixth lines from the top of the page, remove "Sagadahoc, ME" and "York, ME" respectively, from

the Portland, ME urban area. In the twenty-first and twenty-third lines from the top of the page, remove "Newport, RI" and "Statewide, RI" respectively, from the Providence-Pawtucket-Woonsocket, RI urban area.

##### C. May 1, 1986 SNF Cost Limits

In FR Doc. 86-7131 beginning on page 11253 in the issue of April 1, 1986, make the following corrections:

1. On page 11260, in the second column, in the fourth line from the top of the page, remove "Litchfield, CT," from the Hartford-New Britain-Middleton-Bristol, CT urban area.

2. On page 11261, in the first column, in the nineteenth line from the bottom of the page, remove "Merrimack, NH" from the Manchester-Nashua, NH urban area. Note that in the twentieth line "Hillsboro, NH" is corrected to read "Hillsborough, NH".

3. Also on page 11261, in the second column, in the eighth line from the bottom of the page, remove "West Haven" from the New Haven-West Haven-Waterbury-Meriden, CT urban area. This change reflects a correction of the official NECMA title only.

4. On page 11262, in the first column, in the thirty-fourth and thirty-third lines from the bottom of the page, remove "Sagadahoc, ME" and "York, ME" respectively, from the Portland, ME urban area. In the eighteenth and sixteenth lines from the bottom of the page, remove "Newport, RI" and "Statewide, RI" respectively, from the Providence-Pawtucket-Woonsocket, RI urban area.

##### D. July 1, 1986 HHA Cost Limits

In FR Doc. 86-12279 beginning on page 19734 in the issue of May 30, 1986, make the following corrections:

1. On page 19738, in the third column, in the forty-first line from the bottom of the page, remove "Litchfield, CT" from the Hartford-New Britain-Middleton-Bristol, CT urban area.

2. On page 19739, in the first column, in the thirty-ninth and fortieth lines from the top of the page, remove "Merrimack, NH" from the Manchester-Nashua, NH urban area. Note that in the thirty-ninth line "Hillsboro, NH" is corrected to read "Hillsborough, NH". In the twelfth line from the bottom of the page, remove "West Haven" from the "New Haven-West Haven-Waterbury-Meriden, CT urban area. This change reflects a correction of the official NECMA title only.

3. Also on page 19739, in the second column, in the thirty-sixth and thirty-seventh lines from the top of the page, remove "Sagadahoc, ME" and "York,

ME" respectively, from the Portland, ME urban area. In the forty-fourth and forty-fifth lines from the top of the page, remove "Newport RI" and "Statewide, RI" respectively, from the Providence-Pawtucket-Woonsocket, RI urban area.

(Secs. 1102, 1814(b), 1861(v), 1861(v)(1), 1866(a), 1871, and 1888 of the Social Security Act; 42 U.S.C. 1302, 1395f(b), 1395x(v), 1395x(v)(1), 1395cc(a), 1395hh, and 1395yy; 42 CFR 405.460)

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare—Hospital Insurance Program)

Dated: January 5, 1987.

Barbara S. Wamsley,

Acting Deputy Assistant Secretary for Management Analysis and Systems.

[FR Doc. 87-1029 Filed 1-15-87; 8:45 am]

BILLING CODE 4120-01-M

[BPO-63-GN]

**Medicaid Program; Medicaid Management Information System; Waiver of Reduction of Federal Financial Participation**

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** General notice.

**SUMMARY:** In notices containing new system requirements for Medicaid Management Information Systems (MMIS), we explained that, under certain circumstances, a State Medicaid agency could implement the system requirements late without penalty; we provided examples of such circumstances. The examples have been interpreted more broadly than we contemplated in our regulations at 42 CFR 433.131, published July 30, 1985 (50 FR 30841), which set forth requirements for waiver of reduction of Federal financial participation for failure to meet the requirements for approval or reapproval of the MMIS. The purpose of this notice is to clarify the policy set out in the notices published February 1, 1985 (50 FR 4800) and October 7, 1985 (50 FR 40895).

**EFFECTIVE DATE:** February 17, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Wes Baker, (301) 594-9151.

**SUPPLEMENTARY INFORMATION:**

**Background**

A Medicaid Management Information System (MMIS) is a mechanized system of claims processing and information retrieval used in State Medicaid programs under Title XIX of the Social Security Act (the Act). An MMIS is used to process Medicaid claims and to retrieve and produce utilization data and management information about

recipients and services. Under section 1903(a)(3) of the Act, a State agency that has implemented an MMIS is authorized to receive 90 percent Federal financial participation (FFP) for expenditures for its design, development and installation and 75 percent FFP for the operation of an approved system. These rates are higher than the 50 percent FFP for general administrative expenditures.

Section 1903(r) of the Act requires each State (with certain exceptions) to have an approved operating MMIS before September 30, 1985, unless granted a waiver under section 1903(r)(8), and if a State fails to do so, the law prescribes FFP reductions. Section 1903(r) also requires us to review each State's MMIS to determine whether it continues to meet MMIS system requirements, performance standards and any other conditions of reapproval. A reduction in FFP in State expenditures for operating an MMIS is required on an incremental basis if a State Medicaid agency fails to meet any MMIS system requirements, performance standards or other condition of reapproval during the reapproval review and cannot qualify for a waiver under section 1903(r)(8) of the Act.

Our regulations at 42 CFR 433.123 (formerly § 433.115) require us to publish for public comment in the *Federal Register* any proposed changes in system requirements (or in other conditions of approval or reapproval) for systems eligible for funding at 90 or 75 percent. Accordingly, we have announced five new system requirements in the *Federal Register* in two notices, dated February 1, 1985 (50 FR 4800), and October 7, 1985 (50 FR 40895).

On July 30, 1985, we published in the *Federal Register* at 50 FR 30838 a final rule to implement requirements of section 1903(r) of the Act and to specify procedures for reducing the level of FFP in State administrative expenditures when a State fails to meet the conditions for initial operation, initial approval, or reapproval of an MMIS. The rule also contains procedures for waivers of reductions of FFP for failure to meet conditions of approval or reapproval (42 CFR 433.131).

**Waiver of Reductions Due to Circumstances Beyond the Control of the State**

**A. Regulation**

In both the proposed and final rule, we stated that we will waive the FFP reductions for a period during which a State is unable to comply due to circumstances beyond its control, as

provided in § 433.131(b). This situation exists when a State or the contractor responsible for the MMIS is without fault in being unable to comply; e.g., a natural disaster occurred or a delay was caused by us. (48 FR 9044, 50 FR 30841)

**B. Notices**

In the two notices we published on February 1 and October 7, 1985, we included a statement that if a State Medicaid agency cannot implement any of the five new systems requirements by the deadline through no fault of its own ("e.g., Medicare does not implement a requirement in that State or a contractor of the State Medicaid agency has failed to perform . . ."), it will not have its FFP reduced. We stated that the application of any reduction of FFP will depend upon the State Medicaid agency's effort and progress.

**C. Clarification**

Because of questions raised by one State Medicaid agency, we believe this statement in the notices is subject to misinterpretation.

We stated in the preamble to both the proposed and the final rule for § 433.131, regarding approval or reapproval of initial systems, that we will waive FFP reductions when a State agency or the contractor responsible for the MMIS is without fault. Distinct from this, the context of our statement in the February and October, 1985 notices concerning situations under which we would not reduce FFP was intended to apply only to implementation of the new system requirements contained in these two notices. We did not intend the examples to be applicable to situations when a State agency fails to implement an existing system requirement because of contractor failure, nor is the statement in the notices mentioned above to apply to waivers for purposes of initial implementation of an MMIS. Because of the possibility of a contractor's lack of experience with the new system requirements and the relatively short time given the State Medicaid agencies to verify contractor progress in implementing the requirements, we were willing to acknowledge the possibility that a State agency might be without fault in failing to meet the new system requirements by the required effective date, at least for a short period. We were willing to grant temporary extensions in these cases because the State was unable to implement the new system requirements in the period of time allotted by the notice.

State Medicaid agencies are responsible for oversight of contractor performance and failure to provide

prudent oversight does not entitle an agency to a waiver of a reduction of FFP. We did not intend for the notices of new system requirements to establish circumstances that conflict with a previously published regulation that defined the waiver provisions. We consider a State agency responsible for its contractor's performance in meeting deadlines associated with requirements for reapproval and operation of MMIS systems and liable for associated consequences for failure to meet those requirements if the contractor is at fault.

In order to resolve possible conflicting interpretations, we are announcing that we will apply the definition of waiver for circumstances beyond the control of the State or contractor as stated in the preamble to the regulation revisions that added § 433.131. (50 FR 30838) The statement and example of how we will apply the extension of the time periods for new system requirements, included in the February 1 and October 7, 1985 notices, are not relevant to waivers discussed in § 433.131.

#### Regulatory Impact Statement

##### A. Executive Order 12291

Executive Order 12291 requires us to prepare and publish a regulatory impact analysis for any regulations, including notices such as this, that are likely to meet criteria for a "major rule". A major rule is one that would 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 any geographic regions; or
- (3) Significant 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.

We do not believe that the economic impact of this notice would exceed \$100 million or meet the other thresholds specified in the Executive Order. Therefore, we have not prepared a regulatory impact analysis.

##### B. Regulatory Flexibility Act

Consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), we prepare and publish a regulatory flexibility analysis for any notice such as this that is likely to have a significant economic impact on a substantial number of small entities. Under the RFA, States are not small entities. Therefore, the Secretary certifies that this notice will not result in a significant economic impact on a substantial number of small entities and a final

regulatory flexibility analysis is not required.

##### C. Paperwork Burden

This revised policy statement does not impose paperwork collection requirements. Consequently, it need not be reviewed by the Executive Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3801 *et seq.*).

(Sec. 1903(r) of the Social Security Act; 42 U.S.C. 1396b(r); 42 CFR 433.131)

(Catalog of Federal Domestic Assistance Program No. 13.774, Medical Assistance)

Dated: September 18, 1986.

William L. Roper,  
Administrator, Health Care Financing  
Administration.

Approved: November 18, 1986.

Otis R. Bowen,

Secretary.

[FR Doc. 87-1038 Filed 1-15-87; 8:45 am]

BILLING CODE 4120-01-M

#### Public Health Service

##### Statement of Organization, Functions and Delegations of Authority

Part H, Chapter HA (Office of the Assistant Secretary for Health) of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (38 FR 18571, July 12, 1973, as amended most recently at 51 FR 44837-44838, December 12, 1986) is amended to reflect a reorganization of the National Center for Health Statistics (NCHS), Office of the Assistant Secretary for Health. This reorganization will reduce the span of control through the merger of the Office of Vital and Health Care Statistics Program (OVHCSP) and the Office of Interview and Examination Statistics Program (OIESP) into one office, the Office of Vital and Health Statistics Systems (OVHSS), and the transfer of the Office of International Statistics (OIS) to the Office of Program Planning, Evaluation and Coordination (OPPEC) which will become the Office of Planning and Extramural Programs (OPEP) in order to reflect its increased functions. It removes the Computer Users Staff (CUS) function from the Office of Data Processing and Services Program (ODPSP) and the word "Program" from the Office title, making it the Office of Data Processing and Services (ODPS). Additional functions in the area of cognitive research are added to the Office of Research and Methodology (ORM). There are minor functional changes to division statements within the new OVHSS and

to the Division of Data Services, ODPS. The Office of Analysis and Epidemiology Program (OAEP) statement is changed to delete the words "Program" from the title and "environmental" as a modifier of epidemiology in functions (5) and (6). A new function is added regarding computer data processing.

Section HA-20, Organization and Functions, is amended as follows:

Under the heading entitled National Center for Health Statistics (HAS), make the following changes:

Delete the functional statement for the Office of International Statistics (HAS12) in its entirety. International health statistics will be carried out in the Office of Planning and Extramural Programs (HAS15), Item 6.

Delete the functional statements for the Office of Research and Methodology (HAS14), the Office of Program Planning, Evaluation and Coordination (HAS15), the Office of Vital and Health Care Statistics Program (HASB), the Division of Vital Statistics (HASB2), the Division of Health Care Statistics (HASB3), the Office of Interview and Examination Statistics Program (HASC), the Division of Health Interview Statistics (HASC2), and the Division of Health Examination Statistics (HASC3), the Office of Data Processing and Services Program (HASD), the Division of Data Services (HASD3), and the Office of Analysis and Epidemiology Program (HASE) in their entirety and substitute the following:

*Office of Research and Methodology (HAS14).* (1) Participates in the development of policy, long-range plans, and programs of the Center; (2) plans, coordinates and stimulates the Center's applied and basic research program which includes the fields of mathematical statistics, survey design and methodology, cognition and survey measurement and automated statistical and graphical technologies, and conducts research in each of these fields; (3) formulates statistical standards regarding the survey design, data collection, coding, data analysis, data presentation and statistical computing for all NCHS data systems and coordinates activities directed at the implementation and maintenance of these standards; (4) actively supports all of the Center's basic and applied research activities by serving as the Center's consultants in the fields of mathematical Statistics, survey design and methodology, cognition and survey measurement and automated Statistical and graphical technologies; (5) consults and collaborates on statistical research projects with PHS agencies and other

Federal organizations, State and local governments, universities, private research organizations and international health agencies; and (6) reviews for statistical merit all research contracts and intramural projects and all research projects undertaken through contracts, interagency agreements, or intramural activities.

*Office of Planning and Extramural Programs (HAS15).* (1) Participates in the development of policy, long-range plans, and programs of the Center; (2) develops proposed policies for the coordination of NCHS programs with external agencies, both public and private; (3) serves as the focal point for coordination of health statistical activities within NCHS and for developing and coordinating the collaborative statistical activities of NCHS with other organizations and agencies; (4) provides a focus within NCHS for Statistical program planning, evaluation, and legislative affairs; (5) evaluates or arranges for the evaluation of the adequacy, completeness and responsiveness of Center programs both nationally and internationally to the NCHS mission and user needs for data; (6) plans and conducts NCHS international activities; (7) directs the definition, development, and coordination of cooperative programs in health statistics, working with the Regional Offices, State and local governments, and other organizations including the private and academic sectors in the development and strengthening of subnational Statistical systems; (8) conducts research, analyses, and demonstrations, related to subnational systems; (9) provides Executive Secretariat and related services to the National Committee on Vital and Health Statistics; (10) provides program leadership and coordination for the NCHS Reimbursable Work Program; (11) provides guidance and staff support for major Center conferences and committee meetings; (12) provides advice and assistance to outside agencies and organizations in the conduct of statistical training activities; (13) participates with appropriate agencies and organizations to improve the quality, comparability, and timeliness of standard health data sets and to promote and disseminate their use; maintains current information concerning Federal and non-Federal health statistics systems; and (14) coordinates required clearances of NCHS projects.

*Office of Vital and Health Statistics Systems (HASB).* (1) Participates in the development of policy, long-range plans and programs of the Center; (2) directs,

plans, and coordinates the vital and health care statistics programs and the interview and examination statistics programs of the Center; (3) provides policy guidance, technical liaison, leadership, and evaluation of Federal-State conjoint vital and health care statistics programs and interview and examination statistics programs; (4) provides leadership for the monitoring and statistical evaluation of national vital and health care, interview and examination statistics; (5) provides operating liaison with other programs of the Center and other public and private agencies on vital, health care interview and examination statistics; (6) determines the need for new data systems or capabilities in present systems to provide needed health statistics; (7) provides statistical consultation and technical assistance to other producers and users of health statistics; and (8) conducts developmental and evaluation research to assess the quality and cost-effectiveness of these programs.

*Division of Vital Statistics (HASB2).* (1) Plans and administers statistical programs based on the nationwide collection of data from vital records, vital record followback surveys, and demographic surveys of women in the childbearing ages; (2) designs, develops, and implements computer data processing systems and software and produces statistical data for analysis and publication; (3) analyzes data and prepares reports for publication; (4) analyzes and provides data to users through publications, computer tapes, special tabulations, and unpublished data; (5) plans and administers the Division programs related to the Vital Statistics Cooperative Program (formally established as the Cooperative Health Statistics System); (6) develops standards for data collection, data reduction and tabulation; (7) defines, conducts or participates in research programs on data collection methodology, survey methodology, data quality and reliability, computer technology, and statistical computation as related to the vital statistics programs; (8) participates in the development of quality control specifications; (9) conducts methodological research in presentation, evaluation and utilization of vital and related survey statistics data; (10) monitors, evaluates, and provides technical assistance for State and local registration areas on matters of legal and statistical concern and data processing; (11) prepares life tables and analyses of life table data; and (12)

plans and administers a National Death Index.

*Division of Health Care Statistics (HASB3).* (1) Plans and administers statistical programs based on nationwide collection of data on the characteristics and use of health resources; (2) designs, develops, and implements computer data processing systems and software and produces statistical data for analysis and publication; (3) analyzes data and prepares statistical reports for publication; (4) provides health care data to the using public through publication, computer tapes, special tabulations, and unpublished data; (5) plans and administers its programs which are related to the Vital Statistics Cooperative Program; (6) develops standards for data collection, data reduction, and tabulation; (7) defines, conducts or participates in research programs on data collection methodology, survey methodology, data quality and reliability, computer technology and statistical computation as related to health care statistics; (8) participates in the development of quality control specifications; (9) conducts methodological research on presentation, evaluation, and utilization of data in the field of health resources and utilization statistics; (10) plans, supports and conducts special projects on health care; (11) provides specialized responses to requests from data users; and (12) provides technical assistance in health care survey design and methodology, data processing, and analysis.

*Division of Health Interview Statistics (HASB4).* (1) Plans, develops, and administers statistical programs based on systematic nationwide and special health interview surveys; (2) designs, develops, and implements computer data processing systems and software and produces statistical data for analysis and publication; (3) analyzes data and prepares statistical reports for publication on the prevalence and incidence of disease and associated disabilities and on the utilization of medical care resources, medical care expenditures and other health related topics; (4) develops and monitors quality control programs for ongoing data collection and processing activities; (5) defines, conducts or participates in research programs on data collection methodology, survey methodology, data quality and reliability, computer technology, and statistical computation, as related to health interview statistics; (6) provides technical assistance in health interview survey design and methodology, data processing, and

analysis; and (7) provides specialized responses to requests from data users.

*Division of Health Examination Statistics (HASB5).* (1) Plans, develops, and administers statistical programs based on systematic nationwide and special health and nutrition examination surveys' (2) designs, develops and implements computer data processing systems and software and produces statistical data for analysis and publication; (3) analyzes data and prepares statistical reports for publication on the prevalence of disease or health-related characteristics, including data on dental, nutrition, psychological, mental health and health behavior areas, on needs for care, on descriptive or normative data, and on the interrelationships of these variables as observed in the general population; (4) develops and monitors quality control programs for ongoing data collection and processing activities; (5) defines, conducts or participates in research programs on data collection methodology, survey methodology, data quality and reliability, computer technology, and statistical computation, as related to health examination statistics; (6) plans, supports and conducts special projects on health examination of individuals; (7) provides technical assistance in health examination survey design, methodology, data processing, and analysis; and (8) provides specialized responses to requests from data users.

*Office of Data Processing and Services (HASD).* (1) Participates in the development of policy, long-range plans, and programs of the Center; (2) directs, plans, and coordinates the Data Services and Data Processing Program of the Center; (3) provides policy guidance and direction regarding the data processing services, publication services, and scientific and technical information dissemination services of the Center; and (4) provides operating liaison with other programs of the Center and other public and private health agencies on data processing and services activities.

*Division of Data Services (HASD3).* (1) Plans, directs, coordinates and evaluates data dissemination, publications, intramural data collection services for the Center; (2) provides technical information services to all NCHS data users; (3) provides publications services and data collection services for HCHS programs; (4) coordinates data services with other NCHS divisions and programs to meet Center goals effectively; (5) promotes and conducts research to improve methods and operations of intramural

data collection, data dissemination and publication services; (6) designs, develops, and implements automated systems for data dissemination; and (7) provides specialized data services to the Center.

*Office of Analysis and Epidemiology (HASE).* (1) Participates in the development of policy, long-range plans and programs of the Center; (2) directs, plans, and coordinates the Analysis and Epidemiology Program of the Center; (3) develops policy for the Analysis and Epidemiological Health Statistics Program of the Center; (4) provides operating liaison with other programs of the Center and other public and private health agencies on analytic and epidemiologic activities; (5) provides consultation and technical assistance to Federal agencies, States, and other public and private sector institutions in epidemiology and the analysis and interpretation of national health statistics; (6) conducts developmental and evaluation research in the fields of epidemiology and analysis of national health statistics; and (7) designs, develops, and implements computer data processing systems and software and produces statistical data for analysis and publication.

Dated: January 5, 1987.

Robert E. Windom,

Assistant Secretary for Health.

[FR Doc. 87-1040 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-17-M

#### Office of the Assistant Secretary for Health

#### Notice of Meeting; National Committee on Vital and Health Statistics

Pursuant to the Federal Advisory Act (Pub. L. 92-463), notice is hereby given that the National Committee on Vital and Health Statistics (NCVHS) Subcommittee on Statistical Aspects of Physician Payment Systems established pursuant to 42 U.S.C. 242k, section 306(k)(2) of the Public Health Service Act, as amended, will convene on Tuesday, January 20, 1987 from 9:00 a.m. to 5:00 p.m. in Room 403-A of the Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

The Subcommittee will receive updates from the Health Care Financing Administration and begin discussion of the Uniform Ambulatory Medical Care Minimum Data Set.

Further information regarding this meeting of the Subcommittee may be obtained by contacting Marjorie Greenberg, National Center for Health Statistics, Room 2-28, Center Building,

3700 East-West Highway, Hyattsville, Maryland 20782, telephone (301) 436-7122.

Dated: December 30, 1986.

Manning Feinleib,

Director, National Center for Health Statistics.

[FR Doc. 87-1039 Filed 1-15-87; 8:45 am]

BILLING CODE 4160-17-M

#### DEPARTMENT OF THE INTERIOR

#### Bureau of Indian Affairs

#### Walker River Indian Irrigation Project, Schurz, NV

AGENCY: Bureau of Indian Affairs, Department of the Interior.

ACTION: Notice.

**SUMMARY:** The purpose of this notice is to change the annual per acre assessment rate for the operation and maintenance of the Walker River Indian Irrigation System to properly reflect the current costs for labor, materials, equipment, and services. The change in the annual per acre assessment is from \$11.00 to \$15.29 per acre. The rate for lands owned by Indians and operated solely by Indians is \$7.32 per acre. The Bureau of Indian Affairs will request funds to pay the difference between the full rate of \$15.29 per acre and the Indian rate of \$7.32 per acre.

**EFFECTIVE DATE:** This public notice shall be come effective on January 28, 1987.

**FOR FURTHER INFORMATION CONTACT:** Robert L. Hunter, Superintendent, Western Nevada, Agency, 1300 South Curry Street, Carson City, Nevada 89701, telephone number (702) 887-3501.

**SUPPLEMENTARY INFORMATION:** This notice is issued by the Area Director in accordance with § 171.1e of Part 171, Chapter 1, Subchapter H of Title 25 of the Code of Federal Regulations.

The current operation and maintenance charges were established in 1977. The costs of labor, materials, fuel, equipment, and services, have increased during this period and now significantly exceed the revenue generated by the present operation and maintenance assessment.

A notice of the proposed changes in the assessment rate was sent to all water users on August 6, 1986. Three public meetings were then conducted to receive an acknowledge comments from all interested parties. The proposed rates were published in the Federal Register, Volume 51, No. 213, on November 4, 1986. A copy of the published notice was mailed to each

water user and distributed to other interested parties. Written comments were received for a period of 30 days until December 4, 1986. Careful consideration was given to all comments that were relevant to the establishment of the new rates. All supporting documents and comments are on file at the Western Nevada Agency.

The principal author of this document was Ignacio Ang, Western Nevada Agency, 1300 S. Curry Street, Carson City, NV 89701.

**The public notice shall read as follows:**  
**walker river indian irrigation project**

*Annual Operation and Maintenance Charge*

*Annual Operation and Maintenance Charge*—Pursuant to the Indian Appropriation Act of August 1, 1914, (Stat. 582, 25 U.S.C., Sec. 385) annual operation and maintenance charges for irrigation water shall be levied against all lands within the Walker River Indian Irrigation Project to which irrigation water can be delivered by the project facilities. The charge is assessable whether or not the water is requested or used.

The annual per acre operation and maintenance charge is hereby fixed at \$15.29. Pursuant to the Assistant Commissioner's memorandum of July 11, 1960, the annual per acre operation and maintenance charge for lands owned by Indians and operated solely by Indians is hereby fixed at \$7.32 per acre. These rates shall remain in effect until further notice.

*Payment*—The annual operation and maintenance charge shall become due on March 1 of each year and is payable on or before that date.

Charges that remain unpaid after the due date shall accrue interest at the rate of one percent (1%) per month until paid. In addition, an administrative processing fee of ten dollars (\$10.00) shall be added to the total charge each time an overdue payment notice is prepared and mailed by the Bureau. The administrative fee is not charged on the original billing.

Irrigation water shall not be delivered to any lands for which the annual charges have not been paid unless an agreement has been reached under the provisions of 25 CFR 171.17, Delivery of Water.

*Water Users Responsibility*—The water users are responsible for the water after it has been delivered to their lands, and are required to maintain their field ditches in suitable condition to economically and efficiently transport the irrigation water to the place of use. Water delivery shall be refused to such

ditches that are not satisfactorily maintained.

*Distribution and Apportionment*—All water of the project is deemed a common water supply in which all irrigable lands of the project are entitled to share equally and such water will be distributed to the lands of the project as equitably as physical conditions will permit.

James H. Stevens,  
Area Director.

[FR Doc. 87-969 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-02-M

## Bureau of Land Management

[AA-830-07-4830-13]

### Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

January 9, 1987.

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance office at the phone number listed below. Comments and suggestions on the requirement should be made within 30 days directly to the Bureau's Clearance Officer and to the Office of Management and Budget Interior Department's Desk Officer, Washington, DC 20503, telephone 202/395/7313.

Title: Summer Seasonal Opportunities in BLM (Application for Summer/Seasonal Employment).

Abstract: This form will allow applicants to present information necessary for the Bureau of Land Management to judge their qualifications, rating and ranking for a summer seasonal position with the Bureau.

Bureau Form Number: 1400-104(302).

Frequency: Annually.

Description of Respondents:

Individuals applying for seasonal employment with the Bureau of Land Management.

Annual Response: 10,000.

Annual Budget Hours: 5,000.

Bureau Clearance Officer: Rebecca Daughtery, 202/653-8853.

Tom Allen,

Assistant Director, Management Services.

[FR Doc. 87-1016 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-84-M

## Susanville District Grazing Advisory Board Meeting

**AGENCY:** Susanville District Grazing Advisory Board, BLM, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Notice is hereby given that the Susanville District Grazing Advisory Board, created under the Secretary of the Interior's discretionary authority on May 14, 1986, will meet on February 26, 1987.

The meeting will begin at 10:00 a.m. at the Susanville District Office of the Bureau of Land Management, 705 Hall Street, Susanville, California. The agenda will include a discussion of the three approaches to wild horse management in the Experimental Stewardship area; a report on the Wild Horse and Burro Program, FY 1987; a discussion of the Susanville District Monitoring Program; a report on the Reno area Water Plan; a report on Range Development and Management, FY 87; and other items as appropriate.

The meeting is open to the public.

Interested persons may make oral statements to the Board between 3:00 p.m. and 4:30 on February 26, 1987, or file a written statement for the Board's consideration. Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, 705 Hall Street, Susanville, California 96130, by February 20, 1987. Depending upon the number of persons wishing to make oral statements, a per person time limit may be established.

Summary minutes of the board meeting will be maintained in the District Office, and will be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Robert J. Sherve,

Acting District Manager.

[FR Doc. 87-994 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-40-M

[ORE-04408, OR-19022]

## Order Providing for Opening of Public Lands; Correction; Oregon

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice deletes a paragraph and part of another paragraph that were erroneously included in the Order Providing for Opening of Public Lands published in the Federal Register on September 22, 1955.

**EFFECTIVE DATE:** January 16, 1987.

**FOR FURTHER INFORMATION CONTACT:** Champ Vaughan, BLM Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, (Telephone 503-231-6905).

**SUPPLEMENTARY INFORMATION:** In FR Doc. 55-7656, published at page 7114 in the issue of September 22, 1955, make the following corrections:

1. Paragraph No. 5 is hereby removed in its entirety.

2. That portion of paragraph 6 as reads "and the special stipulation provided in the preceding paragraph" is hereby removed.

3. Paragraph Nos. 6 through 9 are hereby redesignated paragraph Nos. 5 through 8, respectively.

Dated: December 29, 1986.

**B. LaVelle Black,**

*Chief, Branch of Lands and Minerals Operations.*

[FR Doc. 87-962 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-33-M

### New Mexico; Filing of Plat of Survey

January 9, 1987.

The Plat of survey described below was officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, effective at 10:00 a.m. on January 9, 1987.

The survey representing the dependent resurvey of the Second Guide Meridian East, the south, east and north boundaries, a portion of the subdivisional lines and the subdivision of sections 1 and 12, Township 17 South, Range 21 East, New Mexico Principal Meridian, New Mexico, executed under Group 822, New Mexico.

This survey was requested by the District Manager, Roswell, New Mexico.

The Plat will be in the open files of the New Mexico State Office, Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87504. Copies of the plat may be obtained from that office upon payment of \$2.50 per sheet.

**William S. DeGroot,**

*Acting Chief, Branch of Cadastral Survey.*

[FR Doc. 87-980 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-FB-M

### New Mexico; Filing of Plat of Survey

January 9, 1987.

The Plat of survey described below was officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, effective at 10:00 a.m. on January 9, 1987.

A survey representing the dependent resurvey of a portion of the west

boundary, a portion of the subdivisional lines, the adjusted record meanders of the left bank of the Canadian River, the subdivision of section 19 and the survey of the new meanders of the present left bank of the Canadian River in section 19, Township 11 North, Range 8 West, Indian Meridian, Oklahoma, under Group 44 OK.

This survey was requested by the BLM Area Manager, Oklahoma Resource Area Headquarters, Oklahoma City, Oklahoma.

The plat will be in the open files of the New Mexico State Office, Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87504. Copies of the plat may be obtained from that office upon payment of \$2.50 per sheet.

**Kelley Williamson Jr.,**

*Acting Chief, Branch of Cadastral Survey.*

[FR Doc. 87-961 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-FB-M

### Las Vegas District Advisory Council Meeting

Notice is hereby given in accordance with Pub. L. 92-463 that a meeting of the Bureau of Land Management, Las Vegas District Advisory Council will be held February 11, 1987.

The meeting will begin at 8:30 a.m. in the Harbor 3 Room, Riverside Hotel, Laughlin, Nevada. The meeting agenda will include:

1. Agenda approval and review of past meeting minutes.
2. Panel Discussion: Impacts on public lands due to growth of the Laughlin, Nevada/Bullhead City, Arizona area.
3. Discussion of land use planning for Southern Nevada.
4. Comments and requirements on A.C.E.C. directives.
5. Summary of BLM Christmas tree program.
6. Unfinished business.
7. Additional items
8. Public Comments.

The meeting of the Advisory Council is open to the public. Persons wishing to make oral statements to the Council must notify the District Manager, Bureau of Land Management, Las Vegas District, 4765 West Vegas Drive, P.O. Box 26569, Las Vegas, Nevada, by February 6, 1987.

Depending on the number of persons wishing to make oral statements, a per-person time limit may be established by the District Manager. Summary minutes of the District Advisory Council Meeting

will be maintained in the BLM Las Vegas District Office.

**Ben F. Collins,**

*District Manager.*

[FR Doc. 87-963 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-HC-M

### Realty Action, Nevada

**ACTION:** Notice of realty action.

**SUMMARY:** Leasing of Public Lands for Private Airstrip N-45086.

**DATE:** January 8, 1987.

This Notice of Realty Action involves the leasing of public lands for a private airstrip. The airstrip is for the exclusive use of Hycroft Resources and Development for mining operations near Sulphur, Nevada. The site proposed for leasing under provisions of section 302 of the Federal Land Policy and Management Act (FLPMA) of 1976 and 43 CFR Part 2920 is described as follows:

Mount Diablo Meridian, Nevada

T. 35 N., R. 39 E.,

Sec. 28 SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ ;

Sec. 33 S $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ ,

SE $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$  SE $\frac{1}{4}$ ;

Sec. 34 NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ .

The area described contains 8.15 acres more or less and is located in Humboldt County, Nevada.

The proposed airstrip would be graded and compacted for a main runway and two crosswind runways. No other proposals will be accepted. The lease would be authorized for a term of five years and could be renewed at the discretion of the Authorized Officer. Hycroft has the legal, financial, and managerial qualifications necessary to complete the proposed improvements to the existing airstrip. No appraisal has been made at this time, therefore, no estimate of rent is available. However, rent will not be less than the appraised fair market value.

Operation of the airstrip would require Federal Aviation Administration stipulations.

For a period of 45 days from the date of publication of this Notice in the **Federal Register**, interested parties may submit comments to the District Manager, 705 E. 4th St., Winnemucca, NV 89445. For further information call (702) 623-3676. In the absence of adverse comments, an application for the proposed use will be processed in accordance with proper application procedures.

Dated: January 8, 1987.

Frank C. Shields,  
District Manager, Winnemucca.  
[FR Doc. 87-964 Filed 1-15-87; 8:45 am]  
BILLING CODE 4310-HC-M

[NM-030-07-4212-11, NM 66388]

### Realty Action; Direct Sale of Public Land in Sierra County, NM

The following described parcel of public land has been examined and found suitable for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 at not less than the appraised fair market value of \$200/acre. The land will not be offered for sale until 60 days after the date of this notice.

#### New Mexico Principal Meridian

T. 12 S., R. 4 W.,  
Sec. 19, Lot 7.  
T. 12 S., R. 5 W.,  
Sec. 24, E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ .

The area described aggregates 30.03 acres.

The lands are proposed to be offered to the Sierra County Commissioners, who plan to use the land to operate a sanitary landfill. The sale is not in conflict with the Bureau's planning system; the lands are not critical to any resource program and have been found suitable for use as a sanitary landfill. It has been determined that sale of this parcel of land to the Sierra County Commission will serve important public objectives.

The patent, when issued, will be subject to all valid and existing rights and will contain the following reservations:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States Act of August 30, 1890 (26 Stat. 391; 43 U.S.C. 945).
2. All mineral deposits in the land so patented. Such minerals shall be subject to the right to explore, prospect for, mine and remove under applicable law and such regulations as the Secretary may prescribe (Federal Land Policy and Management Act of 1976, 990 Stat. 2757; 43 U.S.C. 1719).
3. All the geothermal steam and associated geothermal resources as to associated geothermal resources as to land so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits upon compliance with the conditions and subject to the provisions and limitations of the Act of December 24, 1970 (84 Stat. 1566).

Publication of this notice in the Federal Register segregates the public lands from the operation of the public land laws and the mining laws. The segregative effect will end upon

issuance of a patent or 270 days from the date of the publication, whichever occurs first.

For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments to the Las Cruces District Manager, Bureau of Land Management, 1800 Marquess, Las Cruces, NM 88005. Objections will be reviewed by the BLM State Director, who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

Dated: January 7, 1987.

H. James Fox,  
District Manager.  
[FR Doc. 87-965 Filed 1-15-87; 8:45 am]  
BILLING CODE 4310-FB-M

[NM-030-07-4212-14; NM 64778]

### Direct Sale of Public Land in Dona Ana County, NM

The Notice of Realty Action Direct Sale of Public Land in Dona Ana County, New Mexico, published in the Federal Register, Volume 51, No. 75 on April 18, 1986 is extended.

Extension is necessary as sale was halted due to National Wildlife Federation vs. Burford, et al., Lawsuit Civil Action No. 85-2238. Sale can now continue under provisions of Washington Office Instruction Memorandum No. 86-355, Change 1.

Activity/operator	Location	Date
Cities Service Oil and Gas Corporation; platform removal operations; SEA No. ES/SR 86-01.	Galveston Block 144, Lease OCS-G 3374; 13 miles East of Galveston, Texas.	Nov. 26, 1986.

Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about EAs and FONSI's prepared for activities on the Gulf of Mexico OCS are encouraged to contact the MMS office in the Gulf of Mexico OCS Region.

**FOR FURTHER INFORMATION CONTACT:** Public Information Unit, Information Services Section, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Wholesalers Parkway, New Orleans, Louisiana 70123-2394, Telephone (504) 736-2519.

**SUPPLEMENTARY INFORMATION:** The MMS prepares EAs and FONSI's for proposals which relate to exploration

All the terms specified in the Notice remain applicable to NM 64778. Copies of this Notice are available at the Las Cruces District Office, Bureau of Land Management, 1800 Marquess, Las Cruces, NM 88005.

Dated: January 7, 1987.

H. James Fox,  
District Manager.  
[FR Doc. 87-966 Filed 1-15-87; 8:45 am]  
BILLING CODE 4310-FB-M

### Minerals Management Service

#### Environmental Documents Prepared for Proposed Oil and Gas Operations on the Gulf of Mexico Outer Continental Shelf (OCS)

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** Notice of the availability of environmental documents prepared for OCS mineral development/production proposals on the Gulf of Mexico OCS.

**SUMMARY:** The Mineral Management Service (MMS), in accordance with Federal Regulations (40 CFR 1501.4 and 1506.6) that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Environmental Assessments (EAs) and Findings of No Significant Impact (FONSI's), prepared by the MMS for the following oil and gas development/production activities proposed on the Gulf of Mexico OCS. This listing includes all proposals for which FONSI's were prepared by the Gulf of Mexico in the 3-month period preceding this Notice.

for and the development/production of oil and gas resources on the Gulf of Mexico OCS. The EAs examine the potential environmental effects of activities described in the proposals and present MMS conclusions regarding the significance of those effects. Environmental Assessments are used as a basis for determining whether or not approval of the proposals constitutes major Federal actions that significantly affect the quality of the human environment in the sense of NEPA section 102(2)(C). A FONSI is prepared in those instances where the MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly

presents the basis for that finding and includes a summary or copy of the EA. This notice constitutes the public notice of availability of environmental documents required under the NEPA Regulations.

Date: January 9, 1987.

**J. Rogers Percy,**

*Regional Director, Gulf of Mexico OCS Region.*

[FR Doc. 87-967 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-MR-M

#### **Development Operations Coordination Document; Amoco Production Co.**

**AGENCY:** Minerals Management Service.

**ACTION:** Notice of the receipt of a proposed development operations coordination document (DOCD).

**SUMMARY:** Notice is hereby given that Amoco Production Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS-G 1088, Block 89, West Delta Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an onshore base located at Fourchon City, Louisiana.

**DATE:** The subject DOCD was deemed submitted on January 5, 1987.

**ADDRESS:** A copy of the subject DOCD is available for public review at the Office of the Regional Director, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Wholesalers Pkwy., Room 114, New Orleans, Louisiana (Office Hours: 9 a.m. to 3:30 p.m., Monday through Friday).

**FOR FURTHER INFORMATION CONTACT:**

Michael J. Tolbert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Telephone (504) 736-2867.

**SUPPLEMENTARY INFORMATION:** The purpose of this Notice is to inform the public, pursuant to section 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Dated: January 6, 1987.

**J. Roger Percy,**

*Regional Director, Gulf of Mexico OCS Region.*

[FR Doc. 87-968 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-MR-M

#### **National Park Service**

##### **Intention To Extend Concession Contract; Fred Harvey**

Pursuant to the provisions of section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), public notice is hereby given that sixty (60) days after the date of publication of this notice, the Department of the Interior, through the Director of the National Park Service, proposes to extend a concession contract with Amfac Hotel and Resorts, Inc., dba Fred Harvey, authorizing it to continue to provide lodging, food and beverage, merchandising, souvenir and automobile service station facilities and services for the public at Stovepipe Wells within Death Valley National Monument, California, for a period of one (1) year from January 1, 1988, through December 31, 1988.

The contract extension has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act, and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing contract which expires by limitation of time on December 31, 1987, and therefore, pursuant to the Act of October 9, 1965, as cited above, is entitled to be given preference in the renewal of the contract and in the negotiation of a new contract as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand-delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Interested parties should contact the Regional Director, Western Regional Office, 450 Golden Gate Avenue, San Francisco, California 94102, for information as to the requirements of the proposed contract.

Dated: January 7, 1987.

**John D. Cherry,**

*Acting Regional Director, Western Region.*

[FR Doc. 87-957 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-70-M

##### **Intention To Extend Concession Permit; Michiana Industries**

Pursuant to the provisions of section 5 of the Act of October 9, 1965, 79 Stat. 969; 16 U.S.C. Sec. 20, public notice is hereby given that sixty (60) days after the date of publication of this notice, the Department of the Interior, through the Director of the National Park Service, proposes to extend a concession permit with Michiana Industries, authorizing it to continue to provide parking lot service for the public at Indiana Dunes National Lakeshore, Indiana, for a period of one (1) year from January 1, 1986, through December 31, 1987.

The National Park Service considers a sixty (60) day period to be sufficient for interested parties to respond to this notice because the information on this proposed extension can be obtained at the address stated below.

This permit renewal has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired on December 9, 1986, and, therefore, pursuant to the Act of October 9, 1965, as cited above, is entitled to be given preference in the renewal of the permit and in the negotiation of a new permit as defined in 36 CFR 515.

The Secretary will consider and evaluate all proposals as a result of this notice. Any proposal must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Interested parties should contract the Superintendent, Indiana Dunes National Lakeshore, 1100 No. Mineral Springs Road, Porter, Indiana 46304, for information as to the requirements of the proposed permit extension.

**Charles H. Odegaard,**

*Regional Director, Midwest Region.*

December 15, 1986.

[FR Doc. 87-953 Filed 1-15-87; 8:45 am]

BILLING CODE 4310-70-M

##### **History Committee, Statue of Liberty-Ellis Island Centennial Commission; Meeting**

**AGENCY:** National Park Service.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a forthcoming meeting of the History

Committee of the Statue of Liberty-Ellis Island Centennial Commission. The Committee will review its purpose in relation to the Statue of Liberty-Ellis Island restoration project and will discuss the committee's suggestions and initiatives that will commemorate the hundredth anniversaries of the Statue of Liberty (1986) and Ellis Island (1992).

**DATE:** January 23, 1987, 8:45 a.m. to 4 p.m.

**ADDRESS:** The Statue of Liberty-Ellis Island Foundation, Inc., 101 Park Avenue, Suite 1205, New York, New York 10178.

**FOR FURTHER INFORMATION CONTACT:** Herbert S. Cables, Jr., Regional Director, National Park Service, 15 State Street, Boston, MA 02109-3572.

Dated: January 2, 1987.

**Charles P. Clapper,**

*Acting Regional Director, North Atlantic Region.*

[FR Doc. 87-954 Filed 1-15-87; 8:45 am]

**BILLING CODE 4310-70-M**

## INTERSTATE COMMERCE COMMISSION

### Section 5a Application No. 58; Machinery Haulers Association

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of institution of show-cause proceeding.

**SUMMARY:** Machinery Haulers Association (MHA) is directed to show cause why antitrust immunity should not be revoked for failure to file a revised rate bureau agreement as required by our decision served October 3, 1985.

**DATES:** MHA's response to the show cause order is due February 17, 1987. Comments from other parties are due March 17, 1987. MHA's rebuttal is due April 8, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Jane Udovic, (202) 275-7831

or

Louis E. Gitomer, (202) 275-7691

**SUPPLEMENTARY INFORMATION:**

Additional information is contained in the Commission's full decision. A copy may be purchased from T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call toll-free (800) 424-5403, or (202) 289-4357 in the Washington, DC, metropolitan area.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 11701, 10706, and 10321.

Decided: January 8, 1987.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

**Noreta R. McGee,**

*Secretary.*

[FR Doc. 87-979 Filed 1-15-87; 8:45 am]

**BILLING CODE 7035-01-M**

### Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. Parent corporation and address of principal office: CIGNA Corporation, One Logan Square, Philadelphia, PA 19103

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation:

- (i) Aetna Fire Underwriters Insurance Company (Connecticut)
- (ii) Aetna Insurance Company (Connecticut)
- (iii) Aetna Reinsurance Company (Delaware)
- (iv) Century Indemnity Company (Connecticut)
- (v) CIGNA Asset Advisers, Inc. (Delaware)
- (vi) CIGNA Associates, Inc. (Connecticut)
- (vii) CIGNA Healthplan, Inc. (Delaware)
- (viii) CIGNA Individual Financial Services Company (Delaware)
- (ix) CIGNA Insurance Company (California)
- (x) CIGNA Investment Advisory Company, Inc. (Delaware)
- (xi) CIGNA Investment Group, Inc. (Delaware)
- (xii) CIGNA Investments, Inc. (Delaware)
- (xiii) CIGNA Life Insurance Company (Connecticut)
- (xiv) CIGNA Loss Control Services, Inc. (Delaware)
- (xv) CIGNA RE Corporation (Delaware)
- (xvi) CIGNA Road & Travel Club, Inc. (Texas)
- (xvii) CIGNA Securities, Inc. (Connecticut)
- (xviii) CIGNA Worldwide, Incorporated (Delaware)
- (xix) Connecticut General Corporation (Connecticut)
- (xx) Connecticut General Fire & Casualty Insurance Company (Connecticut)
- (xxi) Connecticut General Life Insurance Company (Connecticut)

- (xxii) Connecticut General Pension Services, Inc. (Connecticut)
- (xxiii) ESIS, Inc. (California)
- (xxiv) INA Corporation (Pennsylvania)
- (xxv) INA Life Insurance Company (California)
- (xxvi) INA Life Insurance Company of New York (New York)
- (xxvii) INA Reinsurance Company (Delaware)
- (xxviii) INA Security Corporation (Pennsylvania)
- (xxix) INA Special Risk Facilities, Inc. (Delaware)
- (xxx) INAPRO, Inc. (Delaware)
- (xxxi) Indemnity Insurance Company of North America (New York)
- (xxxii) Insurance Company of North America (Pennsylvania)
- (xxxiii) International Rehabilitation Associates, Inc. (Delaware)
- (xxxiv) Investors Life Insurance Company of North America (Pennsylvania)
- (xxxv) James P. Toner Company, Inc. (Pennsylvania)
- (xxxvi) Life Insurance Company of North America (Pennsylvania)
- (xxxvii) Pacific Employers Insurance Company (California)
- (xxxviii) Recovery Services International, Inc. (Delaware)
- (xxxix) Trilog, Inc. (Pennsylvania)
- (xl) CIGNA Direct Marketing Company, Inc. (Delaware)
- (xli) Bankers Standard Insurance Company (Florida)
- (xlii) Atlantic Employers Insurance Company (New Jersey)
- (xliii) Marketdyne International, Inc. (Delaware)

1. Parent corporation and address of principal office: Crib N' Cradle, Inc., 7900 Notes Drive, Manassas, VA 22110.

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation: (i) ERA Truckload Carriers, Inc., a Virginia Corporation.

1. Parent corporation and address of principal office: G. Heileman Brewing Company, Inc., 100 Harborview Plaza, La Crosse, Wisconsin 54601

2. Wholly-owned subsidiaries which will participate in the operations, and states of incorporation.

(a) Heileman Baking Company, Inc. A Wisconsin corporation

(b) Machine Products Company, Inc. (Subsidiary of G. Heileman Brewing Co., Inc.) A Wisconsin corporation

1. Parent corporation and address of principal office: Paper Corporation of America, 1325 Morris Drive, Chesterbrook, Wayne, PA 19087.

2. Wholly-owned subsidiaries (including divisions of the parent

corporation and such wholly-owned subsidiaries) which may participate in

the operations, state of incorporation, and address of their respective principal

offices:

Company name	State of incorporation	Address
(i) American Warehouses, Inc.	Division	P.O. Box 1816, Houston, TX 77251.
(ii) Baldwin Paper Company	Division	161 Avenue of the Americas, New York, NY 10013.
(iii) B M & T International Sales, Inc.	Florida	P.O. Box 834, Valley Forge, PA 19482.
(iv) Blake, Moffitt & Towne, Inc.	California	P.O. Box 834, Valley Forge, PA 19482.
(v) Central Paper Company	Division	741 Fourth Street, P.O. Box 330, Menasha, WI 54952-0030.
(vi) Copco Papers, Inc.	Division	525 N. Nelson Road, P.O. Box 597, Columbus, OH 43216-0597.
(vii) Garrett-Buchanan Company	Division	7575 Brewster Avenue, Philadelphia, PA 19153.
(viii) LaSalle Messinger Paper Company	Division	2601 South 25th Avenue, Broadview, IL 60153-4590.
(ix) Mid Continent Paper Corporation	Division	2904 S. Spruce Street, Wichita, KS 67216.
(x) Monarch Paper Company	Division	P.O. Box 2669, Houston, TX 77252-2669.
(xi) Paper Corporation of United States	Division	100 5th Avenue—9th Fl., New York, NY 10011.
(xii) Quality Park Products	Division	2520 Como Avenue, St. Paul, MN 55108.
(xiii) The Fourke-Eno Paper Company, Incorporated	Division	P.O. Box 1962, Hartford, CT 06144-1962.
(xiv) Saxon/Florida	Division	1867 New 72nd Avenue, Miami, FL 33126.
(xv) Saxon/New York	Division	30-10 Starr Avenue, Long Island City, NY 11101.
(xvi) Seneca Paper Company	Division	P.O. Box 2010, Rochester, NY 14603.
(xvii) Unifax	Division	1301 Gulf Life Drive, 3rd Fl., Gulf Life Tower, Jacksonville, FL 32207.
(xix) The Unisource Corporation	Division	300 Oceangate, Suite 425, Long Beach, CA 90802.
(xx) The Unisource Corporation (Nevada)	Nevada	4445 S. Valley View Blvd., Las Vegas, NV 89103.
(xxi) Universal Paper Corporation	Division	1800 West Rogers Avenue, P.O. Box 537, Appleton, WI 54912-0537.
(xxii) Wyomissing Corporation	Division	P.O. Box 742, Reading, PA 19603-0742.

1. Parent corporation and address of principal office: Sky Bros., Inc., Burns Avenue and Canan Station, Altoona, Pennsylvania 16603.

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation:

a. Sky Bros. of Lemoyne, Inc., P.O. Box 632, Altoona, Pennsylvania 16603, a Pennsylvania corporation;

b. Frozen Farm Products, Inc., P.O. Box 632, Altoona, Pennsylvania 16603, a Pennsylvania corporation;

c. Lo-Temp Express, Inc., P.O. Box 632, Altoona, Pennsylvania 16603, a Pennsylvania corporation.

1. Parent Corporation: Three D Equities, Inc., Route 2, Box AA, Saltville, Virginia 24370.

2. Wholly-owned subsidiaries which will participate in the operations, and State(s) of incorporation:

a. Hubs and Wheels, Inc., Route 2, Box AA, Saltville, VA 24370—incorporated in the State of Virginia.

b. Powerboss Batteries, Inc., Route 3, Box 321, Saltville, VA 24370—incorporated in the State of Virginia.

1. Parent Corporation: VF Corporation, 1047 North Park Road, Wyomissing, PA 19610.

2. (a) Wholly-owned subsidiaries which will participate in the operations:

(i) Bassett-Walker, Inc.  
State of Incorporation—Virginia

(ii) Blue Bell, Inc.  
State of Incorporation—Delaware

(iii) Jantzen, Inc.  
State of Incorporation—Nevada

(iv) Jansport, Inc.  
State of Incorporation—Delaware

(v) Kay Windsor, Inc.  
State of Incorporation—Pennsylvania

(vi) The Lee Apparel Company, Inc.

State of Incorporation—Pennsylvania  
(vii) Modern Globe, Inc.

State of Incorporation—Delaware  
(viii) Troutman Industries, Inc.

State of Incorporation—North Carolina

(ix) VF Factory Outlet, Inc.  
State of Incorporation—Delaware

(x) Vanity Fair Mills, Inc.  
State of Incorporation—Pennsylvania

(xi) Willis & Geiger, Inc.  
State of Incorporation—Delaware

Noreta R. McGee,

Secretary.

[FR Doc. 87-978 Filed 1-15-87; 8:45 am]

BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 85-34]

#### Michael J. Bartek, M.D.; Denial of Application

On June 17, 1985, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), directed an Order to Show Cause to Michael J. Bartek, M.D. (Respondent) at the Immediate Medical Care Center, RD3—Route 24, Chester, New Jersey 07930. The Order to Show Cause sought to deny the application for DEA Registration executed by Dr. Bartek on February 4, 1985. The statutory predicate for such denial was that: (1) On January 19, 1979, Dr. Bartek was convicted in the Criminal Court of Shelby County, Tennessee, of obtaining

controlled substances by forged prescriptions; (2) on December 14, 1979, Dr. Bartek was convicted in the Superior Court of the State of Washington, King County, of uttering a false or forged prescription for the controlled substance Demerol; and (3) Respondent was convicted in the New Jersey Superior Court of Essex County, on May 1, 1981, of acquiring controlled dangerous substances by misrepresentation, fraud, deception, and subterfuge. All three were felony convictions relating to controlled substances.

Respondent, by letter dated July 11, 1985, requested a hearing on the issues raised by the Order to Show Cause and the matter was placed on the docket of Administrative Law Judge Francis L. Young. On November 15, 1985, following prehearing procedures, a hearing was held before Judge Young in Washington, DC. On September 22, 1986, Judge Young issued his opinion and recommended ruling, findings of fact, conclusions of law, ruling, and decision. No exceptions were filed and, on October 27, 1986, the Administrative Law Judge transmitted the record of these proceedings to the Administrator. The Administrator has considered the record in its entirety and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter, based upon findings of fact and conclusions of law as hereinafter set forth.

The Administrative Law Judge found that Dr. Bartek has been convicted in Washington, Tennessee and New Jersey of felonies relating to controlled substances. Following a controlled substance-related conviction, the

Washington State Medical Disciplinary Board placed Respondent's medical license on probation. Subsequently, Respondent violated the terms of such probation and his license to practice medicine in the State of Washington was revoked.

In 1978, while living in Tennessee, Respondent's wife was working in physicians' offices from which she stole prescription pads for her husband. Dr. Bartek illegally used these prescription pads to obtain controlled substances for his use.

In 1982, while working in the anesthesiology department of a hospital in Newark, New Jersey, Respondent admitted that he was diverting drugs from the hospital stock for his own use. Judge Young found that Dr. Bartek exhibited clear signs of being under the influence of drugs while working at the hospital.

Dr. Bartek testified on November 15, 1985, before the Administrative Law Judge, under oath, that he was drug free. He has made similar assertions in the past. On September 1, 1976 in Seattle, Washington he told a judge: "I have completely licked the drug problem." In a letter dated January 10, 1977, directed to the Attorney General's Office in Olympia, Washington, Dr. Bartek wrote: "I have been drug free since April 1975 and no longer have this problem." In his letter to the Tennessee Board of Medical Examiners, dated July 29, 1979, he wrote: "My wife and I have been off all drugs for 16 months now."

On November 7, 1985, eight days prior to the hearing before the Administrative Law Judge, Dr. Bartek, possessing no valid DEA registration, obtained a quantity of Schedule III cough syrup for himself by passing a prescription under a fictitious name and bogus DEA number. Fourteen days after the hearing (November 29, 1985), at the same New Jersey pharmacy, Respondent attempted to pass a prescription for the same Schedule III controlled substance, Vicodin.

The Administrative Law Judge found that Dr. Bartek lacks the requisite ability to handle the responsibility associated with a DEA registration. He has amply demonstrated that he is unable to control a strong propensity for drug abuse. Despite his brief drug free periods, Respondent cannot be trusted to refrain from abusing controlled substances for any protracted period. He operated in a hospital under the influence of drugs and tampered with the drug supplies. His medical license has been revoked in the State of Washington. He has been convicted in three states for felonies relating to controlled substances. Dr. Bartek's

ability to prescribe controlled substances would be inconsistent with the public interest. Lawful grounds exist to deny Respondent's application for a DEA Certificate of Registration, 21 U.S.C. 823(f). Therefore, the Administrator agrees with this recommendation and adopts the findings of fact, conclusions of law and decision of the Administrative Law Judge in their entirety.

Having concluded that based on the record in this case there are lawful grounds for the denial of Respondent's application for registration, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that the application for a DEA Certificate of Registration, executed by Michael Bartek, M.D., on February 4, 1985 be, and it hereby is, denied. This denial is effective February 17, 1987.

Dated January 12, 1987.

John C. Lawn,

Administrator.

[FR Doc. 87-1000 Filed 1-15-87; 8:45 am]

BILLING CODE 4410-09-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Job Training Partnership Act; Indian and Native American (INA) Programs for Program Year 1987 Methodology for Setting Grantee Performance Standards

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Final notice.

**SUMMARY:** The Department of Labor is adopting the methodology described below for the purpose of setting performance standards for Job Training Partnership Act (JTPA) Indian and Native American (INA) grantees for Program Year (PY) 1987 (July 1, 1987-June 30, 1988). This information on the methodology was published in the *Federal Register* at 51 FR 34161 on September 25, 1986. Interested parties were invited to submit written comments through October 9, 1986. This issuance summarizes the comments received and announces the adoption of the modeling process for the purpose of setting performance standards for PY 1987.

**EFFECTIVE DATE:** January 16, 1987.

**FOR FURTHER INFORMATION CONTACT:** Clayton Johnson. Telephone: 202-535-0685.

## SUPPLEMENTARY INFORMATION:

### Discussion of Comments

Only a few commenters responded to the previous notice and their points of concern are addressed below.

1. *Short comment period.* Two commenters questioned the short duration of the comment period (fourteen days) in view of the complex nature of issuance. The Department appreciates that concern even though no further comments were received after the closing date. The primary emphasis was to publicize the methodology prior to training sessions being conducted for grantees which commenced during the last week of October, 1986. At these training sessions, grantees' responses to the proposed methodology were generally favorable.

2. *Data sources used in the models.* There was an apparent misinterpretation in some comments regarding the type of data used in constructing the models. These particular comments seemed to assume that JTPA Title II-A participant data were the basis for the modeling weights. In fact, participant characteristics data utilized in the models have been drawn exclusively from the Annual Status Reports submitted by Native American grantees for Program Year (PY) 1984. However, as indicated in the previous notice, the local economic conditions were constructed from Census, Bureau of Labor Statistics, and Bureau of Indian Affairs (BIA) data.

3. *Adverse impact of performance standards.* Concern was expressed by one of the commenters regarding the possible negative effect of performance standards in regard to how well INA programs assist harder-to-serve participants. For example, some indicated that the cost per positive termination standard might encourage shorter training and more direct placement activities. The Department has carefully considered the potential influence of the standards on types of participants served and varieties of training and services provided. The manner in which the standards have been established is based on the expectation that 85% of INA grantees will exceed the minimally acceptable levels if performance is only comparable to PY 1984. For this reason, the judgment of the Department is that the standards are not excessively stringent.

4. *Final recalculation timing.* Some comments indicated concern regarding the effects of computing the final standards after the performance period ends. The viewpoint was that such a procedure does not permit grantees to

plan and perform against a known set of numbers. The Department recognizes that the previous method of setting standards at the beginning of the year functioned in such a manner. However, the modeling process depends upon the use of actual end-of-year data reported by the grantees in calculating the final standards. It should also be noted that the issuance strongly emphasizes that grantees should plan to perform at the performance goal level, or at least sufficiently above the minimally acceptable performance level, in order to offset the unexpected conditions that might arise during the program year.

5. *Trial period.* One commenter suggested that PY 1987 be considered as a trial period for the new method being used to set standards. This is not practicable since the JTPA section 401 regulations at 20 CFR 632.89 require that performance results be a factor in grantee designations for PY 1987-1988, and beyond.

Thus, PY 1985 performance standards results will be considered for the upcoming PY 1987-88 designation cycle. Likewise, later on, performance standards outcomes from PY 1986 and PY 1987 will be a factor in the PY 1989-1990 designation cycle. Also, it should be noted that performance standards were previously used on a trial basis during Fiscal Year (FY) 1983, Transition Year (TY) 1984, and PY 1984 with respect to INA grantees.

6. *Need for technical assistance.* One commenter wanted to know how technical assistance would be provided to grantees in meeting the standards. Grant awards are made under the assumption that organizations are responsible and capable of effectively administering programs. However, the Department concurs with the need to give such assistance both to grantees as a whole and also to specific grantees who may be failing to meet standards. Currently, the Department has arranged a series of TAT workshops for all INA grantees at various locations across the country, including targeted technical assistance for grantees that did not meet their PY 1985 standards. In addition, the Department agrees that technical assistance will be offered prior to imposing a series of sanctions for grantees who fail to meet standards.

7. *Rewards and sanctions.* Several of the commenters expressed concern regarding how grantees could expect to be treated in terms of incentives or penalties for performance standards results. This issuance does not address the possible range of such rewards and sanctions to be adopted. However, the Department acknowledges that the performance standards system needs to

reflect the positive aspects of most grantees surpassing the minimum standards as well as those who will be exceptional performers. The Department intends to develop appropriate sanctions for grantees failing to meet the standards. Also, the Department expects to formulate incentives for those grantees who meet or exceed the exemplary performance levels. Non-monetary approaches such as public recognition awards for superior performance may be the appropriate direction for such incentives.

Aside from the above points, one commenter emphasized that performance standards provide a valuable management tool in achieving higher levels of performance for grantee organizations.

#### Information on Methodology

Job Training Partnership (JTPA) Section 401 establishes training and employment programs for Native American, to ameliorate serious unemployment and economic disadvantages existing among members of their communities. "Recipients of funds under this section shall establish performance goals, which shall, to the extent required by the Secretary, comply with performance standards established by the Secretary pursuant to section 106" (JTPA section 401(h)(2)).

Performance standards for Indian and Native American (INA) programs were introduced on a trial basis in the last year of Comprehensive Employment and Training Act (CETA) Fiscal Year (FY) 1983 (Oct. 1, 1982-Sept. 30, 1983) and during Transition Year (TY) 1984 (Oct. 1, 1983-June 30, 1984) and Program Year (PY) 1984 (July 1, 1984-June 30, 1985). For the first time, based on PY 1985 data, performance standards results will be used to assess grantees for redesignation in PY 1987-1988 (July 1, 1987-June 30, 1989). Currently, performance standards are one of 14 responsibility tests that grantees are expected to meet for redesignation for PY 1987-1988.

Three performance measures are required for INA programs:

- Entered-employment rate.
- Positive-termination rate, where positive terminations are defined to include:
  - Entered employment
  - Entered non-Title IV training (or training provided by another section 401 grantee)
  - Returned to full-time school
  - Completed a major level of education
  - Other successful completion of the participant's planned activity.
- Cost per positive termination.

Community Benefit Projects are available to grantees as an optional fourth performance measure. In calculating the required standards, participants in community benefit projects are excluded and the costs are subtracted from the cost measure.

The entered employment rate (EER) standard reflects the employment orientation of all JTPA programs. The positive termination rate (PTR) standard recognizes that many INA program participants live in areas with depressed labor markets and face other barriers to employment. Thus, in addition to helping participants find employment immediately after termination, another important goal for INA programs is to enhance the employability of participants by helping them return to school or receive other training or complete other planned activities. A cost per positive termination (CPT) standard further emphasizes that INA programs have multiple goals. (Note.—the CPT model includes a built-in inflation factor).

#### Reasons for Revised Approach

INA performance standards have typically been set at some percentage of the previous year's performance (e.g., 75% of past performance for PY 84 and PY 85 and at 100% of past performance for PY 86). This procedure implicitly varies standards to reflect grantee difference in local factors by assuming their previous performance will control for favorable or unfavorable local factors. Such procedures have had a number of problems.

First, the rationale for performance standards is to motivate grantees to run well-managed and efficient programs. Setting standards based on how well the grantee actually performed in a previous year assumed that service levels and local economic conditions do not change from year to year, and that only management quality is reflected in these year-to-year changes in performance. However, it holds grantees harmless for perpetuating poorly-managed programs from one year to the next. For a given set of client characteristics and labor market conditions, a grantee who runs a well-managed program and, thus, did better in a past year will be given a higher standard than a grantee who runs a poorly-managed program and thus performed poorly in a past year. Because performance standards are intended to encourage efficient management, standards should distinguish between well-managed and poorly-managed programs rather than holding the grantees harmless for management quality.

Second, participant characteristics and local economic conditions may change from year to year so that, for instance, a grantee faces meeting the same standard with a more difficult to serve clientele or a more difficult economy. The current approach assumes that each and every grantee can do as well as it did last year and does not account for whatever random or chance events may also influence how well a grantee performs. For example, a new firm may open in the area, creating a short-term need for new workers that wanes in the following year; participants in one year may, by chance, be particularly skilled and able to find jobs more easily than typical applicants; additional funding for related programs may be available in one year, but not the next. Consequently, many INA grantees found that they could not expect to meet their issued standards for PY 1986 because of such random events and had to negotiate with the Department of Labor for changes in their standards.

To mitigate problems associated with the negotiation process, the Department of Labor will use an adjustment model in setting PY 1987 standards. Using historical (PY 1984) data, the model identifies a set of factors that strongly influence the performance outcome. It then provides weights to convert differences among grantees on these factors into appropriate adjustments in expected performance levels. The adjustments raise or lower the expected performance levels from the average performance of all grantees. The adjustment model has the following advantages over the current standard-setting approach:

- The model represents the average influence of factors across all grantees; well-managed programs are expected to do better than the model indicates and poorly-managed programs are expected to do worse. Thus, grantees will not be held harmless for poorly-managed programs.
- It allows adjustments to be applied consistently and equitably to all grantees.
- It quantifies the size of adjustments so that, for example, one knows not only that serving primarily school dropouts is a justifiable reason for lowering performance standards, but also that the standards should be lowered by a specific amount for each additional percentage point above the average percent of dropouts served by all grantees.
- It allows one to add up the adjustments for several factors to determine the net adjustments that should be made to the standards.

### Selection of Modeling Factors

The models are designed to adjust expected performance levels for selected participant characteristics and local economic conditions (called "local factors") that are not in the grantees' control and are known to have strong relationships to program outcomes.

Numerous factors reported on the Indian Annual Status Report (IASR) were examined for inclusion in the model. Local economic conditions were constructed from Census, Bureau of Labor Statistics, and the Bureau of Indian Affairs (BLA) data.

The following criteria determine which factors are included in each model:

- Management practices were excluded because they are regarded as within the control of program managers, not beyond their control.
- There must be some variation on the factor, that is, in service levels or local economic conditions, among grantees.
- The relationship between the factor and the performance measure made intuitive sense.
- The factor was strongly related to the performance outcomes.
- Measures of the factor were objective and easily quantifiable.
- For local economic conditions, published sub-state level data were available nationwide.

The following 12 factors are included in the PY 1987 INA models:

Local factors	Model		
	EER	PTR	CPT
Percent females .....			x
Percent aged 14 to 21 .....	x	x	x
Percent school dropouts .....	x	x	x
Percent students .....	x	x	x
Percent welfare recipients .....	x		
Percent long-term unemployed .....	x	x	x
Percent not in labor force .....	x	x	x
Percent families with income below the poverty level .....			x
Average weeks participated .....			x
Percent of population living on farms .....	x	x	x
Percent employment in manufacturing .....	x		
Tribal Government status .....	x	x	x

Models are derived from the past average performance and service levels of grantees (e.g., PY 1984 experience was used in establishing factor weights in the PY 1987 models). Such an

approach is quite appropriate because the relationships between grantee performance and local factors remain fairly stable over a period of time. The model weights represent the size and direction of each local factor's effect on the performance outcome when the other factors in the model are also taken into account. The following relationships between local factors and performance measures are identified in the PY 1987 models:

- Grantees serving a higher percent of women have higher costs per positive termination.
- Youths under 21 have lower entered employment rates, lower positive termination rates and higher costs per positive termination.
- Students and dropouts both have lower entered employment rates than do graduates; students have higher positive termination rates and lower costs per positive termination than graduates, probably because "completed a major level of education" is counted as a positive termination; dropouts have lower positive termination rates and higher costs per positive termination than do graduates.
- Individuals receiving welfare at enrollment have lower entered employment rates.
- Those who were unemployed for 15 weeks or more or who were out of the labor force prior to enrollment have lower entered employment rates, lower positive termination rates, and higher costs per positive termination than do those who were employed within 15 weeks of enrollment.
- Grantees in areas with a higher proportion of individuals living in poverty have higher costs per positive termination.
- Grantees with longer programs, as measured by the average number of weeks participated, have higher costs per positive termination.
- Grantees in areas where a large proportion of the population live on farms have lower entered employment rates, lower positive termination rates and higher costs per positive termination.
- Grantees in areas with a higher percent of employment in manufacturing industries have higher entered employment rates.
- Reservation grantees (i.e. those tribal groups having a recognized government-to-government relationship as defined by BIA) have lower entered employment rates and higher costs per positive terminations than non-reservation grantees but reservation grantees have somewhat higher positive termination rates.

Some factors are excluded from the models. Program mix was excluded to hold grantees accountable for the program-activity mix they provide. Providing the appropriate mix of program activities to meet the changing needs of the clients is an important management technique.

Other factors are excluded from the models because grantees serve very similar (and usually very small) proportions of individuals with the characteristics. Participant characteristics excluded because of little variation are: single head of household, limited English-language proficiency, handicapped, offender, and transients. All grantees get the same adjustments for these factors. These adjustments are included in the average performance level before it is further adjusted.

Some factors were included in a model for one outcome but excluded from another because their adjustments in the latter did not make sense from a programmatic perspective. Thus, females were excluded from the entered employment rate and positive termination rate models because including them would have generated higher expected performance. Welfare recipients were deleted from the positive termination rate and cost per positive termination models because inclusion would have generated more difficult standards.

Several variables measuring local economic conditions were examined but were excluded from the recommended models because they did not have significant relationships with the performance measures. These variables include population density, average annual earnings in the local area, the unemployment rate in the local area, the percent of Indians and Native Americans who were unemployed, and BIA measures of unemployment rates on reservations. The effects of these factors on outcome measures are generally captured by other conditions (e.g., percent of population living on farms and tribal government status) already included in the model. In particular, the percent of Indians and Native Americans with income below the poverty level was excluded from the models because the percent of all families with income below the poverty level had a somewhat stronger relationship to the performance measures. Similarly, the percent of Indians and Native Americans living on reservations was excluded because the variable indicating whether the grantee has tribal government status had a

stronger relationship to the performance measures.

The percent of families with income below the poverty level was excluded from the entered employment rate and positive termination rate models and the percent of employment in manufacturing was excluded from the positive termination rate and cost models because their estimated effects were not significant and did not make intuitive sense.

The recommended performance goals are calculated as differences from the national average performance. The national average performance represents the outcome of serving participants with average characteristics in local areas with average conditions. Thus a grantee's performance adjustments depend on how different its service levels and economic conditions are from the national averages of these local factors. For PY 87 these averages, which exclude service levels for community benefit projects, are:

Percent Females.....	50.9
Percent Aged 14 to 21.....	31.2
Percent School Dropouts.....	29.5
Percent Students.....	6.8
Percent Welfare Recipients.....	24.4
Percent Long-term Unemployed.....	44.9
Percent Not in Labor Force.....	23.4
Percent Families with Income Below the Poverty Level.....	11.3
Average Weeks Participated.....	18.4
Percent of Population Living on Farms.....	4.4
Employment in Manufacturing.....	16.2
Proportion of Grantees with Tribal Government Status.....	.694

For the last factor, a grantee's local factor will be either "1" if the grantee has recognized tribal government status as under BIA procedures or "0" if the grantee does not have such status, both of which differ from the *proportion of grantees* shown for this factor.

These national averages of service levels *do not* indicate that grantees should strive to serve these specific proportions of participants. These average service levels are used only to determine whether a grantee is serving more hard-to-serve participants than average, and thus should receive lower than average performance goals, or whether the grantee is serving fewer hard-to-serve participants than average, and thus should receive somewhat higher than average performance goals.

Because the use of an adjustment model may yield substantially different standards for some grantees than they received from previous standards-

setting approaches, the Department of Labor will include past performance in the setting of standards for the first year of model use in PY 1987. Under this weighted average approach, grantees' expected performance derived from the model and past performance would be weighted and combined to yield a new expected performance level that is a compromise between the two. A weight for past performance was statistically derived to best predict performance. Weights for past performance vary from 31 to 44% depending upon the performance measure. For PY 1987 standards setting, PY 1985 experience will be used for past performance, both for the initial standards and for end-of-year recalculation.

The adjustment model will provide:

- *A recommended performance goal for each outcome measure.* This recommended goal will fall at an average performance level given the participant characteristics and local economic conditions of that grantee. At an average performance level, fifty percent of grantees facing these same conditions can be expected to perform at or above this recommended goal.

- *A standard set below the recommended goal to reflect a minimally acceptable level of performance.* The standard identifies the performance a grantee must achieve to meet the responsibility test at 20 CFR 632.11(d)(5). Consistent with the grantees' rate of failure to meet standards in the past, the performance standard will be set so that, unless grantees improve their performance relative to the conditions they face, 15% will perform below the standard.

No end-of-year variance will be allowed below this minimally acceptable standard, as was applied sometimes in the past. Thus, grantees should aim their planned performance at or above the recommended goal level calculated by the model. By planning and maintaining performance at the recommended goal level during the year, grantees can accommodate possible changes in actual service levels and local economic conditions during the year that may cause an overlooked increase in the grantee's minimum standard when it is recalculated at year end.

- *A level of exemplary performance* designated at such a level above which only 15% of grantees would be expected to perform, unless they improve their performance relative to the conditions they face.

Minimally acceptable performance standards and exemplary levels of performance are uniquely established

for each grantee taking into account the number of their terminees. Minimally acceptable standards will be set further below the recommended goal for smaller grantees than for larger grantees. Exemplary levels of performance will be set closer to the recommended goal for larger grantees than for small grantees.

The standard setting system does not provide a fixed set of numbers—average expected, minimally acceptable, and exemplary performance—at the beginning of the year to be targeted by grantees throughout the year. Rather, it provides a model that may generate varying goals and standards depending upon each grantee's participant characteristics and local economic conditions. Service levels and local conditions may change during the year and grantees should monitor revised estimates of their performance goals and standards so that they will not be caught short when standards are recalculated on actual service levels shown in the Annual Status Reports at the end of the year.

For preliminary planning purposes, the Department of Labor will provide each grantee with worksheets showing initial performance levels—recommended goal, minimally acceptable performance standard, and exemplary performance. The factor values on these worksheets will be calculated using actual service levels reported on the PY 1985 Annual Status Report from each grantee. These calculations will be included as part of the Division of Indian & Native American Programs (DINAP) Bulletin transmitting Comprehensive Annual Plan instructions for PY 1987 to be issued in the near future to all current grantees.

The initial calculations will appear on sample worksheets for each individual grantee and will illustrate how the model adjustments are computed for their particular factors and how the grantee's past performance in PY 1985 is weighted into the process.

The Employment and Training Administration will provide worksheet computations for all grantees on both the initial calculations and the final calculations. However, individual grantees may wish to familiarize themselves with the worksheets for each measure so that they can update the worksheets with more current service levels as the program year progresses. In this manner, the performance standards can serve as a continuing management tool for grantees in their internal operations.

Grantee performance will be judged, however, not by the initial calculations used for their planned service levels, but by model results using actual service levels reported at the end of the program year. At year end, grantees will submit their Annual Status Reports showing actual service levels and obtain their final performance standards once the Department of Labor recalculates the model results.

Signed at Washington, DC, this 12th day of January 1987.

Roger D. Semerad,  
Assistant Secretary of Labor.

[FR Doc. 87-1018 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-30-M

### **Employment Standards Administration, Wage and Hour Division**

#### **Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions**

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersede as decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modification issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts," and shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

#### **Modifications to General Wage Determination Decisions**

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

## Volume I

Massachusetts:	
MA87-1 (Jan. 2, 1987).....	pp. 372-386.
MA87-2 (Jan. 2, 1987).....	pp. 388-399.
MA87-3 (Jan. 2, 1987).....	pp. 402-410.
Pennsylvania:	
PA87-10 (Jan. 2, 1987).....	p. 936.

## Volume II

Illinois:	
IL87-7 (Jan. 2, 1987).....	p. 136.
Wisconsin:	
WI87-9 (Jan. 2, 1987).....	pp. 1125-1127.
WI87-10 (Jan. 2, 1987).....	pp. 1130-1137.
WI87-11 (Jan. 2, 1987).....	pp. 1139-1140.
WI87-12 (Jan. 2, 1987).....	p. 1143.
WI87-14 (Jan. 2, 1987).....	pp. 1151-1153.
WI87-15 (Jan. 2, 1987).....	pp. 1155-1156.
WI87-16 (Jan. 2, 1987).....	pp. 1159-1160.
Listing by location (index).....	p. lii.

## Volume III

California:	
CA87-1 (Jan. 2, 1987).....	pp. 36-43.
Colorado:	
CO87-1 (Jan. 2, 1987).....	pp. 102-103.
Montana:	
MT87-1 (Jan. 2, 1987).....	pp. 166-178.
Listing by location (index).....	p. xxvii.

### General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the Country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 9th day of January 1987.

James L. Valin,

Assistant Administrator.

[FR Doc. 87-841 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-27-M

### Mine Safety and Health Administration

[Docket No. M-86-188-C]

#### Bull Run Mining Company, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Bull Run Mining Company, Inc., P.O. Box 235, Reedsville, West Virginia 26547 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Meredith Mine (I.D. No. 46-04266) located in Preston County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the use of a locked padlock to secure battery plugs to machine-mounted battery receptacles on permissible, mobile battery-powered machines.

2. As an alternate method, petitioner proposes to use a spring-loaded metal locking device in lieu of padlocks. The spring-loaded device will be designed, installed and used to prevent the threaded rings that secure the battery plugs to the battery receptacles from unintentionally loosening and will be attached to prevent accidental loss. In addition, the fabricated metal brackets will be securely attached to the battery receptacles to prevent accidental loss of the brackets.

3. Petitioner states that the spring-loaded metal locking devices will be easier to maintain than padlocks because there are no keys to be lost and dirt cannot get into the workings as with a padlock.

4. Operators of permissible, mobile, battery-powered machines affected by this modification will be trained in the proper use of the locking device, the hazards of breaking battery-plug connections under load, and the hazards of breaking battery-plug connections in areas of the mine where electric equipment is required to be permissible.

5. For these reasons, petitioner requests a modification of the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1019 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-214-C]

#### Consolidation Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Consolidation Coal Company, Consol Plaza, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Rowland No. 9 Mine (I.D. No. 46-04370) located in Raleigh County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirements that return air courses be examined in their entirety on a weekly basis.

2. The Rowland No. 9 Mine is a hill top mine above the water table and no methane has been detected with blowing system and bleeders at back of the panels.

3. Petitioner states that due to deteriorated roof conditions in the specified return air course, weekly examinations for hazardous conditions are too dangerous to perform. In addition, rehabilitation of the areas would expose miners to hazardous conditions.

4. As an alternate method, petitioner proposes to establish a checkpoint at a specified location where gas and air measurements will be made of the return air course. The results of such measurements will be recorded.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1020 Filed 1-5-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-201-C]

**Golden Oak Mining Co.; Petition for Modification of Application of Mandatory Safety Standard**

Golden Oak Mining Company, Route 2, Box 177, Whitesburg, Kentucky 41858 has filed a petition to modify the application of 30 CFR 75.303 (preshift examination) to its Golden Oak No. 4 Mine (I.D. No 15-15558) located in Letcher County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the active workings of a mine be examined by a certified person within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine.

2. As an alternate method, petitioner proposes to examine three permanent seals in the first 1000 feet of intake airways on a weekly basis.

3. In support of this request, petitioner states:

(a) The mine has forced ventilation. Over the life of the mine, a minimum average pressure of 3 inches water gage against the seals is anticipated, which would assure a constant positive ventilating pressure against these seals.

(b) All seals are being constructed in accordance with the approved ventilation and dust control plan, dated May 9, 1986. To assure permanent roof stability in the immediate area, cribs are being constructed using treated crib blocks on the inby and outby side of each seal;

(c) The coal seam is located above drainage and there is no history of methane; and

(d) All section foremen will perform all preshift examinations to insure air quality and quantity on the working sections; and

(e) Weekly examinations of the three seals will reduce exposure time for the examiner by 80%.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1021 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-190-C]

**H. L. & W. Coal Co.; Petition for Modification of Application of Mandatory Safety Standard**

H. L. & W. Coal Company, 14 Maple Street, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.1714 (self-contained self-rescue devices) to its H. L. & W. Slope (I.D. No. 36-07825) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that each operator make available to each person who goes underground a self-contained self-rescue device approved by the Secretary which is adequate to protect such person for one hour or longer.

2. Petitioner states that the devices are too heavy, bulky and cumbersome to be worn while working in the steeply pitching and narrow areas of the anthracite mine.

3. The mine is always damp to wet which makes it difficult to locate a suitable dry storage location for the rescuers.

4. Petitioner states that the mine can be evacuated in less than five minutes.

5. For these reasons, petitioner requests a modification of the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or

received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1022 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-192-C]

**Island Creek Coal Co.; Petition for Modification of Application of Mandatory Safety Standard**

Island Creek Coal Company, 2355 Harrodsburg Road, P.O. Box 11430, Lexington, Kentucky 40575 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Hamilton No. 2 Mine (I.D. No. 15-02706) located in Union County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that return air courses be examined in their entirety on a weekly basis.

2. Petitioner states that due to heavy top, heavy bottom and roof falls, certain portions of the return entries cannot be traveled.

3. As an alternate method, petitioner proposes to establish check points to monitor airflow at specified locations and check stoppings in neutral airways on a weekly basis. Petitioner also proposes to mine additional return airways to replace part or all of those affected by this petition.

4. For these reasons, petitioner requests a modification of the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1023 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-212-C]

**Liberty Coal Co., Petition for Modification of Application of Mandatory Safety Standard**

Liberty Coal Company, P.O. Box 835, Grudy, Virginia 24614 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its No. 1 Mine (I.D. No. 44-05568) located in Buchanan County, Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that return aircourses be examined in their entirety on a weekly basis.
2. Petitioner states that due to a roof fall, certain areas of the return are unsafe to travel. The volume of air over the fall is 78,000 CFM. It is possible to inspect the air course up to both sides of the fall. Both sides of the fall have had considerable supplemental supports installed and to remove them to clean up would expose miners to hazardous conditions.
3. As an alternate method petitioner proposes to establish check points on both sides of the fall.
4. For these reasons, petitioner requests a modification of the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,  
Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1024 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-209-C]

**Red Bone Mining Co.; Petition for Modification of Application of Mandatory Safety Standard**

Red Bone Mining Company, P.O. Box 3242, Morgantown, West Virginia 26503 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment;

maintenance) to its Crowdad Mine (I.D. No. 46-05589) located in Monongalia County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the use of a locked padlock to secure battery plugs to machine-mounted battery receptacles on permissible, mobile batter-powered machines.
2. As an alternate method, petitioner proposes to use a spring-loaded metal locking device in lieu of padlocks. The spring-loaded device will be designed, installed and used to prevent the threaded rings that secure the battery plugs to the battery receptacles from unintentionally loosening and will be attached to prevent accidental loss. In addition, the fabricated metal brackets will be securely attached to the battery receptacles to prevent accidental loss of the brackets.
3. Petitioner states that the spring-loaded metal locking devices will be easier to maintain than padlocks because there are no keys to be lost and dirt cannot get into the workings as with a padlock.
4. Operators of permissible, mobile, battery-powered machines affected by this modification will be trained in the proper use of the locking device, the hazards of breaking battery-plug connections under load, and the hazards of breaking battery-plug connections in areas of the mine where electric equipment is required to be permissible.
5. For these reasons, petitioner request a modification of the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,  
Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1025 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-217-C]

**South Ridge Coal Co.; Petition for Modification of Application of Mandatory Safety Standard**

South Ridge Coal Company, P.O. Box 2, Sacramento, Pennsylvania 17968 has filed a petition to modify the application of 30 CFR 75.301 (air quality, quantity and velocity) to its Little Diamond Slope (I.D. No. 36-07780) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute.

2. Air sample analysis history reveals that harmful quantities of methane are nonexistent in the mine. Ignition, explosion, and mine fire history are nonexistent for the mine. There is no history of harmful quantities of carbon monoxide and other noxious or poisonous gases.

3. Mine dust sampling programs have revealed extremely low concentrations of respirable dust.

4. Extremely high velocities in small cross sectional areas of airways and manways required in friable Anthracite veins for control purposes, particularly in steeply pitching mines, present a very dangerous flying object hazard to the miners and cause extremely uncomfortable damp and cold conditions in the mine.

5. As an alternate method, petitioner proposes that:

- a. The minimum quantity of air reaching each working face by 1,500 cubic feet per minute;
- b. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries by 5,000 cubic feet per minute; and
- c. The minimum quantity of air reaching the intake end of a pillar line be 5,000 cubic feet per minute, and/or whatever additional quantity of air that may be required in any of these areas to maintain a safe and healthful mine atmosphere.

6. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before February 17, 1987. Copies of the petition are available for inspection at that address.

Dated: January 8, 1987.

Patricia W. Silvey,

Associate Assistant Secretary for Mine Safety and Health.

[FR Doc. 87-1026 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-43-M

### Occupational Safety and Health Administration

#### Maryland State Standards; Approval

##### 1. Background

Part 1953 of title 29, Code of Federal Regulations prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called the Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary), (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On July 5, 1973, notice was published in the *Federal Register* (38 FR 17834) of the approval of the Maryland State plan and the adoption of Subpart O to Part 1952 containing the decision.

The Maryland State plan provides for the adoption of all Federal standards at State standards after comments and public hearing. Section 1952.210 of Subpart O sets forth the State's schedule for the adoption of Federal standards. By a letter dated November 26, 1986, from Commissioner Dominic N. Fornaro, Maryland Division of Labor and Industry to Linda R. Anku, Regional Administrator, and incorporated as part of the plan, the State submitted State standards comparable to (1) 29 CFR 1910.1043, pertaining to corrections to the cotton dust standard as published in the *Federal Register* dated July 3, 1986

(51 FR 24325), and (2) 29 CFR 1910.1047, pertaining to corrections to the ethylene oxide standard as published in the *Federal Register* dated July 10, 1986 (51 FR 25053). These standards are contained in COMAR 09.12.31. Maryland Occupational Safety and Health Standards were promulgated after public hearing on September 26, 1986. These standards became effective on December 1, 1986.

##### 2. Decision

Having reviewed the State submission in comparison with the Federal standards, it has been determined that the State standards are identical to the Federal standards and accordingly are approved.

##### 3. Location of Supplement for Inspection and Copying

A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, 3535 Market Street, Suite 2100, Philadelphia, Pennsylvania 19104; Office of the Commissioner of Labor and Industry, 501 St. Paul Place, Baltimore, Maryland 21202; and the OSHA Office of State Programs, Room N-3476, Third Street and Constitution Avenue NW., Washington, DC 20210.

##### 4. Public Participation

Under 29 CFR 1953.2(c) the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Virginia State plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

a. The standards are identical to the Federal standards which were promulgated in accordance with Federal law including meeting requirements for public participation.

b. The standards were adopted in accordance with the procedural requirements of State law and further participation would be unnecessary.

This decision is effective January 16, 1987. (Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Philadelphia, Pennsylvania this 10th day of December 1986.

Linda R. Anku,  
Regional Administrator.

[FR Doc. 87-875 Filed 1-15-87; 8:45 am]

BILLING CODE 4510-26-M

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (87-05)]

#### NASA Advisory Council, Aeronautics Advisory Committee (AAC); Meeting.

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of Meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee, Ad Hoc Review Team on Aircraft Automation.

**DATE AND TIME:** February 10, 1987, 8:30 a.m. to 5 p.m.; February 11, 1987, 8 a.m. to 3 p.m.

**ADDRESS:** Building 243, Room 126, Ames Research Center, National Aeronautics and Space Administration, Moffett Field, CA 94035.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ray V. Hood, Code RC, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2745.

**SUPPLEMENTARY INFORMATION:** The NAC Aeronautics Advisory Committee (AAC) was established to provide overall guidance and direction to the aeronautics research and technology activities in the Office of Aeronautics and Space Technology (OAST). Special ad hoc teams were formed to address specific topics. The ad hoc team on Aircraft Automation, chaired by Mr. Duane T. McRuer, is comprised of 6 members. The meeting will be open to the public up to the seating capacity of the room (approximately 30 persons including the team members and other participants).

*Type of meeting:* Open.

#### Agenda

February 10, 1987:

8:30 a.m.—Welcome and Introductory Remarks.

9 a.m.—Review of Aircraft Automation Program, Including Changes Since Last Meeting.

1 p.m.—Discussion of Program Options.

2:30 p.m.—Summary Session.

5 p.m.—Adjourn.

February 11, 1987:

8 a.m.—Summary Session (continued).

1 p.m.—Committee Feedback to NASA.

3 p.m.—Adjourn.

Dated: January 9, 1987.

Richard L. Daniels,

Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.

[FR Doc. 87-989 Filed 1-15-87; 8:45 am]

BILLING CODE 7510-01-M

[Notice (87-06)]

**NASA Advisory Council, Aeronautics  
Advisory Committee (AAC); Meeting**

**AGENCY:** Aeronautics and Space  
Administration.

**ACTION:** Notice of Meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee, Ad Hoc Review Team on Computational Fluid Dynamics (CFD).

**DATE AND TIME:** February 12, 1987, 8:30 a.m. to 5 p.m.; February 13, 1987, 8:30 a.m. to 12:30 p.m.

**ADDRESS:** Building 3, Room 215, Lewis Research Center, National Aeronautics and Space Administration, Cleveland, OH 44135.

**FURTHER INFORMATION CONTACT:** Dr. R.A. Graves, Code RF, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2828.

**SUPPLEMENTARY INFORMATION:** The NAC Aeronautics Advisory Committee (AAC) was established to provide overall guidance and direction to the aeronautics research and technology activities in the Office of Aeronautics and Space Technology (OAST). Special ad hoc teams were formed to address specific topics. The ad hoc team on CFD Validation, chaired by Dr. Richard Bradley, is comprised of 10 members. The meeting will be open to the public up to the seating capacity of the room (approximately 30 persons including the team members and other participants).

*Type of Meeting:* Open.

*Agenda:*

February 12, 1987:

8:30 a.m.—Introduction.

8:40 a.m.—Overview of Validation and Code Development Activities.

10 a.m.—Review of Individual Validation Experiments.

5 p.m.—Adjourn.

February 13, 1987:

8:30 a.m.—Committee Discussion of Presentations.

12:30 p.m.—Adjourn.

January 9, 1987.

Richard L. Daniels,

Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.

[FR Doc. 87-990 Filed 1-15-87; 8:45 am]

BILLING CODE 7510-01-M

**NUCLEAR REGULATORY  
COMMISSION**

[Docket No. 70-824]

**Finding of No Significant Impact  
Renewal of Materials License No.  
SNM-778 Babcock and Wilcox  
Lynchburg Research Center,  
Lynchburg, Virginia**

The U.S. Nuclear Regulatory Commission (the Commission) is considering the renewal of Materials License No. SNM-778 for the continued operation of the Babcock & Wilcox (B&W) Lynchburg Research Center (LRC) at Lynchburg, Virginia.

**Summary of the Environmental  
Assessment**

*Identification of the Proposed Action*

The proposed action is the renewal of the license necessary for B&W to continue the existing research and development operations, utilizing source, byproduct, and special nuclear materials and work in the areas of process control, non-destructive examination methods and instrument development, and non-nuclear ceramics.

*The Need for the Proposed Action*

The B&W LRC performs research and development necessary to create new products and processes, along with examining and improving those of the present generation. Denial of license renewal for the research and development activity at the LRC would require that similar activities be undertaken at another site. Although denial of the SNM license renewal for the B&W LRC is an alternative available to the NRC, it would be considered only if issues of public health and safety cannot be resolved to the satisfaction of the regulatory authorities involved.

*Environmental Impacts of Proposed  
Action*

There will be small quantities of radioactive gases and particulates to the atmosphere and of radioactivity contaminated liquids to the liquid waste treatment facility at the Babcock & Wilcox Naval Nuclear Fuel Division on the adjacent property and subsequently to the adjacent James River. The 50-year dose commitments to individuals

exposed to aquatic and atmospheric pathways are well below the environmental radiation dose limits established by the Environmental Protection Agency.

*Agencies and Persons Consulted*

There was no contact with other agencies.

*Finding of No Significant Impact*

The Commission has determined not to prepare an Environmental Impact Statement for the proposed action. Based upon the Environmental Assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment. The Environmental Assessment for the proposed action, on which this Finding of No Significant Impact is based, relies on the Babcock & Wilcox, Environmental Report, Babcock and Wilcox Lynchburg Research Center, October 1985 and the additional information requested from the staff's review and submitted by LRC in June 1986.

The Environmental Assessment and the above document related to this proposed action are available for public inspection and copying, for a fee, at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC. Copies of the Environmental Assessment may be obtained by calling (301) 427-4510 or by writing to the Uranium Fuel Licensing Branch, Division of Fuel Cycle and Material Safety, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Dated at Silver Spring, Maryland, this 12th day of January, 1987.

For the Nuclear Regulatory Commission.

W.T. Crow,

Acting Chief, Uranium Fuel Licensing Branch,  
Division of Fuel Cycle and Material Safety,  
NRCSS.

[FR Doc. 87-1043 Filed 1-15-87; 8:45 am]

BILLING CODE 7590-01-M

**Applications for Licenses To Import  
Nuclear Facilities or Materials**

Pursuant to 10 CFR 110.70(b) "Public notice of receipt of an application" notice is given that the Nuclear Regulatory Commission has received the following applications for import licenses. A copy of each application is on file in the Nuclear Regulatory Commission's Public Document Room located at 1717 H Street NW., Washington, DC.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in

the Federal Register. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the

General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, the Secretary, U.S. Nuclear Regulatory Commission, and the

Executive Secretary, U.S. Department of State, Washington, DC 20520. Information concerning the license applications follows:

NRC IMPORT APPLICATIONS

Name of applicant date of application date received application No.	Material type	Material in kilograms		End use
		Total element	Total isotope	
Braunkohle Transport USA, 12-29-86, 12-30-86, IU 87001	Natural Uranium ore concentrate	500,000		Further Processing and re-export for use in light water reactors (LWR). Processing and use in domestic and foreign LWR's. Processing and use in domestic and foreign LWR's. Fabrication of LWR fuel for re-export.
Braunkohle Transport USA, 12-29-86, 12-30-86, IU 87002	Natural Uranium as UF6	1,000,000		
Braunkohle Transport USA, 12-29-86, 12-30-86, ISNM 87003	Uranium as UF6 enriched to 5% U-235 max	500,000	25,000	
Braunkohle Transport USA, 12-29-86, 12-30-86, ISNM 87004	Uranium as UF6 enriched to 4% U-235 max	40,000	1,600	

Dated this 12th day of January 1987 at Bethesda, Maryland.

For the Nuclear Regulatory Commission.

R. Neal Moore,

Acting Assistant Director, Export/Import and International Safeguards, Office of International Programs.

[FR Doc. 87-1044 Filed 1-15-87; 8:45 am]

BILLING CODE 7590-01-m

not represent an official NRC staff position.

Public comments are being solicited on both the draft guide and the draft value/impact statement. Comments on the draft value/impact statement should be accompanied by supporting data. Written comments may be submitted to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Comments may also be delivered to Room 4000, Maryland National Bank Building, 7735 Old Georgetown Road, Bethesda, Maryland from 8:15 a.m. to 5:00 p.m. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street NW., Washington, DC. Comments will be most helpful if received by March 10, 1987.

Although a time limit is given for comments on these drafts, comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time.

Regulatory guides are available for inspection at the Commission's Public Document Room 1717 H Street NW., Washington, DC. Requests for single copies of draft guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Technical Information and Document Control. Telephone requests cannot be accommodated. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 12th day of January 1987.

For the Nuclear Regulatory Commission.

Eric S. Beckjord, Director,

Office of Nuclear Regulatory Research.

[FR Doc. 87-1045 Filed 1-15-87; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-400]

**Shearon Harris Nuclear Power Plant, Unit 1; Issuance of Facility Operating License**

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued Facility Operating License No. NPF-63 to Carolina Power & Light Company, and North Carolina Eastern Municipal Power Agency (the licensees) which authorizes operation of the Shearon Harris Nuclear Power Plant, Unit 1, at reactor core power levels not in excess of 2775 megawatts thermal (100 percent of rated core power) in accordance with the provisions of the license, the Technical Specifications, and the Environmental Protection Plan. The issuance of the license was approved by the Nuclear Regulatory Commission at a meeting on January 8, 1987, and supersedes the license for fuel loading and low power testing, license NPF-53, issued on October 24, 1986.

Shearon Harris Nuclear Power Plant, Unit 1, is a pressurized water reactor located in Wake And Chatham Counties, North Carolina, approximately 16 miles southwest of Raleigh, North Carolina.

The license is effective as of the date of issuance. 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

**Draft Regulatory Guide; Issuance, Availability**

The Nuclear Regulatory Commission has issued for public comment a draft of a new guide planned for its Regulatory Guide Series together with a draft of the associated value/impact statement. This series has been developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications.

The draft guide, temporarily identified by its task number, FC 603-4 (which should be mentioned in all correspondence concerning this draft guide), is entitled "Guide for the Preparation of Applications for Radiation Safety Evaluation and Registration of Sealed Sources Containing Byproduct Material" and is intended for Division 10, "General." It is being developed to provide guidance to sealed source manufacturers and distributors on submitting request for NRC's radiation safety evaluation and registration of sealed sources containing byproduct material.

This draft guide and the associated value/impact statement are being issued to involve the public in the early stages of the development of a regulatory position in this area. They have not received complete staff review and do

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 January 27, 1982 (47 FR 3898).

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 the exemption included in the license will have no significant impact on the environment (52 FR 713, dated January 8, 1987).

For further details with respect to this action, see (1) Facility Operating License No. NPF-63; (2) the Commission's Safety Evaluation Report, dated November 1983 (NUREG-1038), and Supplements 1 through 4; (3) the Final Safety Analysis Report and Amendments thereto; (4) the Environmental Report and supplements thereto; and (5) the Final Environmental Statement (NUREG-0972) dated October 1983.

These items are available at the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555, and at the Richard B. Harrison Library, 1313 New Bern Avenue, Raleigh, North Carolina 27610. A copy of the Facility Operating License NPF-63 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of PWR Licensing-A. Copies of the Safety Evaluation Report and its supplements (NUREG-1038) and the Final Environmental Statement (NUREG-0972) may be purchased at the current rates from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, or may be ordered by calling (202) 275-2060 or (202) 275-2171, or by writing to the U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. All orders should clearly identify the NRC publication number and the requester's GPO deposit account, or VISA or Mastercard number and expiration date.

Dated at Bethesda, Maryland, this 12th day of January, 1987.

For the Nuclear Regulatory Commission.  
**Daniel G. McDonald,**  
*Acting Director, PWR Project Directorate #2,  
 Division of PWR Licensing-A, Office of  
 Nuclear Reactor Regulation.*  
 [FR Doc. 87-1046 Filed 1-15-87; 8:45 am]  
 BILLING CODE 7590-01-M

## OFFICE OF MANAGEMENT AND BUDGET

### The Freedom of Information Reform Act of 1986 (Pub. L. 99-570); Proposed Fee Schedule and Administrative Guidelines

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice and request for public comment on Proposed Guidelines and Fee Schedule implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570).

**SUMMARY:** These Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 which require the Office of Management and Budget (OMB) to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

The Freedom of Information Reform Act permits agencies to charge for the direct costs of providing FOIA services such as search, duplication, and, in certain cases, review. OMB has interpreted this "direct cost" provision to mean the actual costs each agency incurs in operating its FOIA program. Since these costs vary widely from agency to agency, consistency with this interpretation requires OMB to provide not a single set of fees for FOIA services to be used by all agencies; but, rather, a set of definitions and procedures that will permit agencies to develop their own rates in conformance with government-wide standards. Thus, for example, each agency will develop charges for duplication using the same criteria to determine what makes up duplication charges. OMB expects that this process will result in the consistent application of FOIA fees across the government—one of the primary goals of the FOIA Reform Act.

OMB invites interested parties to provide comments on this proposal, and especially on the definitions of the following terms:

- "Commercial";
- "Representative of the news media";
- "Educational Institution";
- "Non-commercial Scientific Institution";

- "Search"; and
- "Review."

**DATE:** Comments must be received before February 17, 1987.

**ADDRESS:** Send comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Room 3235 NEOB, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, Information Policy Branch, 202-395-4814.

### Proposed Guidance

#### *Uniform Freedom of Information Act Fee Schedule and Guidelines*

To the Heads of Executive Departments and Establishments:

1. Purpose—These Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570) which require the Office of Management and Budget to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

Data from agencies, annual FOIA reports to the Congress as well as studies by the General Accounting Office, and others indicate that inconsistent application of the Act's fee provisions has sometimes resulted in inequitable treatment of users of the Act as well as substantial loss of revenues to the Treasury. While the legislative history of the 1974 amendments to the Freedom of Information Act shows that the Congress did not intend that fees be erected as barriers to citizen access, it is quite clear that the Congress did intend that agencies recover certain of their costs. Therefore, these Guidelines encourage agencies to charge fully for those costs that the statute makes recoverable and provide a schedule of fees and related administrative procedures in order to establish a consistent government-wide framework for assessing and collecting FOIA fees.

2. Scope—These Guidelines apply to all agencies subject to the Freedom of Information Act (see 5 U.S.C. 552(e)).

3. Effective Date—These Guidelines are effective upon issuance in final form.

4. Inquiries—Inquiries should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Telephone: (202) 395-4814.

5. Authorities—The Freedom of Information Act (5 U.S.C. 552), as amended; the Paperwork Reduction Act (44 U.S.C. 35); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et

seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et seq.).

6. Definitions—For the purpose of these Guidelines:

a. All the terms defined in the Freedom of Information Act apply.

b. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C.

552(a)(4)(A)(vi)) means any statute that enables a government agency, such as the Government Printing Office or the National Technical Information Service (NTIS), to set and collect fees in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

c. The term "direct costs" means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

d. The term "search" includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Such activity should be distinguished, however, from "review" of material in order to determine whether the material is exempt from disclosure (see subparagraph 5f below).

Searches may be done manually or by computer using existing programming.

e. The term "duplication" refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

f. The term "review" refers to the process of examining documents located

in response to a commercial use request (see subparagraph 5g below) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

g. The term "commercial use request" refers to a request from or on behalf of one who seeks information for a use or purpose that is related to commerce, trade or profit as these phrases are commonly known or have been interpreted by the courts in the context of the Freedom of Information Act. In determining whether a requester properly belongs in this category, agencies must look first to the use to which a requester will put the documents requested. Where a requester does not explain his purpose, or where his explanation is insufficient, agencies may draw reasonable inferences from his identity and charge fees accordingly. Thus, for example, agencies would be entitled to presume that a document request written on corporate letterhead stationery that merely recites a list of the documents wanted is for a commercial use.

h. The term "educational institution" refers to an accredited institution of higher learning engaged in scholarly research.

i. The term "non-commercial scientific institution" refers to an independent non-profit institution whose purpose is to conduct scientific research.

j. The term "representative of the news media" refers to any representative of established news media outlets, i.e., any organization such as a television or radio station, or a newspaper or magazine of general circulation, or person working for such organization which regularly publishes information for dissemination to the general public whether electronically or in print. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

7. Fees to be Charged—General. Agencies should charge fees that recoup the full direct costs they incur. Moreover, they shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. Agencies are encouraged to contract with private sector services to locate, reproduce and disseminate records in response to

FOIA requests when that is the most efficient and least costly method. Moreover, agencies should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in paragraph 5b above), such as the NTIS, they inform requesters of the steps necessary to obtain records from those sources.

a. Manual Searches for Records—Whenever feasible, agencies should charge at the salary rate(s) (i.e. basic pay plus 16.1 percent) of the employee(s) making the search. However, where a single class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), agencies may establish an average rate for the range of grades typically involved.

b. Computer Searches for Records—Agencies should charge at the actual direct cost of providing the service, including computer search time, runs, and operator salary.

c. Review of Records—Agencies may charge only requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. It should be noted that charges may be assessed only for the initial review; i.e., the review necessary at the initial administrative level to determine the applicability of any relevant FOIA exemptions, as opposed to review taken at the administrative appeal level of the exemptions already applied.

d. Duplication of Records—Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies taking into account the salary of the operators as well the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, agencies shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, agencies should charge the actual direct costs of producing the document(s).

e. Other Charges—It should be noted that complying with requests for special services such as those listed below is entirely at the discretion of the agency. Neither the FOIA nor its fee structure cover these kinds of services. Agencies should recover the full costs of providing services such as those enumerated below to the extent that they elect to provide them:

(1) Certifying that records are true copies;

(2) Packaging and mailing records rather than holding for pickup;

(3) Sending records by special methods such as express mail, etc.

f. **Restrictions on Assessing Fees**—With the exception of requesters seeking documents for a commercial use, section (4)(A)(iv) of the Freedom of Information Act, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, agencies would not begin to assess fees until after they had provided the free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, an agency would determine the cost of only 10 minutes of search time and only five pages of reproduction. If this cost was equal to or less than the cost to the agency of billing the requester and processing the fee collected, no charges would result.

g. **Waiving or Reducing Fees**—Section (4)(A)(iii) of the Act requires agencies to furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

8. **Fees to be Charged**—Categories of Requesters. There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories:

a. **Commercial use requesters**—When agencies receive a request for documents appearing to be for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. Moreover, when agencies receive a request for disclosure that is primarily in the commercial interest of the requester, the Act does not require them to consider a request for waiver or reduction of fees based upon an

assertion that disclosure would be in the public interest. Agencies are reminded that they may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

b. **Educational and Non-commercial Scientific Institution Requesters**—Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters eligible for free search must reasonably describe the records sought.

c. **Requesters who are Representatives of the News Media**—Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. Requesters eligible for free search must reasonably describe the records sought.

d. **All Other Requesters**—Agencies shall charge requesters who do not fit into any of the categories above fees which recover the full direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

9. **Administrative Actions to Improve Assessment and Collection of Fees**—Agencies shall ensure that procedures for assessing and collecting fees are applied consistently and uniformly by all components. To ensure such consistency and uniformity, agencies should ensure that their agency-wide FOIA regulations are amended to conform to the provisions of these Guidelines and Fee Schedule, especially including the following elements:

a. **Charging Interest—Notice and Rate**. Agencies should give notice in their regulations that interest may be charged those requesters who fail to pay fees charged. Agencies may begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C.A.

b. **Charges for Unsuccessful Search**. Agencies should give notice in their

regulations that they may assess charges for time spent searching, even if the agency fails to locate the records or if records located are determined to be exempt from disclosure.

c. **Aggregating Requests**. When an agency reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the agency should aggregate any such requests and charge accordingly.

d. **Advance Payments**.

(1) Where the agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the agency should require a requester to make an advance payment of the entire fee before continuing to process the request.

(2) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e. within 30 days of the date of the billing), the agency should require the requester to pay the full amount owed plus any applicable interest as provided above, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(3) When an agency acts under subparagraphs (1) or (2) above, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the agency has received fee payments described above.

f. **Effect of the Debt Collection Act of 1982 (Pub. L. 97-365)**. Agencies' FOIA regulations should contain procedures for using the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

10. **Agencies, Required Implementing Actions**—Section 1804(b)(1) of the Freedom of Information Reform Act requires, agencies to issue final regulations in conformance with OMB's schedule and guidelines no later than the 180th day following enactment: April 25, 1987.

James C. Miller III.

Director.

[FR Doc. 87-973 Filed 1-15-87; 8:45 am]

BILLING CODE 3110-01-M

**SECURITIES AND EXCHANGE  
COMMISSION**

[Rel. No. IC-15527, 812-6529]

**ML Venture Partners I, L.P. et al.;  
Notice of Application**

January 9, 1987.

**AGENCY:** Securities and Exchange Commission ("SEC").**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 ("the 1940 Act").

*Applicants:* ML Venture Partners I, L.P. (the "Partnership"), Merrill Lynch KECALP L.P. 1986 ("KECALP"), and Merrill Lynch Interfunding Inc. ("MLIF").

**Relevant 1940 Act Sections:**

Exemption requested under section 17(b) from the provisions of sections 17(a) and under section 57(a)(4) and 57(i) and 17(d) and Rule 17d-1 thereunder, approving certain transactions.

*Summary of Application:* Applicants seek an order relating to the acquisition of certain securities (i) deemed "joint transaction" under the 1940 Act or (ii) from "affiliated persons", as defined in the 1940 Act.

*Filing Date:* The application was filed on November 7, 1986 and amended on January 9, 1987.

*Hearing or Notification of Hearing:* If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on January 29, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, Washington, DC 20549. The Partnership, 717 Fifth Avenue, New York, New York 10022. KECALP and MLIF, One Liberty Plaza, 165 Broadway, New York, New York 10080.

**FOR FURTHER INFORMATION CONTACT:** Staff Attorney Fran Pollack (202) 272-2856 or Special Counsel Karen L. Skidmore, (202) 272-3023 (Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:**

Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the

SEC's commercial copier (800) 231-3282 (in Maryland (301) 252-4300).

**Applicants' Representations**

1. The Partnership, a limited partnership organized in 1982 under the laws of Delaware, is a business development company under the 1940 Act. Its investment objective is to seek long-term capital appreciation by making venture capital investments. The Partnership has five general partners, four of whom are individuals (the "Individual General Partners"). In accordance with section 56(a) of the 1940 Act, a majority of the Individual General Partners are persons who are not "interested persons" of the Partnership within the meaning of section 2(a)(19) of the 1940 Act.

2. The managing partner for the Partnership, Merrill Lynch Venture Capital Co., L.P. (the "Managing General Partner"), is responsible for identification and management of the Partnership's venture capital investments. The general partner of the Managing General Partner is Merrill Lynch Venture Capital Inc. (the "Management Company"), which is also the management company for the Partnership. The Management Company is an indirect subsidiary of Merrill Lynch & Co., Inc. ("ML & Co."), a holding company which, through its subsidiaries, provides investment, financing, real estate, insurance and related services. MLIF, a Delaware corporation, is an indirect subsidiary of ML & Co. that is engaged in commercial financing transactions.

3. KECALP, organized under the laws of Delaware as a limited partnership, is an employees' securities company as defined in section 2(a)(13) of the 1940 Act and registered under the 1940 Act as a closed-end, non-diversified management company. KECALP's registration statement under the Securities Act of 1933 became effective on January 10, 1986. KECALP operates in accordance with the terms of an exemptive order issued pursuant to section 6(b) of the 1940 Act in Investment Company Act Release No. 12363 (April 8, 1982) (the "KECALP Exemptive Order"). The sole general partner for KECALP is KECALP Inc. (the "KECALP General Partner"), a Delaware corporation and a wholly-owned subsidiary of ML & Co. The KECALP General Partner is responsible for managing and making investment decisions for KECALP. All investments made by KECALP are approved by the Investment Committee of the Board of Directors of the KECALP General Partner (the "Investment Committee").

4. International Power Technology, Inc. ("IPT") is engaged in providing cogeneration services—i.e., the installation of electrical generating capacity with arrangements to sell excess power to public utilities. On September 23, 1986, the Partnership acquired 22,223 shares of Series A Preferred Stock (the "IPT Shares") under an agreement with IPT, which investment represents less than 1.5% of the Partnership's net assets. The purchase price was \$45.00 per share for an aggregate purchase price of \$1,000,035. Under an agreement with IPT (the "IPT Agreement"), KECALP has agreed, conditioned upon receiving the exemption requested in the application, to purchase 4,444 IPT Shares at the same purchase price as that paid by the Partnership for an aggregate purchase price of \$199,980, which investment will represent less than 3% of KECALP's initial assets. The IPT Agreement provides that KECALP is not required to make payment to IPT for the 4,444 IPT Shares that KECALP intends to acquire unless the Partnership and KECALP receive the relief requested. In view of the delay in payment to IPT, IPT required that KECALP pay interest on such amount to IPT at a rate equal to ten percent per annum until KECALP makes payment to IPT for the 4,444 IPT Shares it has agreed to purchase. The terms of KECALP's purchase are the same as those of the Partnership's purchase in all other respects. The Partnership and KECALP are seeking relief under section 17(d) and Rule 17d-1 thereunder and sections 57(a) and 57(i) of the 1940 Act to permit this transaction.

5. Agritech, Inc. ("Agritech") is engaged in the commercialization of innovative biotechnology-based products in the field of veterinary, agricultural and food-related diagnostics. On September 30, 1986, the Partnership acquired 153,846 shares of Series C Preferred Stock (the "Agritech Shares") of Agritech under an agreement with Agritech, which investment represents less than 1.5% of the Partnership's net assets. The purchase price was \$6.50 per share for an aggregate purchase price of \$999,999. Under an agreement with Agritech (the "Agritech Agreement"), KECALP has agreed, conditioned upon receiving the exemption requested in the application, to purchase 30,769 Agritech Shares at the same purchase price as that paid by the Partnership for an aggregate purchase price of \$199,998.50, which investment will represent less than 3% of KECALP's initial assets. The Agritech Agreement provides that KECALP is not required to make payment to Agritech

for the 30,769 Agritech Shares that KECALP intends to acquire unless the Partnership and KECALP receive the relief requested. In view of the delay in payment to Agritech, Agritech required that KECALP pay interest on such amount to Agritech at a rate equal to eight percent per annum until KECALP makes payment to Agritech for the 30,769 Agritech Shares it has agreed to purchase. The terms of KECALP's purchase are the same as those of the Partnership's purchase in all other respects. The Partnership and KECALP are seeking relief under section 17(d) and Rule 17d-1 thereunder and sections 57(a) and 57(i) of the 1940 Act to permit this transaction.

6. Computer Power, Inc. ("CPI") provides data processing and related computer software and systems to financial institutions originating and/or servicing single family mortgage loans. During 1986, Merrill Lynch Capital Markets ("MLCM"), an unincorporated group within MLPF&S that conducts its investment banking and underwriting activities, structured a leveraged buyout of CPI. As a result of the transactions involved with the leveraged buyout, CPI's equity securities are owned by Acquisition. Acquisition is a newly formed Delaware corporation which was organized solely for the purpose of effecting the leveraged buyout of CPI. Acquisition's equity securities are owned by members of CPI's management, MLIF and several institutional investors, including certain entities affiliated with ML & Co. or its subsidiaries that are partnerships sponsored or managed by ML & Co. or its affiliates. MLIF has agreed to sell to KECALP 7,000 shares of the Acquisition common stock it owns, which investment represents 0.4% of Acquisition's outstanding shares of common stock on a fully diluted basis. The price paid for such shares was \$10.00 per share ("Original Purchase Price") on September 17, 1986 ("Original Acquisition Date"). The purchase price to be paid by KECALP to MLIF for the Acquisition common stock proposed to be acquired by KECALP will be the lower of (i) the value of the investment on the date it is acquired by KECALP (as determined by the Board of Directors of the KECALP General Partner) or (ii) the cost to MLIF of purchasing and holding the investment. With respect to clause (ii), such costs shall be the Original Purchase Price per share paid for the common stock of Acquisition on the Original Acquisition Date, plus carrying costs relating to such investment. For purposes of this transaction, carrying costs consist of

interest charges computed at the lower of (i) the prime commercial lending rate charged by Citibank, N.A. during the period from the date the Investment Committee approved KECALP's purchase of the investment until KECALP acquires it or (ii) the effective cost of borrowings by ML & Co. during such period. The effective cost of borrowings by ML & Co. is its actual "Average Cost of Funds" which is calculated on a monthly basis by dividing its consolidated financing expenses by the total amount of borrowings during this period. KECALP is seeking relief under section 17(b) of the 1940 Act exempting this transaction from section 17(a).

7. Relief is justified by both the terms of the transaction and the fact that the proposed investment is not otherwise available to KECALP. With respect to the terms of the transaction, the Investment Committee has reviewed the proposed investment in detail. The members of the KECALP General Partner Board of Directors, including the members of the Investment Committee, are sophisticated and experienced in valuing securities and evaluating financial transactions generally. In this regard, the Investment Committee considered all relevant information the nature of the investments by affiliates of ML & Co. and the fairness of the purchase price proposed to be paid by KECALP.

The Investment Committee determined that the proposed investment by KECALP will not directly or indirectly benefit the entities affiliated with ML & Co. or its subsidiaries which also acquired investments in Acquisition. Moreover, the Investment Committee approved KECALP's investment in Acquisition after consideration of each of the factors set forth in section 17(b) of the 1940 Act.

8. In evaluating the terms of KECALP's purchase of the common stock of Acquisition, the Board of Directors of the KECALP General Partner and the Investment Committee considered the fact that the proposed purchase price to be paid by KECALP will include carrying costs incurred by an affiliated person (i.e., MLIF) if the value of the investment at the time of acquisition by KECALP is more than the sum of the purchase price plus the affiliate's carrying costs. In approving the purchase price which may include carrying costs, the Investment Committee recognized that the KECALP General Partner receives no compensation for serving as general partner of KECALP and that ML & Co. had incurred considerable expenses in

organizing KECALP. KECALP believes that it is entirely appropriate for it to reimburse affiliates for carrying costs in a situation in which an affiliate purchased such investment as, in effect, its nominee and KECALP would have purchased such investment directly if it had not been deemed necessary to obtain the relief requested herein. In light of these factors, the KECALP General Partner Board of Directors and the Investment Committee believe it is wholly appropriate for the purchase price paid for portfolio investments to reflect carrying costs provided the value of the investments at the time of acquisition exceeds the amount of the purchase price plus carrying costs. KECALP and MLIF submit that to deny reimbursement for carrying costs would result in a further and unwarranted loss to MLIF and provide a disincentive to act on behalf of KECALP in the future transactions of this type.

9. Issuance of the order requested is appropriate and necessary because the above-described investment in Acquisition is not otherwise available for purchase by KECALP. The Investment Committee has approved such investments after review of a considerable number of possible investments for KECALP. KECALP submits that their investment program will be prejudiced if they are not permitted to make the investment referred to in the application. The Board of Directors of the KECALP General Partner believes that the proposed investment is consistent with the rationale underlying the establishment of KECALP as an "employees' securities company." Similarly, the proposed transaction is consistent with the purpose of KECALP and its stated policies.

10. The Managing General Partner of the Partnership considered and approved co-investments by the Partnership and KECALP in IPT and Agritech. Among the factors considered by the Managing General Partner was the fact that the terms of such purchases by the Partnership will be no less favorable than the terms on which the other party or parties to such transactions will make such purchases. The Managing General Partner also determined that the Partnership would not be disadvantaged in any manner by the Partnership's participation in the proposed transactions and that the investments are consistent with the Partnership's investment objectives as stated in its prospectus.

11. The KECALP General Partner also reviewed the proposed investments. At a meeting held on September 15, 1986,

the Investment Committee determined that the investments in securities of IPT and Agritech were consistent with KECALP's investment objectives of seeking long-term capital appreciation. The Investment Committee determined that the investments in IPT and Agritech by the Partnership would not disadvantage KECALP in making such investment, maintaining its investment position or disposing of such position. The Investment Committee was aware that KECALP will be required by IPT and Agritech to pay interest as a result of KECALP's delayed payments for its investments.

12. In reaching the above determinations, both the Managing General Partner of the Partnership and the Investment Committee of KECALP considered several factors, including the difference in the amounts proposed to be invested in IPT and Agritech by the Partnership and KECALP. It was recognized that the terms of the purchases by the Partnership KECALP would be the same in terms of the price per share. Applicants submit that the transactions would be consistent with the provisions, policies, and purposes of the Act.

13. In both the KECALP Exemptive Order and KECALP's prospectuses, it was indicated that affiliates of ML & Co. would be involved in indentifying and investing in many of KECALP's portfolio investments. The prospectus of the Partnership indicated that the Partnership may be a co-investor in portfolio companies with affiliates of management. The Partnership and KECALP thus submit that the relief requested herein is consistent with the purposes of the Partnership and KECALP, their stated policies and the disclosures made to prospective investors.

14. In connection with the deliberations and determinations by the Investment Committee and the Board of Directors of the KECALP General Partner regarding the Partnership's and KECALP's proposed IPT, Agritech and Acquisition transactions, appropriate record-keeping will be maintained and made available for inspection by the Commission in accordance with the KECALP Exemptive Order and the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-1037 Filed 1-15-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-23973; File No. PHLX 86-43]

**Self-Regulatory Organizations;  
Proposed Rule Change By the  
Philadelphia Stock Exchange, Inc.  
Relating to Options/Futures Multi-Part  
Orders**

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 December 11, 1986, the Philadelphia 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 Philadelphia Stock Exchange, Inc. ("PHLX" or the "Exchange") proposes to amend Rules 1066 and 1068 as set forth below. Italics indicate material proposed to be added; brackets indicate material proposed to be deleted.

*Rule 1066. Certain Types of Orders  
Defined*

1066(a)-(b) No change.

1066(c)(4) *Multi-Part Order. A multi-part order is an order to buy and/or sell a stated number of foreign currency option contracts and a stated number of foreign currency future contracts. A multi-part order may be executed in accordance with the procedures outlined in Rule 1068.*

*Rule 1068. Execution of Multi-Part  
Orders.*

*A member or participant holding or entering a foreign currency options—futures multi-part order may execute the order in the following manner:*

*(i) The member shall request bids and offers for the relevant options series and make all persons in the trading crowd aware of his request.*

*(ii) The member shall then ascertain the best bid and offer for the relevant futures contract reflected on the board broker's book and shall then, after announcing a price between such bid and offer that the member is willing to execute the futures leg of the order, request bids and offers for the options series.*

*(iii) The member shall provide an opportunity for bids and offers in the options to be made, both by market participants willing to participate in the foreign currency options—futures multi-part order and market participants*

*bidding and offering for the options series alone.*

*(iv) The member may then accept the best bid or offer of the participants willing to participate in the foreign currency options—futures multi-part order so long as that bid or offer is better than any bid or offer for the options series alone. In the event that the best bid or offer of the participant(s) willing to participate in the foreign currency option—futures multi-part order equals the bid or offer for the options series alone, the order may be executed only if all bids or offers at that price for the options series alone are satisfied.*

*(v) If the member holding a foreign currency options—futures multi-part order also has an opposing order, he must follow steps (i) through (iii) above. He must then offer above the bid price or bid below the offered price at prices differing by the minimum fraction until the bid and offer differ by the minimum fraction, and if neither the bid nor offer is accepted the member may execute a transaction between the two orders, pursuant to the provisions of PBOT Rule 327.*

**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  
Statements of the Purpose of, and  
Statutory Basis for the Proposed Rule  
Change**

In late 1982, the Exchange initiated trading in foreign currency options. This product has experienced significant growth, prompting the Exchange to create a contract market on its futures exchange subsidiary, PBOT, in currency futures.

Market participants in foreign currency options and futures, tend to be sophisticated investors, primarily representing corporations and financial institutions utilizing trading strategies to hedge foreign currency risk. The terms of PBOT foreign currency futures contracts and PHLX foreign currency

options contracts are substantially similar; except that the PBOT foreign currency future contract is twice the size of PHLX foreign currency options contracts. Foreign currency option/futures participants utilize many of the same complex trading strategies associated with equity options trading such as spreading, conversions, reversals, and numerous other combination strategies. They have been hampered in their ability to utilize the PHLX foreign currency options and PBOT foreign currency futures, however, by the absence of an effective means for executing unitary spread transactions in these instruments. In this regard the PHLX proposes to adopt an amendment to its option rules respecting foreign currency options to provide foreign currency options and futures market participants with an efficient and effective means to execute foreign currency options/futures multi-part orders, i.e., an order to buy (sell) a stated number of foreign currency options and sell (buy) a stated number of foreign currency futures.

The proposed amendment would recognize as a contingent factor the execution of a futures part of a multi-part order providing assurance that market participants will not be exposed to the risk that only the futures component of a multi-part order would be executed. For example, a financial institution active in foreign currency options contracts is bullish on the U.S. dollar relative to the Swiss franc and contacts its broker-dealer requesting a reversal multi-part order to sell one Swiss franc futures contract on the PBOT and buy one Swiss franc foreign currency option call and sell one foreign currency option put on the PHLX. Under the proposed rule change, the floor broker representing such a multi-part order would execute the order as follows: (1) Request bids and offers for the relevant foreign currency option series; (2) ascertain the best bid and offer for the relevant futures contract including those reflected on the PBOT Board broker's book and after announcing a price between the bid and offer that he is willing to execute the sale of the futures contract, request bids and offers for the foreign currency options put and call series respectively; (3) ascertain the best bid or offer for market participants willing to execute the foreign currency options alone or participate in the futures contract component of the multi-part order as well; (4) execute the options and futures components of the order, making sure that all bids or offers for options

components done at the execution price are satisfied.

If the floor broker wants to facilitate execution of a foreign currency option/futures multi-part order by also representing an opposing order, he must follow the previous procedures and reflect the offer above the bid price below the offer price until the minimum price differential is achieved or if neither the bid nor the offer is accepted the broker may execute a transaction between the two orders pursuant to PBOT Rule 327.

An objective of the proposed rule change is to assure that the foreign currency options component of the multi-part order yields priority to any bids or offers in the market for the options alone. In this respect, the proposed rule change follows the traditional procedures of the auction market, providing priority to bids or offers of the foreign currency options participants in the market with interests that are equal to or better than the foreign currency options component of a multi-part order. The proposed rule change treats the foreign currency options/futures multi-part order as essentially a set of mutually contingent orders between two markets which operate on the same floor, at adjacent posts and involve many of the same market participants.

Because the proposed rule change relates to products which are regulated by two different agencies, the PBOT will file a corresponding rule change with the Commodities Futures Trading Commission.

The proposed rule change is consistent with section 6(b)(5) of the Securities Exchange Act of 1934 which provides, in pertinent part, that the rules of an exchange be designed to facilitate transactions in securities and protect investors and the public interest.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The PHLX does not believe that the proposed rule change will impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

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 its 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 submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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, DC 20549. 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 by February 6, 1987.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: January 9, 1987.

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 87-1036 Filed 1-15-87; 8:45 am]

BILLING CODE 8010-01-M

[Release NO. 34-23975; File No. SR-NSCC-86-14]

#### **Self-Regulatory Organizations; Proposed Rule Change by National Securities Clearing Corp.**

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 October 1, 1986, NSCC 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 NSCC. 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**

Modify NSCC's SCC Division Rules and Procedures as follows: (Italic indicates addition.) Fund/Serv Member. Rule 51.

Sec. 2. Each applicant to become a Fund/Serv Member shall sign and deliver to the Corporation an instrument in writing whereby the applicant shall agree:

(e) to pay the Corporation the compensation provided for by the Rules of the Corporation for mutual fund transactions *if the applicant distributes shares on a principal basis, or if the applicant distributes shares on an agency basis then to pay to the Corporation the compensation provided for by the Rules of the Corporation for mutual fund transactions to the extent that the applicant can recover such amount from the investment company(ies) whose shares it distributes; and, whether the applicant distributes shares on a principal or agency basis, to pay such fines as may be imposed in accordance with such Rules of the Corporation for the failure to comply therewith;*

**Addendum I**

Standards of Financial Responsibility and Operational Capability for Fund/Serv Members

B. In addition to the foregoing standards,

1. Broker/dealer applicants shall:

- (e) *i. have at least \$1 million in capital if the broker/dealer distributes shares on a principal basis, or*
- ii. have at least 80% of the assets under management in funds of at least \$50 million if the broker/dealer distributes shares on an agency basis.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NSCC 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. NSCC 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**

NSCC's Standards of Financial Responsibility and Operational Capability (the "Standards") for Fund/Serv Members requires broker/dealer applicants to have \$1 million in capital. NSCC has determined that the Standards are burdensome for broker/dealer applicants who distribute shares of a mutual fund on an agency basis. In addition, NSCC's Rule 51 requires a Fund/Serv Member to be principally liable to NSCC for the settlement of mutual fund transactions. NSCC has been advised that a broker/dealer who distributes shares on an agency basis cannot make this commitment without incurring substantial increased financial requirements which amounts would have to be considered when computing the firm's minimum net capital requirements.

The purpose of this proposed rule change is (1) to adopt an alternative standard which requires that at least 80% of the assets under management be in funds of at least \$50 million and (2) to amend the Rule (and the Fund/Serv Member's Agreement) so that a broker/dealer who distributes shares on an agency basis would only be liable to NSCC for such sums as the broker/dealer was able to recover from the investment company whose share it distributes.

The premise behind the Standards was to ensure that only mutual funds of a certain size should automatically be permitted to join NSCC since it was believed that there was little likelihood that a large fund would present a financial risk to NSCC. NSCC believes that with the proposed alternative standard it would be in a similar position of limited risk from the failure of such a fund of at least \$50 million. In addition, the alternative standard would be applicable only to applicants who distribute shares on an agency basis.

With regard to a broker/dealer who distributes shares on an agency basis being liable to NSCC only for such sums it can recover from the investment company, the assets of such a broker/dealer are usually considerably less than the assets of the underlying investment company. With the proposed rule change, NSCC would be able to look to the assets of the investment company, without requiring each investment company to individually become a Member of NSCC. In addition to modifying the rule (and the relevant

Member's Agreement), NSCC would also require the Member to enter into an agreement with NSCC whereby NSCC would be subrogated to the rights of the broker/dealer against the investment company whose shares it distributes.

Since the proposed rule change will permit the prompt and accurate clearance and settlement of mutual fund transactions, the rule change is consistent with the requirements of the Securities Exchange Act of 1934.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

NSCC does not perceive that the proposed rule will have an impact or impose a burden on competition.

**C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

No comments on the proposed rule change have been solicited or received. NSCC will notify the Securities and Exchange Commission of any written comments received by NSCC.

**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 submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 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, DC. 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 by February 6, 1987.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: January 9, 1987.

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 87-1014 Filed 1-15-87; 8:45 am]

BILLING CODE 8010-01-M

## SELECTIVE SERVICE SYSTEM

### Agency Forms Submitted to the Office of Management and Budget for Clearance

The following forms have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S. Chapter 35):

SSS Form No. and Title:

SSS Form 152, Alternative Service Employment Agreement

SSS Form 153, Employer Data Sheet

SSS Form 156, Skills Questionnaire

SSS Form 157, Alternative Service Job Data Form

SSS Form 160, Request for Overseas Job Assignment

SSS Form 163, Employment Verification Form

SSS Form 164, Alternative Service Worker Travel Reimbursement Request

SSS Form 166, Claim for Reimbursement for Emergency Medical Care.

Copies of the above identified forms can be obtained upon written request to: Selective Service System, Reports Clearance Officers, Washington, DC 20435.

Written comments and recommendations for the proposed forms should be sent within 60 days of the publication of this notice, to: Selective Service System, Reports Clearance Officer, Washington, DC 20435.

Send a copy of the comments to: OMB Reports, Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Dated: January 12, 1987.

**Wilfred L. Ebel,**  
*Acting Director.*

[FR Doc. 87-952 Filed 1-15-87; 8:45 am]

BILLING CODE 8015-01-M

## DEPARTMENT OF STATE

[CM-8/1038]

### Shipping Coordinating Committee Meeting, National Committee for the Prevention of Marine Pollution

The National Committee for Prevention of Marine Pollution (NCPMP), a subcommittee of the Shipping Coordinating Committee, will conduct an open meeting February 6, 1987 at 9:30 AM in Room 2415 at Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC.

The purpose of the meeting will be a general review of the agenda items to be considered at the Twenty-fourth session of the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) to be held February 16-20, 1987. Proposed U.S. positions on MEPC agenda item issues will be discussed.

The major items of discussion will be the following:

1. Proposed revisions, will a view toward ratification of Optional Annexes III and IV of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78).

Discussions will focus on the major initiative to implement Annex III (Regulations for the Prevention of Pollution by Harmful Substances Carried by the Sea in Packaged Form) provisions through the International Maritime Dangerous Goods (IMDG) Code. Specifically, selection criteria for determining Annex III marine pollutants and immersion testing standards for packagings will be addressed.

2. Effective implementation of optional Annex V of MARPOL 73/78 (Regulations for the Prevention of Pollution by Garbage from Ships) with emphasis on measures to combat plastic pollution of the sea.

3. Uniform interpretations of Annex I (Regulations for the Prevention of Pollution by Oil) and Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk) of MARPOL 73/78.

4. Enforcement of pollution conventions.

5. Inter-related work of other Committees and Subcommittees.

Members of the public may attend the meeting up to the seating capacity of the room.

For further information or for documentation pertaining to the NCPMP meeting, contact either Lieutenant Commander D.B. Pascoe or Lieutenant G.T. Jones, U.S. Coast Guard Headquarters (G-MER-3), 2100 Second Street, SW., Washington, DC 20593; Tel: (202) 267-0419.

Dated: January 8, 1987.

**Richard C. Scissors,**

*Chairman, Shipping Coordinating Committee.*

[FR Doc. 87-974 Filed 1-15-87; 8:45 am]

BILLING CODE 4710-07-M

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Implementation of Modifications in Specialty Steel Import Relief

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** This notice establishes country allocations of the quotas presently applicable to imports of certain stainless steel and alloy tool steel products and makes modifications in the Tariff Schedules of the United States to implement changes in the import relief program. The notice provides separate allocations within the stainless steel bar, stainless steel rod, and the alloy tool steel categories for Brazil, within the stainless steel bar and the alloy tool steel categories for Mexico, within the stainless steel bar category for the Republic of Korea, and within the stainless steel rod category for Taiwan.

**EFFECTIVE DATE:** January 20, 1987.

**FOR FURTHER INFORMATION CONTACT:** Naomi Norden, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, (202) 377-3964.

#### SUPPLEMENTARY INFORMATION:

Presidential Proclamation 5074 of July 19, 1983 (48 FR 33233), provided for the temporary imposition of increased tariffs and quantitative restrictions on certain stainless steel and alloy tool steel products imported into the United States, pursuant to Section 203 of the Trade Act of 1974. Proclamation 5074 authorizes the U.S. Trade Representative to take such actions and perform such functions for the United States as may be necessary to administer and implement the relief, including negotiating orderly marketing agreements and allocating quota quantities on a country-by-country basis. The U.S. Trade Representative is also authorized to make modifications in the Tariff Schedules of the United States (TSUS) headnote or item proclaimed by the President in order to implement such actions.

Pursuant to the above authority, the U.S. Trade Representative determined by notice in the **Federal Register** of July 21, 1986 (51 FR 139) that the quarterly quota quantities should be converted to

semiannual quantities for the stainless steel bar, stainless steel rod and alloy tool steel categories. The U.S. Trade Representative has now determined further that the quota quantities should be reallocated to provide country allocations for certain steel products for Brazil, Mexico, the Republic of Korea and Taiwan.

In conformity with the above, subpart A, part 2 of the Appendix to the TSUS is modified as follows:

(1) Item 926.13 is modified to add to the country allocations, in alphabetical order, "Brazil", "Mexico", and "The Republic of Korea", and also to add corresponding quota quantities of "1,140" short tons, "80" short tons, and "900" short tons, respectively, for the period January 20, 1987 through July 19, 1987. Item 926.13 is further modified by changing the quota quantity for "Other" countries to "162" short tons for the period January 20, 1987 through July 19, 1987.

(2) Item 926.18 is modified to add to the country allocations, in alphabetical order, "Brazil" and "Taiwan", and also to add corresponding quota quantities of "660" and "100" short tons, respectively, for the period January 20, 1987 through July 19, 1987. Item 926.18 is further modified by changing the quota quantity for "Other" countries "596" short tons for the period January 20, 1987 through July 19, 1987.

(3) Item 926.23 is modified to add to the country allocations, in alphabetical order, "Brazil" and "Mexico", and also to add corresponding quota quantities of "540" short tons and "150" short tons, respectively, for the period January 20, 1987 through July 19, 1987. Item 926.23 is further modified by changing the quota quantity for "Other" countries to "790" short tons for the period January 20, 1987 through July 19, 1987.

On October 21, 1983, a notice was published in the *Federal Register* (48 FR 205) which, *inter alia*, provided a separate allocation to Austria with respect to alloy tool steel (TSUS item 926.23). Effective March 1, 1987, that notice is modified to delete the separate allocation for imports of alloy tool steel from Austria as a result of an exchange of letters between the Government of the United States and the Government of Austria which incorporates alloy tool steel into the U.S.-Austria Arrangement Concerning Trade in Certain Steel Products. Such products presented for importation into the United States on or after March 1, 1987 shall be permitted

entry subject to the appropriate Customs procedures.

Michael B. Smith,

Acting United States Trade Representative.

[FR Doc. 87-1030 Filed 1-15-87; 8:45 am]

BILLING CODE 3190-01-M

## DEPARTMENT OF TRANSPORTATION

### Aviation Proceedings; Agreements Filed During the Week Ending January 9, 1987

The following agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 408, 409, 412, and 414. Answers may be filed within 21 days of date of filing.

*Docket No. 44597 R-1 & R-2*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 5, 1987.

*Subject:* Establish DAR/JRO-GBE fares within Africa.

*Proposed Effective Date:* January 3, 1987.

*Docket No. 44598 R-1—R-9*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 5, 1987.

*Subject:* Close Center America fares/amend within South America fares.

*Proposed Effective Date:* January 15, 1987.

*Docket No. 44599*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* Revises SCRs Worldwide.

*Proposed Effective Date:* January 01, 1987.

*Docket No. 44600*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* Revalidate Canada to Europe Rates thru March.

*Proposed Effective Date:* January 15, 1987.

*Docket No. 44601*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 5, 1987.

*Subject:* Establish Tokyo-Dalian Fares

*Proposed Effective Date:* April 1, 1987.

*Docket No. 44602*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* Amend Japan-Brazil Circle Pacific Fares.

*Proposed Effective Date:* April 1, 1987.

*Docket No. 44603*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* 1987/88 S W Pacific Fare Structure.

*Proposed Effective Date:* April 1, 1987.

*Docket No. 44604 R-1—R-3*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* Excess Baggage Charges TC1-Asia via North Atlantic.

*Proposed Effective Date:* April 01, 1987.

*Docket No. 44605 R-1—R-18*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 05, 1987.

*Subject:* 1987/88 Mid Atlantic-Africa Middle East Fares Structure.

*Proposed Effective Date:* April 01, 1987.

*Docket No. 44607 R-1—R-10*

*Parties:* Members of International Air Transport Association.

*Date Filed:* January 06, 1987.

*Subject:* Eighth Meeting of Cargo Agency Conference Resos.

*Proposed Effective Date:* April 01, 1987.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-960 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-62-M

### Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed During the Week Ended January 9, 1987

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

**Docket No. 44606**

*Date Filed:* January 5, 1987.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* February 2, 1987.

**Description:** Application of Aerosevicios Ecuatorianos, C.A., pursuant to section 402 of the Act and Subpart Q of the Regulations applies for renewal of its foreign air carrier permit, issued by Order 82-1-8, November 3, 1981, authorizing it to engage in non-scheduled foreign air transportation of property between Gyayaquil and/or Quito, Ecuador and the co-terminal points Miami and Houston, as well as foreign charter transportation of property.

**Docket No. 44608**

**Date Filed:** January 6, 1987.

**Due Date for Answers, Conforming Applications, or Motions to Modify Scope:** February 3, 1987.

**Description:** Application of The Flying Tiger Line Inc., pursuant to section 401 of the Act and Subpart Q of the Regulations applies for a certificate of public convenience and necessity authorizing it to engage in scheduled foreign air transportation of property and mail between Columbus, Ohio served through Rickenbacker Airport on the one hand and Toronto, Quebec, Canada on the other hand.

**Docket No. 44613**

**Date Filed:** January 9, 1987.

**Due Date for Answers, Conforming Applications, or Motions to Modify Scope:** February 6, 1987.

**Description:** Application of Million Air, Inc. pursuant to section 401 of the Act and Subpart Q of the Regulations requests an amendment of its certificate of public convenience and necessity authorizing it to perform scheduled all-cargo service between the United States, on the one hand, and Costa Rica and Panama, on the other hand.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-959 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-62-M

**Office of the Secretary**

**Application of Airlift International, Inc.**

**AGENCY:** Department of Transportation.

**ACTION:** Notice of order of show cause (Order 86-1-24); docket 44546.

**SUMMARY:** The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding that Airlift International, Inc., continues to be fit to engage in the air transportation authorized by its certificates.

**DATE:** Persons wishing to file objections should do so no later than January 21, 1987.

**ADDRESS:** Responses should be filed in Docket 44546 and addressed to the Documentary Services Division, Department of Transportation, 400 7th Street SW., Room 4107, Washington, DC 20590 and should be served on the parties listed in Attachment A to the order.

**FOR FURTHER INFORMATION CONTACT:** Carol A. Szekeley, Special Authorities Division, P-47, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 2059, (202) 366-9721.

Dated: January 9, 1987.

Matthew V. Scocozza,  
Assistant Secretary for Policy and International Affairs.

[FR Doc. 87-958 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-62-M

**Federal Highway Administration**

**Environmental Impact Statement: King County, WA**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for a proposed highway project in King County, Washington.

**FOR FURTHER INFORMATION CONTACT:** Paul C. Gregson, Federal Highway Administration, Evergreen Plaza Building, Suite 501, 711 South Capitol Way, Olympia, Washington 98501, Telephone: (206) 753-2120; Clyde L. Slemmer, Project Development Engineer, Department of Transportation, Transportation Building, Olympia, Washington 98504, Telephone (206) 753-6135; or R. E. Bockstruck, District Administrator, District One, Washington State Department of Transportation, 6431 Corson Avenue South, Seattle, Washington 98108, Telephone (206) 764-4020.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Washington State Department of Transportation and King County Department of Planning and Community Development, will prepare an EIS on a proposal to improve a 22-mile section of State Route 18 between Auburn-Black Diamond Road and Interstate 90.

Improvements to the corridor are considered necessary to bring SR 18 up to current design standards, to improve traffic operations, and to improve the safety of the corridor. Alternatives under consideration include the no action alternative and several proposals that would: (1) Widen the existing two-

lane roadway to a four-lane divided highway with fully controlled access. (2) Construct new interchanges tentatively located at S.E. 312th Way, the S.E. 296th Street/S.E. 288th Street vicinity, the S.E. 248th vicinity, 244th Avenue S.E., and Clssaquah-Hobart Road. (3) Construct grade separations of S.E. 296th Street, S.E. 240th Street and possibly at 236th Avenue S.E. and S.E. 200th Street. (4) Reconstruct existing interchanges at Auburn-Black Diamond Road, Kent Kangley Road (SR 516), S.E. 232nd Street and I-90. (5) Construct frontage roads connecting the new interchanges to the existing King County Road system.

Letters describing the proposed action and soliciting comments will be sent to the appropriate state and local agencies as well as citizens and organizations that have expressed interest in this project. A series of meetings with the public, interested community groups and governmental agencies will be held between November 1986 and January 1987. In addition, a public hearing will be held subsequent to publication of the draft environmental impact statement. Public notice of actions related to the proposal which identify the date, time, place of meetings and note the length of review periods will be published when appropriate.

To ensure that the full range of issues related to this proposed project are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of federal programs and activities apply to this program)

Pat O'Neil,

Area Engineer, Olympia, Washington.

[FR Doc. 87-971 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-22-M

**Environmental Impact Statement: York and Gloucester Counties, VA**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in York and Gloucester Counties, Virginia.

**FOR FURTHER INFORMATION CONTACT:**

George E. Kirk, Jr., District Engineer,  
Federal Highway Administration, P.O.  
Box 10045, Richmond, Virginia 23240-  
0045, Telephone (804) 771-2380.

**SUPPLEMENTARY INFORMATION:** The  
FHWA, in cooperation with the Virginia  
Department of Transportation (VDOT)  
will prepare an environmental impact  
statement (EIS) on a proposal to provide  
improved traffic flow over the York  
River between York County and  
Gloucester County.

The proposed project will consist of  
the study of several alternatives to  
relieve congestion at the existing George  
P. Coleman Bridge crossing the York  
River from York County to Gloucester  
County. Various build alternatives  
within the study area will be analyzed.

There are also three alternatives to  
the proposed project under  
consideration:

1. Null or No-Build Condition—which  
includes all elements of the Regional  
Transportation Plan with the exception  
of the proposed project.

2. Mass Transit—to evaluate the  
ability of mass transit to accommodate  
the transportation demands in the study  
area.

3. Traffic system Management—to  
evaluate the ability of non-major  
construction activities on the existing  
roadway network to accommodate the  
transportation demands in the study  
area.

Letters describing the proposed action  
and soliciting comments will be sent to  
appropriate Federal, State and local  
agencies and to private organizations  
and citizens who have expressed  
interest in this proposal. No formal  
scoping meeting is planned at this time.  
The DEIS will be available for public  
and agency review and comment.  
Following publication of the DEIS, a

public hearing will be held. Public notice  
will be given of the time and place of the  
hearing.

To ensure that the full range of issues  
related to this proposed action are  
addressed and all significant issues  
identified, comments and suggestions  
are invited from all interested parties.  
Comments or questions concerning this  
proposed action and the DEIS should be  
directed to the FHWA at the address  
provided above.

(Catalog of Federal Domestic Assistance  
Program Number 20.205, Highway Research,  
Planning and Construction. The provisions of  
Executive Order 12372 regarding State and  
local review of Federal and Federally  
assisted programs and projects apply to this  
program)

Issued on: January 7, 1987.

**George E. Kirk, Jr.,**

*District Engineer, Richmond, Virginia.*

[FR Doc. 87-970 Filed 1-15-87; 8:45 am]

BILLING CODE 4910-22-M

# Sunshine Act Meetings

Federal Register

Vol. 52, No. 11

Friday, January 16, 1987

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).

## CONSUMER PRODUCT SAFETY COMMISSION

**TIME AND DATE:** Tuesday, January 20, 1987, see times below.

**LOCATION:** Room 456, Westwood Towers, 5401 Westbard Avenue, Bethesda, MD.

### STATUS:

### MATTERS TO BE CONSIDERED:

10:00 a.m.

#### Open to the Public

1. Program Overview: Emerging Hazards; Chemical

The staff will brief the Commission on an overview of activities on the emerging hazards program and the chemical program.

2 p.m.

#### Closed to the Public

2. Compliance Status Report

The staff will brief the Commission on the Status of various compliance matters.

**FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL:** 302-492-5709.

**CONTACT PERSON FOR ADDITIONAL INFORMATION:** Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 301-492-6800.

January 13, 1987.

Sheldon D. Butts,  
Deputy Secretary.

[FR Doc. 87-1099 Filed 1-14-87; 1:02 pm]

BILLING CODE 6355-01-M

## FEDERAL DEPOSIT INSURANCE CORPORATION

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 Corporation's Board of Directors will meet in open session at 2:00 p.m. on Tuesday, January 20, 1987, 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 consent to purchase assets and assume liabilities and to establish branches:

Community Bank, Blountsville, Alabama, an insured State nonmember bank, for consent to purchase certain assets and assume the liability to pay deposits made in the Sneed Branch of Central Bank of the South, Birmingham, Alabama, and for consent to establish that branch of Central Bank of the South as a branch of Community Bank.

Washington Mutual Savings Bank, Seattle, Washington, for consent to purchase certain assets and assume the liability to pay deposits made in the Laurelhurst Branch, Madison Park Branch, and Mount Vernon Branch of Shoreline Savings Bank, Seattle, Washington, a non-FDIC-insured institution, and for consent to establish those three branches of Shoreline Savings Bank as branches of Washington Mutual Savings Bank.

*Recommendations regarding the liquidation to a bank's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:*

Case No. 46,853-L (Amendment)  
Park Bank of Florida, St. Petersburg, Florida

Case No. 46,855-NR (Amendment)  
Penn Square Bank, National Association, Oklahoma City, Oklahoma

Case No. 46,862-NR  
Seminole State National Bank, Seminole, Texas

Case No. 46,863-SR  
Watkins Banking Company, Faunsdale, Alabama

### Reports of committees and officers:

Minutes of actions approved by this standing committee 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:  
Rainsville Bank, Rainsville, Alabama (2557)  
(Memo dated December 19, 1986)

Summary Audit Report re:  
The Citizens Bank of Winigan Missouri, Winigan, Missouri (6666) (Memo dated December 5, 1986)

Summary Audit Report re:

The First National Bank of Tekamah, Tekamah, Nebraska (2539) (Memo dated December 5, 1986)

Summary Audit Report re:  
Stockholm State Bank, Stockholm, South Dakota (2544) (Memo dated December 19, 1986)

Summary Audit Report re:  
First State Bank, Memphis, Texas (2543)  
(Memo dated December 22, 1986)

### Discussion Agenda:

No matters scheduled.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street, NW, Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898-3813.

Dated: January 13, 1987.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 87-1095 Filed 1-14-87; 12:37 pm]

BILLING CODE 6714-01-M

## FEDERAL DEPOSIT INSURANCE CORPORATION

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 Tuesday, January 20, 1987, 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)(6), (c)(8), and (c)(9)(A)(ii) 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 Federal deposit insurance:

Gateway American Bank of Florida, a proposed new bank to be located at 1451 N.W. 62nd Street, Fort Lauderdale, Florida.

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), (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, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898-3813.

Dated: January 13, 1987.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 87-1096 Filed 1-14-87; 12:37 pm]

BILLING CODE 6714-01-M

#### FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Notice forwarded to Federal Register on January 9, 1987.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 11:00 a.m., Tuesday, January 20, 1987.

CHANGES IN THE MEETING: Addition of the following closed item(s) to the meeting:

Matters relating to the Plans administered under the Federal Reserve System's employee benefits program.

#### CONTACT PERSON FOR MORE

INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Date: January 14, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-1125 Filed 1-14-87; 2:40 pm]

BILLING CODE 6210-01-M

#### FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m. Wednesday, January 21, 1987. (This meeting may be rescheduled to 2:00 p.m., Thursday, January 22, 1987. Please call 452-3206 on Friday, January 16, to verify the exact time and date of the open meeting.)

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

#### MATTERS TO BE CONSIDERED:

1. Proposed amendment to Regulation H (Membership of State Banking Institutions in the Federal Reserve System) implementing the Bank Secrecy Act compliance provision of the Anti-Drug Abuse Act of 1986.

2. Any items carried forward from a previously announced meeting.

**Note.** This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for \$5 per cassette by calling (202)452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

#### CONTACT PERSON FOR MORE

INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: January 14, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-1071 Filed 1-14-87; 11:03 am]

BILLING CODE 6210-01-M

#### FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 10:30 a.m., Wednesday, January 21, 1987, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC. 20551.

STATUS: Closed.

#### MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. 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: January 14, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-1072 Filed 1-14-87; 11:03 am]

BILLING CODE 6210-01-M

#### NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:00 a.m., Wednesday, January 21, 1987.

PLACE: NTSB Board Room, Eighth Floor, 800 Independence Avenue, SW., Washington DC 20594.

STATUS: The first two items will be open to the public. The last four items will be closed under Exemption 10 of the Government in the Sunshine Act.

#### MATTERS TO BE CONSIDERED:

1. *Marine Accident Report: Capsizing and Sinking of the U.S. Sailing Vessel PRIDE OF BALTIMORE* in the Atlantic Ocean, May 14, 1986.

2. *Highway Accident Summary Reports: Ackerly, Texas, July 20, 1985; Eureka Springs, Arkansas, September 13, 1985; and Bramwell, West Virginia, October 13, 1985.*

3. *Opinion and Order: Administrator v. Denham, Docket SE-7127; disposition of the Administrator's appeal.*

4. *Order: Administrator v. Ruggles, Docket SE-7395; disposition of respondent's request for reconsideration.*

5. *Opinion and Order: Administrator v. Spais, Docket SE-6625; disposition of the respondent's appeal.*

6. *Opinion and Order: Administrator v. Tomahawk Airways, Inc., Docket SE-7054; disposition of the Administrator's appeal.*

#### FOR MORE INFORMATION, CONTACT:

Rhonda Underwood, (202) 382-6525.

Rhonda Underwood,

Alternate Federal Register Liaison Officer.

January 14, 1987.

[FR Doc. 87-1063 Filed 1-14-87; 10:33 am]

BILLING CODE 7533-01-M

#### POSTAL RATE COMMISSION

TIME AND DATE: 10:00 a.m. on Thursday, January 22, 1987.

PLACE: Conference Room, 1333 H Street, NW., Suite 300, Washington, DC 20268-0001.

MATTERS TO BE CONSIDERED: To consider the motion of United States Postal Service for acceptance of a nonunanimous stipulation and agreement in Docket No. MC87-1.

#### CONTACT PERSON FOR MORE

INFORMATION: Charles L. Clapp, Secretary, Postal Rate Commission, Room 300, 1333 H Street, NW.,

Washington, DC 20268-0001, Telephone  
(202) 789-6840.

Charles L. Clapp,

Secretary.

[FR Doc. 87-1050 Filed 1-14-87; 8:52 am]

BILLING CODE 7715-01-M

#### TENNESSEE VALLEY AUTHORITY

"FEDERAL REGISTER" CITATION OF  
PREVIOUS ANNOUNCEMENT: 52 FR 1275,  
January 12, 1987.

PREVIOUSLY ANNOUNCED TIME AND DATE  
OF MEETING: 10 a.m. (e.s.t.), Wednesday,  
January 14, 1987.

PREVIOUSLY ANNOUNCED PLACE OF  
MEETING: TVA West Tower Auditorium,  
400 West Summit Hill Drive, Knoxville,  
Tennessee.

STATUS: Open.

ADDITIONAL MATTER: The following item  
is added to the previously announced  
agenda:

Unclassified

F-7. Interagency order between TVA and the  
United States Department of the Army  
for reimbursable services related to  
purification of methylphosphonic  
dichloride at the phosphate development  
works.

#### CONTACT PERSON FOR MORE

INFORMATION: Craven H. Crowell, Jr.,  
Director of Information, or a member of  
his staff can respond to requests for  
information about this meeting. Call  
615-632-8000, Knoxville, Tennessee.  
Information is also available at TVA's  
Washington Office, 202-245-0101.

#### SUPPLEMENTARY INFORMATION:

##### TVA BOARD ACTION

The TVA Board of Directors has  
found, the public interest not requiring  
otherwise, that TVA business requires  
the subject mater of this meeting be  
changed to include the additional item  
shown above and that no earlier  
announcement of this change was  
possible.

The members of the TVA Board voted  
to approve the above findings and their  
approvals are recorded below:

Dated: January 13, 1987.

Approved.

C. H. Dean, Jr.,

Director and Chairman.

John B. Waters,

Director.

[FR Doc. 87-1049 Filed 1-14-87; 8:52 am]

BILLING CODE 8120-01-M

# Corrections

Federal Register

Vol. 52, No. 11

Friday, January 16, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[A-4-FRL-3131-5; AL-008]

#### Approval and Promulgation of Implementation Plans; Alabama; Bubble for Union Camp's Prattville Mill

##### Correction

In rule document 86-28741 beginning on page 46655 in the issue of Wednesday, December 24, 1986, make the following correction:

On page 46658, in the first column, in the sixth paragraph, in the 14th, 15th, and 16th lines, the text between "were" and "annual" should read "9.2  $\mu\text{g}/\text{m}^3$ , 24-hour maximum and less than 1.0  $\mu\text{g}/\text{m}^3$ ".

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Parts 310 and 314

[Docket No.86N-0392]

#### Revision of Rules Governing Postmarketing Reporting of Adverse Drug Reactions

##### Correction

In proposed rule document 86-29161 beginning on page 47028 in the issue of Tuesday, December 30, 1986, make the following corrections:

On page 47030, in the second column, in the first complete paragraph, in the second line from the bottom, "\$ 312.80" should read "\$ 314.80". In the same line, "find" should read "finding".

BILLING CODE 1505-01-D

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[CA 940-07-4212-18, CA 18984, N-43627]

#### Clearing Title to Certain Lands Along the California-Nevada Boundary

##### Correction

In notice document 86-26193 beginning on page 42013 in the issue of Thursday, November 20, 1986, make the following corrections:

1. On page 42014, in the second column, at the end of the 18th line, insert "Lot 2 NW  $\frac{1}{2}$ ".

2. On page 42016, in the first column, the 30th line should be moved to the next line, between "14," and "portion".

3. Also in the first column, in the 19th line from the bottom, remove "portion" the first time it appears.

4. On the same page, in the second column, in the 13th line, the first "4" should read "3".

5. Also in the second column, under "Lands patented by the State of California \* \* \*", in the seventh line "N." should read "S".

BILLING CODE 1505-01-D

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 31

[LR-144-86]

#### Submission of Certain Withholding Exemption Certificates and Entitlement to Additional Withholding Exemption; Proposed Rulemaking

##### Correction

In proposed rule document 86-28265 appearing on page 45132 in the issue of Wednesday, December 17, 1986 make the following corrections:

On page 45132, in the second column, in the first, second, fourth, fifth, sixth and seventh lines, wherever "(1)" appears in a paragraph designation it should read "{1)".

BILLING CODE 1505-01-D

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# **federal register**

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Friday  
January 16, 1987

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## **Part II**

### **Department of Labor**

Wage and Hour Division, Employment  
Standards Administration

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**29 CFR Part 553**

**Application of the Fair Labor Standards  
Act to Employees of State and Local  
Governments; Final Rule**

## DEPARTMENT OF LABOR

## Wage and Hour Division

## Employment Standards Administration

## 29 CFR Part 553

## Application of the Fair Labor Standards Act to Employees of State and Local Governments

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This document provides the final text of regulations for the implementation of sections 2, 3, 4, 5, and 6 of the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150) applicable to employees of State and local governments. Existing 29 CFR Part 553 has been restructured and retitled "Application of the Fair Labor Standards Act to Employees of State and Local Governments."

Subpart A contains rules on certain statutory exclusions and exemptions, compensatory time provisions, and special recordkeeping requirements applicable to State and local governments and their employees.

Subpart B contains rules for the implementation of the 1985 Amendments concerning the use of volunteers by State and local government agencies. These rules address the statutory requirements concerning exclusion from the definition of "employee", and thus from coverage under the FLSA, of individuals who volunteer their services to State and local governments and who receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof. This Subpart also sets forth rules concerning the status of individuals who are employees of State and local governments and who also volunteer services to their employing agency or to another State or local government agency.

Subpart C revises the prior existing regulations in 29 CFR Part 553, concerning State and local government fire protection and law enforcement personnel, to incorporate rule changes needed to reflect the 1985 Amendments. These existing regulations have been restructured and retitled as noted above. In addition, this Subpart includes the results of a study published in the *Federal Register* on September 8, 1983 (Vol. 48, No. 175), as required by section 6(c)(3) of the 1974 Amendments to the Act, which reflect the current maximum hours standards applicable to employees of public agencies who are

engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) and who qualify for the partial overtime exemption under section 7(k) of the FLSA.

**EFFECTIVE DATE:** February 17, 1987.

**FOR FURTHER INFORMATION CONTACT:** Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 523-8305. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On April 18, 1986, the Department of Labor published in the *Federal Register* (51 FR 13402) proposed regulations to implement the changes in the Fair Labor Standards Act (FLSA or Act) resulting from the 1985 Amendments.

These Amendments, which were enacted on November 13, 1985, changed certain provisions of the FLSA as they relate to employees of State and local governments. The legislation was enacted following the decision by the U.S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority et al.* (Garcia), 105 S.Ct. 1005 (February 19, 1985) which held that the FLSA may constitutionally be applied to State and local governments. The Amendments responded to many of the concerns expressed by representatives of many State and local government employer and employee organizations who identified areas in which they believed the application of the FLSA would have adverse effects.

The 1985 Amendments amended the FLSA by including special provisions applicable to State and local government agencies and their employees. The amended Act permits such agencies to grant compensatory time off with pay in lieu of cash overtime wages to their employees under certain conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards by which volunteers for public agencies are excluded from the Act's coverage (and, therefore, from the FLSA's minimum wage and overtime pay requirements) provided they receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.

#### Background

In 1966, Congress amended the FLSA to cover employees of certain publicly-

operated institutions, principally schools and hospitals. The constitutionality of this extension of coverage under the Act was upheld by the U.S. Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968). The Education Amendments of 1972 further extended FLSA coverage to employees of public preschools. Virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 FLSA Amendments were brought under the coverage of the Act by the 1974 Amendments. These Amendments were challenged as unconstitutional and in *National League of Cities v. Usery* (NLOC), 426 U.S. 833 (1976), the Supreme Court overruled its earlier decision in *Maryland v. Wirtz*. In NLOC, the Court held that the minimum wage and overtime pay provisions of the FLSA could not be applied constitutionally to State and local government employees who are engaged in traditional governmental activities. However, the Court also held that these provisions could be applied constitutionally to public agency employees engaged in non-traditional activities.

In the *Garcia* case, the issue before the courts was whether the FLSA was unconstitutional as applied to employees of public mass transit systems. On February 19, 1985, the U.S. Supreme Court issued its decision overruling NLOC in its entirety, concluding that the "traditional governmental function" test is unworkable and "inconsistent with established principles of federalism."

As a result of this decision, State and local government employees previously determined to be engaged in traditional governmental functions, and thus excluded from the minimum wage and overtime pay provisions of the FLSA, became subject to these provisions.

#### Discussion of Major Comments

A total of 165 comments were received on the proposed regulations, including many from organizations with national constituencies. Among these were comments from (listed in the order received):

- National Public Employer Labor Relations Association (NPELRA).
- National Association of Towns and Townships (NATT).
- Public Employee Department, AFL-CIO (AFL-CIO).
- American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).
- National Education Association (NEA).
- National Volunteer Fire Council (NVFC).
- International Association of Fire Fighters (IAFF).

International Association of Fire Chiefs (IAFC).  
 National Association of Counties (NAC).  
 National Conference of State Legislatures (NCSL).  
 Fraternal Order of Police (FOP).  
 National League of Cities (NLOC).  
 International Personnel Management Association (IPMA).

In addition to the substantive comments discussed below, many commenters submitted minor editorial suggestions some of which have been adopted and some of which have not been adopted. Also, a number of commenters requested that the regulations be revised to explain the application of the FLSA to specific hypothetical situations (or ask for specific opinions on fact situations), concerning, for example, hours worked issues. In the Department's view, the regulations, which are intended to have broad, general application, cannot attempt to address such specific issues which, in any event, would require a full examination of all the facts and circumstances in specific cases. Therefore, such comments have not been addressed herein.

#### Section 553.1 Definitions.

One commenter noted that §§ 553.1 and 553.20 differ with respect to the definition or description of "public agency." (Section 553.1 includes as part of the definition "any agency of a State . . ."). The National League of Cities (NLOC) requested that "an intergovernmental agency" be added to the definition in § 553.1. Such entities will be recognized as units of State or local governments where, in fact, they are so constituted. However, the definition in § 553.1 is intended to reflect the language of the statutory definition, as also reflected in § 553.20. Section 553.1 is modified accordingly.

#### Section 553.10 General.

One commenter stated that clarification is needed in this section (dealing with statutory exclusions from coverage) regarding the condition for exclusion that an employee "not be subject to the civil service laws of the employing State or local agency", because some State civil service laws have placed certain unclassified elected officials, appointees of a legislature, heads of departments who can hire and fire, persons associated with boards of elections, etc., under civil service. Also, classified service may include employees in competitive and noncompetitive positions. There is concern that employees in the above categories will be considered to be

under civil service laws and thus not excluded from coverage.

The language ". . . not subject to the civil service laws of the State, political subdivision, or agency which employs . . ." is set forth in section 3(e)(2)(C) of the statute itself. The Congressional intent is to exclude from coverage elected officials and certain of their political appointees. The Department will be guided by this principle in reviewing any State or local civil service laws where there is a question of whether particular individuals come within this exclusion. No change is being made to this section.

#### Section 553.11 Exclusion for elected officials and their appointees.

A number of commenters, including the NLOC, the Ohio Municipal League, and the States of Wisconsin and South Carolina suggested that the definition of the statutory term "member of personal staff" is too restrictive and that it be modified to eliminate the requirement in § 553.11(b) that such individuals be "under the direct supervision of" and have "regular contact with" an appointing elected official in order to be excluded from coverage. The comments noted that as the office holder's responsibilities increase, so too does the size of the staff.

In applying this exclusion, which was enacted by the 1974 Amendments to the Act, due weight must be given to the statutory requirement that an individual be a member of the elected official's *personal* staff. While there is no definition or discussion in the legislative history of the 1974 Amendments concerning the term "personal staff," it is apparent that Congress would not have made a distinction between "personal" staff and other staff if all persons not subject to the civil service laws of the employing jurisdiction were meant to be excluded from coverage. The Department, therefore, has adopted an interpretation of the term "personal" which is in keeping with the commonly understood meaning of this word. For example, *Webster's Ninth New Collegiate Dictionary* defines the word "personal" to mean ". . . do in person without the intervention of another . . ." or ". . . carried on between individuals directly . . .". Therefore, the exclusion for personal staff applies only to those staff members who directly report to, are responsible to, and are regularly supervised by the appointing elected official. The Department believes that the regulatory language accurately reflects statutory intent; thus, no changes have been made to incorporate the suggested changes.

In addition, the NLOC, the State of Wisconsin Legislature and others recommended revisions to provide more objective and more commonly understood criteria for determining whether an employee is subject to State or local civil service laws as discussed in § 553.11(c). These suggestions have merit and are being adopted. In addition, the criteria in the proposal that the individual's position be outside a table of organization and that the source of compensation for personal staff be a specific appropriation are deleted as not relevant to such determinations, as also pointed out by a number of commenters.

#### Section 553.12 Exclusion for employees of legislative branches.

The NLOC requested that "intergovernmental agencies" be added to the list of units of government contained in § 553.12(a). They argued that this change was necessary in order to clarify that such agencies are units of State or local governments for purposes of the FLSA.

In drafting the regulation, the Department has paid careful attention to the language of the statute. The Act provides that the exclusion from coverage for employees of legislative bodies (as well as for elected officials, their personal staffs, and certain of their appointees and advisors) applies to individuals ". . . employed by a State, political subdivision of a State, or an interstate governmental agency . . ." The Department agrees that "intergovernmental agencies" may be considered as units of governments and that such agencies may fall under the term "State" or "political subdivision of a State." However, in order for the exclusion from coverage under discussion to apply, an individual must be employed by a legislative body, i.e., a political body which enacts laws. For these reasons, the suggested addition to the regulations would be inappropriate.

The NLOC also requested changes in § 553.12(b) to broaden the exclusion to include employees of certain school boards. They contended that under certain circumstances a school board could qualify as a legislative body if the board is a part of a school district which is a political subdivision of a State or an agency of a State or local government having legislative powers. However, the legislative history (House Report No. 99-331, p. 21—hereinafter cited as H. Rep.) clearly states an intent not to exclude from coverage employees of school districts or higher education institutions unless they are otherwise excluded (e.g., elected officials, their personal staffs,

etc.). For this reason, the suggested change cannot be incorporated.

*Section 7(o) Compensatory Time and Compensatory Time Off.*

*Section 553.20 Introduction.*

The NLOC stated that the specific reference to the 40-hour workweek overtime standard in section 7(a) of the Act should be eliminated since compensatory time could be provided to employees who work overtime under other statutory requirements, such as section 7(k). Also, the NLOC recommended that the reference to an "element of flexibility" for the employer and an "element of choice" for employees should be eliminated since collective bargaining requirements could eliminate any elements of flexibility or choice.

The Department agrees that the language in the proposed rule concerning the application of compensatory time could be misleading and has modified the section to note that compensatory time may be provided in lieu of monetary overtime compensation that otherwise would be required by any of the applicable provisions of section 7 of the FLSA. With respect to the second comment, the legislative history indicates that the intent of section 7(o) of the FLSA was "to provide flexibility to State and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees" (H. Rep., p. 19). Accordingly, this suggested revision has not been made. However, to clarify that employee representatives often exercise the employees' element of choice by negotiating the terms of the agreement or understanding, the phrase "or the representatives of their employees" has been added to the second sentence of this section between the words "employees" and "regarding."

*Section 553.23 Agreement or understanding prior to performance of work.*

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by " . . . a collective bargaining agreement

(CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.)) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

The NLOC also suggested replacing the words "in conformance" with the word "consistent" in the sentence in § 553.23(b)(1): "Any agreement must be in conformance with the provisions of section 7(o) of the Act." The Department agrees that the words "in conformance" could be misconstrued to mean that the agreement could not provide standards for use of compensatory time more beneficial than those in section 7(o) of the Act (such as double-time pay, a cap lower than 480 hours for employees engaged in public safety activities, etc.). Furthermore, the NLOC also suggested elsewhere that the regulations make clear that provisions contained in agreements which "conflict" with section 7(o) are superseded by the Act's requirements.

Both of these comments have merit and the Department has revised the language of the section to address these issues.

The Fraternal Order of Police (FOP) recommended that the proposed rule be revised to state that an existing practice or CBA regarding compensatory time will continue as an agreement or understanding for purposes of section 7(o) of the FLSA even if the parties are operating under the terms of an expired agreement, are in negotiations for a successor agreement, or are engaged in dispute resolution.

The Department has no legal authority under the statutory language or legislative history of the 1985 Amendments to issue rules concerning collective bargaining negotiations between a public agency and their employees regarding compensatory time, except those needed to assure that any such agreements are consistent with the provisions of section 7(o) of the Act. The outcome in such cases is a matter between the parties and is dependent upon the terms of the expiring CBA, any other formal agreements or understandings between the parties, and applicable labor-management relations laws.

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23(b)(1), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggested that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department

recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

The FOP and the Public Employee Department, AFL-CIO (AFL-CIO) disagreed with the statement in the proposal that where there is no employee representative, an agreement or understanding may be evidenced by a notice to the employee that compensatory time will be given and that acceptance will be presumed when the employee fails to object. These commenters indicated that this language in the regulation would permit a unilateral agreement since, because of job realities, an employee is unlikely to object. They stated that if a notice is deemed to meet the statutory requirement of an agreement, more restrictions should be placed on the employer.

The House Report states on page 20 that "The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between employer and employee, or notice to the employee, prior to the performance of the work." (Emphasis added.) Neither the statute nor legislative history provides any basis for the Department to impose restrictions on the use of a notice to evidence that there is an agreement or understanding.

As discussed above, proposed § 553.23(c) provided that an agreement or understanding may be evidenced by a notice to the employee provided, among other requirements, that the employee accept the compensatory time in lieu of overtime pay after being so notified. The NLOC correctly pointed out that employers should not have to wait for employees to work overtime in order to be certain that the "agreement" requirement has been met. The Department agrees and, in view of the fact that no such requirement is in the statutory language or legislative history of the Amendments, has deleted this requirement.

The NEA argued that in no event should the agreement or understanding to accept compensatory time off in lieu of cash overtime compensation be made a condition of original employment as proposed in § 553.23(c)(1). They suggested that the proposal does not reflect the statutory intent that employees must agree to accept compensatory time off in lieu of overtime pay "freely and without coercion." They stated that the only freedom of choice the potential employee would have in such a case would be the freedom not to accept the position. The NEA argued that the statute gives the employees the right to increase their bargaining power by designating representatives to enter into agreements with employers on the issue of compensatory time. They further argued that potential employees would never have the opportunity to exercise such power if they were required to accept compensatory time as "a condition of employment." Therefore, the NEA proposed that all references to agreements or understandings to accept compensatory time as a "condition of employment" be deleted from the proposed regulations.

Both the Senate and House Reports clearly provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of original employment. The Senate Report states: "The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection." (i.e., section 7(o).) (S. Rep., p. 11). The House Report on page 20 provides similar language. Since the language in § 553.23(c) tracks the legislative history on this issue, no change has been made to incorporate this comment.

Finally, the NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time as a condition of employment in this subsection be deleted. However, the Senate Report on page 11 specifically contains this requirement. The House Report also contains similar language on page 20. Accordingly, this change cannot be made.

*Section 553.24 "Public safety", "emergency response", and "seasonal" activities*

Several commenters, including the NLOC and representatives of various cities, stated that the proposed definition of "public safety activities" should be broadened to include support staff, such as civilian dispatchers, within the higher compensatory time cap. It was argued that such support personnel perform work similar to public safety employees for a similar number of hours and that the term "public safety activities" was intended to include more persons than police and firefighters under the section 7(k) partial overtime exemption.

While the statute does not provide a specific definition of the term "public safety activities", as used in section 7(o), the House and Senate reports both use the term "public safety employees" in an identical discussion which clarifies that this group of employees consists of those subject to 7(k): "The 1974 Amendments included a limited overtime exception for police officers, fire fighters and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments and the unusually long hours that these *public safety employees* must spend on duty, ready and available to respond to calls to protect the public safety." (H. Rep., p. 6; S. Rep., p. 5; emphasis added). The prior Part 553 issued after the 1974 Amendments excluded civilian employees from the section 7(k) exemption, and there is no indication in the statute or the legislative history to the 1985 Amendments to suggest that Congress intended to include such employees under either section 7(k) or as public safety employees under section 7(o). However, support staff, such as civilian dispatchers, who regularly perform "emergency response" activities will qualify for the higher compensatory time cap because of their regular involvement in such activities as discussed in § 553.24(d). Accordingly, the suggested revision has not been adopted.

The National Public Employer Labor Relations Association (NPELRA) and the NLOC stated that with regard to emergency response activities, the proposed rule should be expanded beyond ambulance and rescue service employees since to limit the eligibility for the higher compensatory time cap to these employees make this activity only a subset of public safety activities. In addition, it is argued that persons who perform work following disasters such

as earthquakes or hurricanes should be considered engaged in emergency response activities since these events create emergency situations which require a great number of work hours.

The legislative history is clear that an employee must be regularly engaged in an emergency response activity to qualify for the higher compensatory time cap. Specifically, the House Report stated on page 21 that the Congress did not intend that employees whose work includes emergency response activity as well as other work be subject to two different limits on accruable compensatory time. As long as the employee's work regularly includes the activities included in the higher cap, that employee will be covered by the higher cap. However, the same section of the Report makes clear that the Congress did not expect to find employees suddenly reclassified with additional "emergency response" type duties after the enactment of the 1985 Amendments. Thus, the term "emergency response" does not apply to employees who only in rare instances perform emergency services. In addition, emergency response is not intended to be a subset of public safety activity, but is meant to include those persons who regularly perform work in emergency situations but would not qualify as "public safety". This may include dispatchers of public safety employees and equipment, hospital emergency technicians, and ambulance and rescue personnel who do not qualify as law enforcement or fire protection employees. Accordingly, the suggested revisions have not been adopted.

Various commenters argued that certain occupations should automatically be considered seasonal by their nature, such as road crews, snow plow operators, or park employees. It was argued that to examine each employee separately to determine if he or she performs seasonal activities could create a situation where employees performing similar work would nevertheless be subject to two different compensatory time caps.

The legislative history is clear that an employee can be considered to be engaged in a "seasonal activity" only if (1) the activity is a regular and recurring aspect of the employee's work, and (2) the employee's projected overtime hours during the period of significantly increased demand is likely to result in the accumulation during such period of more than 240 compensatory time hours (H. Rep., p. 22). It would not, therefore, be appropriate to arbitrarily designate categories of specific activities as seasonal because of their nature without

examining individually the specific activities of employees engaged in such work. It is the Department's view that any list of occupational titles could be extremely misleading as a guide for this purpose. Although the suggested revision has not been made, the language in the section discussing "seasonal activity" has been revised to more closely track the legislative history. In addition, some of the occupations more commonly recognized as "seasonal" are used as illustrations in § 553.24(e).

The NLOC argued that the regulations should be revised to provide that when employees engaged in public safety, emergency response, or seasonal activities transfer to other types of positions they should continue to be subject to the higher 480-hour limitation on accrual of compensatory time for up to two years.

The Department agrees that the regulations should provide guidance on how employers are to handle transfers of employees to positions subject to the lower 240-hour limitation on accrual of compensatory time. However, there is no statutory basis for establishing an arbitrary transition period such as the two years proposed by the NLOC. In the absence of any statutory language or legislative history on this issue, the Department has developed a position which is consistent with the statutory purpose of the two different levels of caps on compensatory time and equitable to all parties. Therefore, a new subsection has been added to provide that an employee who has been subject to the higher cap may carry the number of compensatory hours accrued over to the new position which is subject to the lower cap. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit (although the agency may choose to do so at any time). However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

Finally, the NLOC argued that the requirement that an employee's work must regularly include public safety, emergency response or seasonal activities to qualify for the higher compensatory time cap should be eliminated. It was argued that an employee should qualify for the higher cap whenever a significant component of the employee's activities involve public safety, emergency response or public safety activities. This revision has not been adopted, since the

legislative history states that such work must be performed on a regular and recurring basis, as discussed above (H. Rep., p. 21.).

*Section 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").*

Many commenters, including the FOP, the National Association of Towns and Townships (NATT) and the NLOC, stated that the definition of "reasonable period" was unclear and needed to be made more specific. It was suggested by the NLOC that employers be permitted to establish a general rule and not be required to examine each request for compensatory time off on a case by case basis. The FOP suggested that outside time limits could be established within which compensatory time must be granted. Others suggested that the scheduling of compensatory time should be solely at the employer's discretion. However, some commenters, including the AFL-CIO, argued that the intent of the Act was to give employees the right to receive compensatory time and not the employer the right to grant.

The legislative history makes it clear that an employee has the right to use some or all of accrued compensatory time within a reasonable time after requesting such use, provided that it does not unduly disrupt the employer's operations (H. Rep., p. 23 and S. Rep., p. 12). The Department believes the use of the term "reasonable" was intended to accommodate varying work practices based on the facts and circumstances of each case. Therefore, it is necessary that each situation be examined on a case by case basis to make a determination of "reasonable period" since no arbitrary rule could be applied in every situation. The proposed revision has, therefore, not been adopted. However, the legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant to that employee within a reasonable period of his or her making a request for use of such time. The rule has been modified to make it clear that compensatory time is not envisioned as a means to avoid overtime compensation (H. Rep., p. 23) and that an employee has the right to be able to use the compensatory time earned. However, no specific time frame has been established for use of compensatory time.

With regard to the term "unduly disrupt", many commenters, including the International Association of Fire Chiefs (IAFC), suggested that the term

be defined to state that it would be unduly disruptive to grant compensatory time off any time granting such leave to an employee would require another employee to work overtime to perform the services. Also, the NLOC and others disagreed with the statement in this section that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off."

The legislative history to the 1985 Amendments specifically clarifies that the term "unduly disrupt" means something more than mere inconvenience (H. Rep., p. 23 and S. Rep., p. 12). The Reports provide an example that a request by a snow plow operator in Vermont or Maine to use compensatory time in February would probably be unduly disruptive even if the request were made well in advance. On the other hand, the same request by the same employee for compensatory time in June probably would not be unduly disruptive. As stated in the proposed rule, for an agency to refuse an employee's request for compensatory time off, it must be clear that the granting of such compensatory time off must result in an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity. The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive. In addition, it should be noted that the legislative history (H. Rep., p. 23) states that for those employees where the problem of disruption of services to the public is persistent, compensatory time should not be the preferred method of compensation for overtime work. The Department believes the proposed rule accurately mirrors the legislative intent. Therefore, the suggested revisions are not adopted.

The NLOC suggested deleting § 553.25(b)(2) in the proposal. This subsection states that where the agreement or understanding between the employer and the employee (or the representative of the employee) contains the conditions under which an employee can take compensatory time off, such agreement or understanding will govern the meaning of "reasonable period". The NLOC pointed out that neither the statute nor legislative history of the 1985 Amendments provides for such a rule. The Department, however, believes that some parties may choose to include in their agreement or understanding the

conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms. Accordingly, the suggested revision has not been adopted.

*Section 553.27 Payments for unused compensatory time.*

Various parties, including the National Association of Counties (NAC), commented on the statutory requirement that at the time of termination an employee must be paid for unused compensatory time based on either the average regular rate received during the last 3 years of employment or the final regular rate received, whichever is higher. Of particular concern was the 3-year period which must be used in making such a determination. It was suggested that only the 3 years prospective to April 15, 1986, be used, since States and local governments not covered by the FLSA prior to that date would be unable to reconstruct payroll records to determine a 3-year average regular rate. Also, it was suggested that the last 3 years of employment be defined as the last 3 years of continuous employment since some employees may have worked a total of 3 years for a public agency, but over a longer period of time. Thus, the rule would require public agencies to maintain payroll records for an indeterminate period of time.

The Department recognizes that State and local government agencies may not have some or all of the records for the period prior to April 15, 1986, needed to calculate the 3-year average regular rate for their terminating employees, and that this lack of 3 years of records may continue to exist for some time, in some cases until April 15, 1989. The Department has no authority to waive this statutory requirement, and thus no changes have been made in this section to incorporate this comment. However, in order to provide for the 3-year transition period following April 15, 1986, the Department has adopted the following enforcement policy with respect to this matter. Where there are no payroll records for the period prior to April 15, 1986 (or where the available records are inadequate to permit the calculation of the regular rate as defined in FLSA section 7(e)), the final regular rate, or the average regular rate in the period between April 15, 1986, and the date of termination, whichever is higher, should be used to calculate the payment for accrued compensatory time. However, where some or all of the records of employment prior to April 15,

1986, are adequate, including any accurate records maintained by the employee, such records should also be utilized in calculating the employee's average regular rate, even if they do not cover the entire 3-year period prior to termination of employment.

The Department agrees that a literal reading of the statutory requirement that the average regular rate received during the final 3 years of employment could require public agencies to retain payroll records indefinitely in order to provide for circumstances in which an employee's final 3 years of employment are not consecutive. Nothing in the statutory language or legislative history of the 1985 Amendments would suggest that the Congress intended to place such a burden on public agencies. It is the Department's position that the phrase "last 3 years of employment" means the 3-year period immediately prior to termination and has revised this section of the regulations accordingly. Thus, where an employee's last 3 years of employment are not continuous because of a break in service, assuming that the initial separation was intended to be permanent and any accrued compensatory time earned after April 14, 1986, was cashed out at the time of the initial separation, the subsequent period of employment would be treated as a new employment. If the final period of employment is less than 3 years, the average regular rate would be calculated based on the rate(s) in effect during such period.

*Section 553.28 Other compensatory time.*

The NLOC suggested several clarifying editorial changes to this section of the regulations which discusses the application of the FLSA to compensatory time which may be earned or accrued by employees in excess of the FLSA requirements in section 7(o). The NLOC argued that a reference was needed in subsection (b) to State laws which, in addition to local laws, may provide for compensatory time under hours standards different from the FLSA. Also, within the same subsection, the NLOC recommended that a reference to FLSA section 7(a) be added to the statement discussing the 40-hour workweek standard for overtime to clarify that this overtime standard applies only to work governed by section 7(a). (The 40-hour workweek standard does not apply, for example, to work performed under section 7(k).) In addition, the NLOC suggested changes to subsections (d) and (e) of this section to make clear that the compensatory time requirements in FLSA section 7(o)

do not apply with respect to "other" compensatory time earned or accrued by public agency employees. The Department agrees that these subsections need modification and has incorporated these suggestions as well as other minor editorial revisions for clarification purposes.

*Section 553.30 Occasional or sporadic employment—section 7(p)(2).*

A large number of State and local government commenters including the NLOC requested that the statutory term "occasional" be defined as occurring at "irregular" or "infrequent" intervals and the statutory term "sporadic" be defined as "irregular", "intermittent", "infrequent" or "occurring in scattered instances," pointing out that the statutory terms are provided in the alternative.

Other than semantic nuances, the Department can discern no substantive difference between the language of the proposal and the above comments. This, we believe, is borne out by the examples set forth in the subsections as proposed which were derived from the legislative history (H. Rep., pp. 24-25). In this regard, contrary to the interpretation expressed by the NLOC in requesting an alternate definition, the legislative history clearly indicates that "additional work regularly performed on a scheduled basis" does not qualify as "occasional or sporadic." (Emphasis added.) Accordingly, because there appears to be no valid reason for revision, this section has not been changed.

Some commenters, including the NLOC, requested that § 553.30(b)(1) be revised to indicate that the bases for determining whether "occasional or sporadic" work is performed in a "different capacity" are the occupational titles of the two jobs rather than the "same general occupational category as the employee's regular work" as contained in the proposal.

The pertinent language in the proposal is derived from the legislative history (H. Rep., p. 25) which states: "The Committee clearly intends 'different capacity' to bar any occasional or sporadic assignments within the same general occupational category as the employee's regular work." Thus, no changes can be made on this issue.

The NLOC suggested that the phrase "or promised reward" at the end of § 553.30(b)(2) be deleted, pointing out this section as proposed would prohibit a public agency from providing any compensation to an employee for additional, occasional or sporadic work. The AFL-CIO contended that the entire last sentence of this subsection conflicts

with the rest of the section and the legislative history and should be deleted. In essence, they argued that just because an employee has not been threatened with reprisal or promised reward does not mean that an employee has decided to perform "occasional or sporadic" work at "his/her sole option" as required by the statute, since performance of such work is often understood or expected of an employee. Both of the above comments are valid and the entire sentence has been deleted.

Many commenters, particularly municipalities in the State of North Carolina and the NLOC, requested that the regulations provide that security work performed at city-owned buildings by police and firefighters employed by the city be considered sufficiently different to be considered as employment "in a different capacity."

These comments cannot be adopted because of the clear legislative history contained in the House Report on page 25: "The Committee expects the Secretary of Labor in promulgating regulations to interpret 'different capacity' in the strictest sense so as to prohibit instances where a public safety employee might be encouraged to take on any kind of security or safety function within the same local government." (Emphasis added.)

The NLOC also suggested utilizing the 9-digit occupational titles contained in the *Dictionary of Occupational Titles* (DOT) to differentiate "different capacity" in § 553.30(c). This suggestion cannot be adopted; furthermore, the Department has adopted the 3-digit grouping in the DOT, as fully discussed under § 553.103 below. However, the references to education, experience, skills and knowledge have been deleted since these criteria are not generally used in the DOT. Notwithstanding this general rule, in light of the legislative history discussed above, public safety employees are precluded from taking on any security or safety function on an occasional or sporadic basis.

Several commenters requested that this section be modified to make clear that occasional or sporadic part-time work (e.g., coaching or teaching) performed by non-certified personnel employed by a school system (i.e., non-teachers) would be considered work in a "different capacity". On the other hand, the NEA and others argued that all work regularly and historically performed by school employees, including extra duties such as attending school functions, counseling students, taking tickets at a school event, etc., be considered work in the same capacity. They recommended that only employment which is in a

different capacity from any capacity in which the employee is regularly employed be excluded from computing hours worked for overtime pay purposes under this provision.

Both points of view in the comments on this issue have merit and are well taken. The Department's position is that any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will not be considered as employment in a "different capacity". However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a "different capacity", provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis. Where all the requirements for this provision are met, the hours of work need not be combined with the hours of work in the regular job for purposes of calculating overtime pay or compensatory time earned. The regulation has been modified accordingly.

Some other commenters made general suggestions that this section should contain more examples of "occasional or sporadic" and "different capacity".

None of the commenters provided suggestions or examples to illustrate the application of this provision of the Act. The Department believes the examples included in the proposed regulations are consistent with the statutory language and are, in a large part, derived from the legislative history of section 7(p)(2). Further, these examples have broad, general application. Therefore, no changes have been made to this section with respect to these comments. The Department will rely on the legislative history in making determinations on specific fact situations as the need arises.

*Section 553.31 Substitution—section 7(p)(3).*

Several commenters stated that this section was not clear as to which employee (if any) is credited with the hours worked when substitution occurs. As explained in the last two sentences of § 553.31(a), the employee scheduled to work receives credit (and compensation) as if he or she had worked; the employee actually working (substituting) receives no credit (or compensation) from the employer for the hours involved. This position is set forth in the legislative history (H. Rep., p. 25;

S. Rep., p. 13). The Public Employee Department, AFL-CIO, and the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) suggested changing the word "primarily" in § 553.31(b) to "solely" or "exclusively" since the statutory language clearly states that any decision to substitute is to be solely at the employee's option. The Department agrees and has revised the language accordingly.

The NLOC recommended that the phrase "or promise of reward" be deleted, since, generally, employee substitutions occur only if one employee promises to pay the other employee cash or to work a shift for the substituting employee at a later date. This point is well taken; however, the intent of this phrase has to do with an employer's promise of reward and the language has been clarified to so indicate.

#### Section 553.32 Other FLSA exemptions.

Several comments were received on this section which sets forth some of the minimum wage and/or overtime pay exemptions contained in the FLSA. Some commenters suggested that the Department modify these exemptions, apparently not understanding that they are statutory exemptions enacted by the Congress. Other commenters suggested that all FLSA exemptions be referenced in this section. The purpose of this section is simply to highlight, for informational purposes, other major FLSA exemptions which may have general application to State and local governments. Thus, other than to note that the list of exemptions is not comprehensive, no changes have been made.

Finally, several commenters requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis. The commenters argued that State and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as State and local government laws which preclude the payment of wages for hours not worked (except for earned leave).

On November 19, 1985, the Department of Labor published in the *Federal Register* (50 FR 47696) an advance notice of proposed rulemaking requesting the views of the public on

any changes they felt were necessary in 29 CFR Part 541. The comment period ended on March 22, 1986. However, the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for the Department to address this issue in developing a final rule for Part 553.

#### Section 553.101 "Volunteer" defined.

Two commenters suggested that the definition of "volunteer" in § 553.101(a) be revised to include individuals who are required by a court to perform community service for no compensation. While, depending on all the facts and circumstances, such individuals would not be considered "employees" under the FLSA, and thus would not be entitled to minimum wage or overtime compensation, they also would not fall within the definition of "volunteer". Therefore, no change has been made in § 553.101(a).

The Public Employee Department, AFL-CIO, and AFSCME argued that the word "undue" in § 553.101(b) should be deleted from the sentence "Congress . . . condemned any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services." The commenters argued that the term "undue" is not in keeping with legislative intent and implies that some degree of pressure may be acceptable. However, since this term appears in both the House and Senate reports (H. Rep., p. 25; S. Rep., p. 14), the suggested revision has not been made.

The NLOC suggested that "expressly condemned" in § 553.101(b) be revised to read "expressed its wish to prevent" in order to more closely reflect the legislative history. The Department agrees and has incorporated the suggested language.

The AFL-CIO also suggested that the definition of "volunteer" should include language paraphrased from the Office of Personnel Management's regulations on Federal agency volunteers at 5 CFR 551.102(g), namely: "An individual is a volunteer when he or she donates service the primary benefit of which accrues to the performer of the service or to someone other than the public agency. Under such circumstances there is neither an express nor implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the

assignment of an employee to perform them." The Department believes that the language proposed by the AFL-CIO is not fully consistent with the legislative history and Congressional intent of the 1985 Amendments which sought to recognize existing, historical, and legitimate practices affecting persons who volunteer their services to State and local government agencies. For example, the proposed language could preclude the use of volunteer firefighters, whose absence would obviously require the hiring of paid firefighters. Accordingly, the section has not been revised to incorporate the suggested language.

Three commenters suggested that § 553.101(d) should be deleted or revised to permit employees to perform their usual services for their agencies on occasion as volunteers. However, section 3(e)(4)(A) of the FLSA, as amended, specifically provides that individuals are considered volunteers under the Act only if, among other conditions, the services performed ". . . are not the same type of services which the individual is employed to perform for such public agency." Accordingly, no changes have been made to this subsection.

#### Section 553.102 Employment by the same public agency.

The NLOC, NATT, National Volunteer Fire Council (NVFC), and approximately 25 other commenters suggested dropping the treatment or classification of State or local governments by the Census of Governments as a factor in determining whether two agencies of the same State or local government constitute the "same public agency". Most of these commenters suggested that the regulations should use such factors as whether the two agencies deal with each other at arm's length, whether there are separate payroll systems, and if there are separate budgets or pension plans. On the other hand, the AFL-CIO argued that the 1985 Amendments preclude any divisions of State or local governments into separate agencies, contrary to the proposed regulations.

Section 3(e)(4)(A) of the FLSA states: "The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if . . . (ii) such services are not the same type of services which the individual is employed to perform for such public agency." (Emphasis added.) The Department believes the language in proposed § 553.102(b) and the reliance on the Census of Governments

as a factor in determining whether two public agencies are separate is consistent with the statute. The Census of Governments has been the subject of numerous challenges in the courts with regard to its use for revenue sharing purposes, and has been held to be valid. In addition, our review of the criteria used by the Bureau of the Census in identifying individual units of government ("existence as an organized entity", "governmental character", and "substantial autonomy") are equally valid, as a general proposition, as guidance in determining separate units of government under the FLSA Amendments. It is recognized, however, that situations may arise in which, for example, an independent school district or agency, such as a port authority, may not be treated separately by the Census of Governments, but may be considered a separate public agency for purposes of the FLSA Amendments. These situations will be considered on a case-by-case basis. Accordingly, no substantive changes have been made to § 553.102. However, a clarifying editorial change has been made based on comments submitted by the Bureau of the Census. The word "statistical" has been substituted for "reporting" to clarify that the factor to be considered is how the two agencies are treated in the Census report rather than how the data for the report is collected.

*Section 553.103 "Same type of services" defined.*

The 1985 Amendments prohibit a public agency employee from volunteering to perform the "same type of services" which the individual is employed to perform for such public agency. The NLOC argued that the restriction applies only to the same employer and that further, for example, a nurse employed by a State hospital could volunteer to perform nursing services at a State-operated health clinic provided the health clinic is not operated by the same hospital. The Department does not agree with this interpretation since the term "public agency" is defined in section 3(e)(4)(A) of the FLSA, as amended, as "... a State, a political subdivision of a State, or an interstate governmental agency." Furthermore, both the House and Senate Reports include the following legislative history: "To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however, perform such services as a volunteer at a county clinic." (H. Rep., p. 26; S. Rep., p. 14.)

The IAFC and a number of other commenters argued that paid firefighters

should be permitted to perform their usual services for their agencies on occasion as volunteers. However, as discussed above under § 553.101, the 1985 Amendments clearly preclude public agency employees from volunteering their usual services for the same public agency. Accordingly, no change has been made.

The NLOC also proposed that the definitions of the 9-digit categories of occupations contained in the *Dictionary of Occupational Titles* (DOT) be used to determine whether a volunteer service is the same type of service as the individual is employed to perform. The Department agrees that the DOT is a useful guide for this purpose, but that the 3-digit categories of occupations, which distinguish between major occupational groups, should be used, rather than the 9-digit categories. The 9-digit categories delineate only extremely minor differences between occupations which often involve "the same type of services". For example, the DOT separates cooks and chefs into thirty-eight groups using the 9-digit categories. Accordingly, § 553.103 has been revised to incorporate a reference to the 3-digit occupational groups in the DOT. The Department wishes to emphasize, however, that the occupational categories in the DOT are only one of the criteria that will be used to determine whether a volunteer service is the "same type of service" for purposes of this section. Equally important in such a determination will be consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.

*Section 553.104 Private individuals who volunteer services to public agencies.*

The AFL-CIO and AFSCME suggested that paragraph (a) be modified to clarify that, in addition to a promise or expectation of compensation, the actual receipt of compensation is contrary to the status of volunteer. The Department agrees and has incorporated the suggested language with the proviso that volunteers may, of course, receive reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106.

The NLOC suggested that paragraph (a) be revised to clarify that a private individual who is not employed by a public agency may perform services of any type on a volunteer basis. The Department agrees that the statute provides no limitations or restrictions on

the types of volunteer services that may be rendered to a public agency provided the services are performed by bona fide volunteers. Paragraph (a) has been revised to clarify this matter.

One commenter suggested that this section be revised to clarify that the status of volunteers is not affected by the possibility that the public agency might hire such individuals, pointing out that volunteers develop skills and gain experience which make them likely candidates for employment. The Department agrees, in principle, that the possibility of future employment does not in itself affect the status of otherwise bona fide volunteers. However, where an agency has a practice or requirement of hiring only from its pool of volunteers, and advises job applicants of this practice, or where the volunteers expect or anticipate future employment after a period of "volunteer" service, such conditions raise a question as to whether such individuals are bona fide volunteers or are trainees who would be subject to the Act's minimum wage and overtime pay requirements. (It is the Department's long-standing position, which has been upheld by the U.S. Supreme Court, that trainees are employees under the FLSA where, for example, the training is not primarily for the benefit of the trainees; the employer derives some advantage from the trainees' activities; the trainees displace regular employees; and the trainees are entitled to a job at the conclusion of training.) The Department believes that these issues can only be resolved on a case-by-case basis and, therefore, no changes to this section have been made to incorporate this comment.

Finally, in paragraph (a) a typographical error has been corrected by adding the word "hours" in the phrase "if their hours of service . . .".

*Section 553.106 Payment of expenses, benefits, or fees.*

Over 40 comments were received on this section of the proposed rules. Most of these comments questioned the restriction of "reasonable benefits" to service-related benefits, the absence of retirement plans from the examples of allowable benefits, the prohibition against the payment of fees based on productivity, the listing of group insurance as a "reasonable benefit", and the lack of a more specific definition of a "nominal fee".

Many of the commenters, including the NLOC and the AFL-CIO, questioned the rule in § 553.106(d) that benefits provided to volunteers would be considered reasonable if they are

otherwise furnished by the public agency to the employees who perform the same services as the volunteers. It was argued by the NLOC and others that in many cases there are no employees who perform services similar to those performed by the volunteers. The AFL-CIO argued that the reasonableness of a benefit must be tested against its appropriateness for a volunteer and not by whether it is also provided to employees. The Department agrees that the 1985 Amendments and legislative history do not require such a test for reasonableness of benefits provided to volunteers and, therefore, has deleted this requirement from the subsection.

Comments submitted by the AFL-CIO and AFSCME argued that the "economic realities" test which § 553.106(e) of the proposed rule applied to fees paid to volunteers to determine if such fees are "nominal" should also be applied to benefits and expenses. The Department agrees with the argument that this test is only reasonable and reliable when applied to the total fees, benefits and expenses paid to volunteers, and the final rule has been revised accordingly.

Although the proposed rule contained no specific prohibition against retirement plans as a "reasonable benefit" for volunteers, the proposal did not include pensions as an example of a "reasonable benefit", and many commenters assumed that the Department intended to prohibit such benefits by their exclusion from the examples. The regulations did not, by their omission, intend to prohibit retirement plans for public agency volunteers. The NPELRA, NVFC, NLOC, and over thirty other commenters argued that there is no statutory basis for excluding retirement benefits from examples of reasonable benefits provided to volunteers. The information furnished in the comments indicated that a very large number of volunteer firefighters receive a pension or "length of service" award in recognition of their many years of dedicated volunteer service to the community.

In light of the fact that retirement plans were identified as an acceptable benefit for volunteers in the prior existing rule (§ 553.11 of Part 553), and since the Department believes that the Congress intended to recognize existing practices concerning the furnishing of benefits to bona fide public agency volunteers, the regulations have been revised to include retirement plans as an example of a "reasonable benefit" for volunteers. The Department has also concluded that the application of the "economic realities" test to benefits,

expenses and fees provided volunteers, as discussed above, provides a sufficient safeguard against any possible abuse with respect to pensions for public agency volunteers.

The NEA argued that group insurance should be dropped from the types of permissible benefits for volunteers. However, life and health insurance were identified as acceptable benefits for volunteers in the prior existing rule (§ 553.11 of Part 553), and, in the Department's view, the regulations conform with Congressional intent with respect to benefits, as discussed above. The Department believes the application of the "economic realities" test to benefits is a sufficient safeguard against any possible abuse and, therefore, the suggested change has not been made.

Many of the commenters argued that the phrase "service-related", which modified the examples of reasonable benefits in § 553.106(d) of the proposal, was obscure and overly-restrictive. The Department agrees that the statutory language and legislative history do not provide any basis for such a restriction and, therefore, the phrase "service-related" has been deleted from the final rule. As discussed above, the Department believes that the application of the "economic realities" test to expenses, benefits, and fees provided public agency volunteers is a sufficient safeguard against any possible abuse.

The NLOC and many other commenters stated that the prohibition in § 553.106(e) against fees based on "productivity" for volunteers would preclude "per call" payments to volunteer firefighters. The NVFC indicated in their comments that almost 30 percent of all volunteer firefighters are paid a small fee for each fire call to which they respond. The purpose of the prohibition against productivity-based fees for volunteers was to preclude payments which were so closely tied to work production as to constitute compensation on a "piece rate" wage or production bonus basis. Nothing in the statutory language or legislative history of the 1985 Amendments would preclude the payment of nominal per call fees to volunteer firefighters. Accordingly, § 553.106(e) has been revised to clarify the rule on this matter.

A number of commenters, including the International Personnel Management Association (IPMA), argued that the discussion in § 553.106(e) should be revised to provide more specific guidance on the meaning of the term "nominal fee". However, it is the Department's view that whether a specific amount is "nominal" depends on the economic realities of the situation

and that no guidelines on specific amounts applicable to all (or even most) possible situations can be provided. Therefore, this subsection has not been revised in this regard.

*Section 553.200 Statutory provisions: section 13(b)(20).*

Section 13(b)(20) of the FLSA provides a complete overtime pay exemption for "any employee of a public agency who in any workweek is employed in fire protection activities or . . . law enforcement activities . . . if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities."

The International Association of Fire Fighters (IAFF) suggested that the term "employ" should be interpreted to include situations where employees may be on leave status, rather than on duty, during a workweek. They argued that the proposed regulations could be interpreted to allow an employer who employs five employees engaged in fire protection or law enforcement activities to utilize the exemption during any workweek when one employee goes on vacation. The Department agrees that the language in the proposed rule could have led to misinterpretation and has added language for purposes of clarification.

In their comments, the NLOC stated that § 553.200(b) of the proposed regulations should be revised to clarify that all individuals to whom the FLSA section 3(e) exclusion applies (e.g. elected officials and their personal staffs) will not be counted in determining whether section 13(b)(20) applies. The proposed regulations listed "volunteers" as an example of persons who are not counted in determining the exemption. The Department agrees that listing additional examples may provide clarification and has modified this section accordingly.

The NLOC comments also stated that the section 13(b)(20) exemption should be applied on an annual rather than a workweek basis and that public agencies should be allowed to utilize the section 7(k) exemption during those years in which section 13(b)(20) does not apply. The NLOC also proposed that the requirements for the exemption could be met where a public agency employs less than five employees in fire protection or law enforcement activities for six or more months in a 12-month period. NLOC argued that major administrative problems for employers and confusion to employees may occur as a result of employees being exempt in certain workweeks and nonexempt in other workweeks.

The statutory language of the section 13(b)(20) exemption, quoted above, is clear that this exemption is to apply solely on a *workweek* basis. Therefore, the Department cannot incorporate the suggested changes.

*Section 553.201 Statutory provisions: section 7(k).*

The IAFF requested that the regulations be revised to require that a prior agreement between the employer and the employees, or their representative, should be required in order to utilize the section 7(k) exemption which provides a partial overtime pay exemption for firefighters and law enforcement personnel who are employed by public agencies on a work period basis. The IAFF recommended this change in order to make the requirements under section 7(k) consistent with the "prior agreement" provisions under section 7(o), which permits compensatory time off for public agency employees.

The Department has not adopted this recommendation. The requirement that a prior agreement or understanding between the employer and employees be obtained in order to utilize the compensatory time provisions under section 7(o) is statutory. There is no such requirement in the FLSA with respect to section 7(k).

*Section 553.210 Fire protection activities.*

This section of the regulations discusses the statutory phrase "any employee . . . in fire protection activities" as that term is used for purposes of qualifying for the exemptions under sections 7(k) and 13(b)(20) of the Act.

The NLOC and others suggested that this section be revised so as to treat ambulance and rescue service personnel as fire protection employees if their services are provided through a fire department or fire protection district, regardless of whether such personnel form an "integral part" of the public agency's fire protection activities.

The legislative history of the 1974 FLSA Amendments, which added sections 7(k) and 13(b)(20) to the FLSA, clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions. (See *Congressional Record—House*, March 28, 1974, Conference Report on S. 2747, pages 2380-81.) For this reason the Department has not adopted this recommendation.

Two commenters stated that job titles of employees who are possibly exempt under FLSA section 13(a)(1) (bona fide executive, administrative and professional employees) should be removed from the list of employees engaged in fire protection activities in § 553.210(a). However, since fire protection employees who are exempt under 13(a)(1) are counted in determining the applicability of the 13(b)(20) exemption for public agencies that employ fewer than five employees in fire protection or law enforcement, the Department has not adopted the suggested change.

Several commenters stated that support staff, such as dispatchers, should be considered as engaged in fire protection activities for purposes of applying section 7(k). They argued that many support staff employees work on shifts corresponding to the shifts of law enforcement officers or firefighters. They contended that support personnel must be scheduled to insure that the coverage required to maintain public safety activities is provided and, therefore, should be exempt under section 7(k). The lengthy discussions on sections 7(k) and 13(b)(20) in the legislative history of the 1974 Amendments identify only "police officers", "firefighters", "security personnel" in correctional institutions, and certain "ambulance and rescue personnel" as qualifying for these exemptions. Support personnel, including dispatchers, are not addressed in the legislative history. It is noted that the language of the version of section 13(b)(20) proposed by the House, which would have provided a complete overtime exemption for firefighters and law enforcement personnel irrespective of the number of such personnel employed by the public agency, would also have resulted in an overtime exemption for *all* employees (including support personnel) of such agencies. The House version read as follows: "(20) any employee of a public agency engaged in fire protection or law enforcement activities (including security personnel in correctional institutions)." The House-Senate conferees, however, specifically added language to the final versions of sections 13(b)(20) and 7(k) which limits these exemptions to individual employees who *themselves* are engaged in fire protection or law enforcement activities, or who are security personnel in correctional institutions.

The prior regulations (29 CFR Part 553), issued following the 1974 Amendments, provided that firefighters and law enforcement personnel who, for a number of reasons, were engaged in

so-called "civilian" activities (dispatching, maintenance, etc.) remained subject to the 7(k) and 13(b)(20) exemptions, but "civilian" employees who performed such activities were excluded. The distinction between "civilian" personnel and firefighters and police officers developed out of the public hearings held as part of the rulemaking. At those hearings, a representative who testified on behalf of the National League of Cities, the U.S. Conference of Mayors, the National Governors Conference, and other organizations, urged that civilian support personnel, including dispatchers, be *excluded* from the definition of fire protection and law enforcement personnel. On the other hand, the representative from the International Association of Fire Fighters urged that *all* support personnel be *included* in the count of firefighters and law enforcement employees for purposes of section 13(b)(20).

After considering all the testimony at the public hearings, researching the legislative history, and analyzing all the comments on the proposed rules, the Department issued the prior final regulations (29 CFR Part 553) which do not include dispatchers or other civilian support personnel under the 7(k) or 13(b)(20) exemptions. Nothing in the statutory language or legislative history of the 1985 Amendments provided any basis for revising this interpretation and the proposed rules merely carried over the language of the prior final rule. In light of the above, the Department has not adopted the suggested change.

*Section 553.211 Law enforcement activities.*

This section of the regulations discusses the term "any employee . . . in law enforcement activities" as that term is used in sections 7(k) and 13(b)(20) of the Act. The NLOC recommended that subsection (b) of this section be revised to allow ambulance and rescue service personnel to qualify for exemption under section 7(k) or section 13(b)(20), if their services are provided through a police department, regardless of whether such personnel form an "integral part" of the public agency's law enforcement activities.

As discussed above in the analysis of the comments on § 553.210, the Congress clearly intended that only those ambulance and rescue service employees whose activities are *substantially related* to fire protection or law enforcement activities can qualify for exemption under sections 7(k) or 13(b)(20). The Department also received several comments on this section

arguing that support staff, such as dispatchers, should be treated as persons engaged in law enforcement activities for purposes of qualifying for the exemptions contained in sections 7(k) and 13(b)(20). However, as also discussed above in the analysis of the comments on § 553.210, neither the statute nor the legislative history of the 1974 and 1985 Amendments provides for the application of this exemption to support staff of fire or police departments.

*Section 553.215 Ambulance and rescue service employees.*

The Department received comments from the NLOC and others suggesting that the regulations be modified to consider all ambulance and rescue service personnel to be engaged in firefighting for purposes of the section 7(k) exemption, unless such employees are exclusively engaged in law enforcement activities (i.e., regularly dispatched to accidents but not fires). If such individuals were treated as fire protection employees, they would be subject to the higher hours standard for overtime pay purposes (e.g., 212 hours in a 28-day period).

Several commenters stated that this section of the proposed regulations was unclear as to which hours standard would apply to ambulance and rescue service personnel who are engaged in both fire protection and law enforcement activities.

It is the Department's position that ambulance and rescue service employees who are trained in the aid and assistance of fire and accident victims and who are regularly dispatched to fires, riots, crime scenes, accidents, and natural disasters will qualify for whichever hours standard applies to the activity in which the employee spends the majority of work time during the work period. The Department has revised this section accordingly.

The NLOC commented that subsection (b) of § 553.215 should be eliminated because it is not supported by the statutory language or legislative history of the 1974 Amendments. Specifically, this subsection contains a discussion of the types of public ambulance and rescue service employees who were covered under the FLSA prior to the 1974 Amendments.

As evidenced in a colloquy during the floor debate on S. 2747, the exemptions contained in sections 7(k) and 13(b)(20) were meant to relate only to ambulance and rescue service employees brought under FLSA coverage in 1974. In referring to ambulance and rescue service personnel, the legislative history

clearly states on pages 2380-81, "... if the employer was covered by the overtime provisions of section 7 of the Act prior to these amendments, then its employees would not by operation of the conference report be brought under section 6(c)." (Section 6(c) of the 1974 Amendments contained FLSA sections 7(k) and 13(b)(20).) Accordingly, this section has not been eliminated. However, for clarity, the references in the proposed rule to certain types of public agency employers that are unlikely to employ ambulance and rescue service personnel have been deleted.

*Section 553.216 Other exemptions.*

This section of the regulations discusses, among other things, the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Act to public agency employees engaged in fire protection and law enforcement activities. The section 13(a)(1) exemption applies to bona fide executive, administrative, and professional employees, as those terms are defined in 29 CFR Part 541.

The NLOC and two other commenters proposed that this section list job titles of employees who could qualify for exemption under section 13(a)(1). The Department has historically taken the position that job titles in and of themselves are not factors to be relied upon in determining qualification for this exemption. Determinations in this regard must be made on a case-by-case basis. The Department believes that any attempt to list job titles in this case would be misleading and inappropriate. Therefore, no revisions have been made to this section.

Several commenters, including various cities, the NLOC and the NPELRA, stated that 29 CFR Part 541 should be revised to eliminate the requirement that an exempt employee be paid on a salary basis.

As discussed earlier under § 553.32, there is a separate rulemaking process with respect to Part 541. Therefore, it would not be appropriate for the Department to address this issue in developing a final rule for Part 553.

*Section 553.221 Compensable hours of work.*

This section of the proposed regulations summarizes the general rules concerning compensable hours of work under the FLSA as contained in 29 CFR Part 785. The comments received on this section were varied. However, there was a consensus among several commenters, including the NLOC and the NAC, that this section is unclear

with respect to the treatment of "on-call" time in that it seems to indicate that determinations regarding the compensability of such time would be made on a case-by-case basis. They contended that this position is inconsistent with § 785.17, which, they argue, generally defines on-call time as noncompensable.

In order to further clarify that § 553.221 is fully consistent with the hours worked principles in Part 785, the Department has incorporated into subsection (d) the language in § 785.17 concerning the general rules and conditions under which on-call time spent away from the employer's premises is not compensable.

*Section 553.222 Sleep time.*

This section includes special sleep time rules applicable to firefighters and law enforcement personnel employed under the partial overtime pay exemption in FLSA section 7(k). As discussed in this section, the rules represent a partial departure from the general rules on hours worked under the FLSA as contained in Part 785. Specifically, firefighters and law enforcement personnel who are on tours of duty of exactly 24 hours may not have sleep time excluded from the computation of compensable hours. Many commenters objected to this position on the basis that this principle is inconsistent with Part 785 and that it does not recognize the traditional method of counting hours worked, especially for firefighters. The commenters contended that, generally, those employees who work 24-hour tours have time to sleep and that such sleep time should be excluded from hours worked.

The Department understands the concerns expressed by many commenters about the inconsistency between Part 553 and Part 785 on this issue. However, the legislative history of the 1974 Amendments to the FLSA indicates that the unique "tour of duty" concept utilized with respect to police and firefighters under section 7(k) should be treated differently from the normal "hours worked" concept under section 7(a), as set forth in Part 785. The Conference Report on the 1974 Amendments directed the Department to establish new regulations on what constitutes compensable hours of work in a "tour of duty" for employees subject to the section 7(k) exemption. In this connection, the Department issued rules in 1975 regarding compensable hours and "tour of duty" for fire protection and law enforcement employees. (See § 553.15.) The proposed regulations

merely incorporated the 1975 rule that police and firefighters paid under section 7(k) who are confined to a duty station and who work tours of duty of 24 hours or less may not have sleep time excluded from their hours of work. Such employees must be ready at all times to respond to calls to duty. Accordingly, the suggested change has not been adopted.

Another comment on this section submitted by the NLOC suggested an editorial change to subsection (a) to incorporate the phrase "or police officers" to clarify that section 7(a) may be used as an alternative to section 7(k) for overtime pay purposes for police officers, as well as firefighters. This is correct and this section has been revised accordingly.

The IAFF commented on subsection (c) stating that the requirement that the employee be allowed to get at least 5 hours of sleep in order to deduct sleep time for tours of duty in excess of 24 hours should be revised to provide that the employee must be allowed to get at least "5 continuous and uninterrupted hours" of sleep. They argue that this is necessary because in many cases a fire station is so busy that although a firefighter may get a total of 5 hours of sleep, the sleep is so interrupted that the firefighter has not had a reasonable night's rest.

The sleep time principles which apply to employees paid under section 7(a), who are on duty for 24 hours or more, are discussed in § 785.22 of Part 785. As provided in this section, an employer and an employee may agree that up to 8 hours of sleep time may be excluded from hours worked, provided that adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. Any interruptions during the sleeping period must be counted as hours worked. As further provided in § 785.22, if the interruptions are so frequent that the employee cannot get a reasonable night's sleep, the entire period must be counted. A reasonable night's sleep is defined, for enforcement purposes, as at least 5 hours of sleep. The Department's enforcement experience with these principles, which have been in effect for a number of years, has indicated that the "5-hour" rule as currently contained in Part 785 is reasonable. Therefore, the Department will not make an exception to this rule for employees to whom section 7(k) applies.

#### *Section 553.223 Meal time.*

A large number of commenters including the NLOC, NPELRA, and IPMA stated that meal times for

firefighters who are on tours of duty of 24 hours or less and who are employed under section 7(k), should not be considered as compensable hours of work if completely relieved of all duties. They argued that the meal time rules for firefighters should conform to the rules for all other employees, including law enforcement personnel employed under section 7(k).

The IAFF submitted comments in favor of the proposed rule regarding meal time for firefighters, citing the legislative history of the 1974 Amendments in support of the position that such time is compensable.

As provided in Part 785.19, meal periods of at least 30 minutes, where the employee is completely relieved from duty, may be excluded in computing an employee's hours of work. In the case of police officers and firefighters employed under section 7(k), the prior rules in Part 553 permitted the exclusion of meal periods only in tours of duty of more than 24 hours. However, shortly after the issuance of these rules in 1975, the Wage and Hour Division issued an opinion letter which stated that with respect to police officers working away from the police station, meal periods could be excluded from compensable hours where such employees are completely relieved from duty during such periods. The proposed rule in this section followed the policy adopted in the 1975 opinion letter in permitting the exclusion of bona-fide meal periods from compensable hours for police officers who are employed under section 7(k).

The Department has carefully considered the issue regarding the exclusion from hours worked of meal times for employees employed under section 7(k). It remains the Department's position, as fully discussed below, that firefighters paid under section 7(k) who are confined to a duty station and who work tours of duty of 24 hours or less may not have meal times excluded from their hours of work. Such firefighters must be ready at all times to respond to emergency calls. These employees, therefore, are "engaged to wait" during such tours of duty. On this basis, it cannot be said that such employees are completely relieved from duty during meal periods.

By contrast, law enforcement personnel, who typically work 8-hour shifts, are not generally required to remain on the premises during their meal periods. In such instances, where they are completely relieved from duty, the meal periods would not be compensable. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar

quarters, or are engaged in extended surveillance activities (e.g., "stake-outs"), their meal periods are similar to those of firefighters, in that their time is controlled or restricted by the employer. In such cases, law enforcement personnel are not considered to be completely relieved from duty and such meal periods would be compensable. The regulations have been modified to clarify this position regarding meal time for law enforcement officers.

As discussed in the legislative history of the 1974 FLSA Amendments, Congress was aware of the extended duty hours and unusual working conditions of public safety employees. To accommodate these conditions, the Senate and the House Conference adopted the limited overtime pay exemption in section 7(k) with certain special conditions, including the "tour of duty" concept and the averaging of duty hours over specified work periods of 7 to 28 days. In the Conference Report on the 1974 Amendments (Report No. 93-758 on S.2747, page 27), it was stated that the bill departed from the standard "hours of work" concept under the FLSA and adopted a standard keyed to the "tour of duty" concept, reflecting the uniqueness of the fire fighting service. In this regard, the Congress also directed the Secretary to adopt regulations implementing these unique provisions, including regulations defining the "tour of duty" concept. In keeping with this Congressional intent, in 1974 the Department adopted special meal and sleep time rules with respect to employees paid under section 7(k). In enacting the 1985 FLSA Amendments, Congress proposed no changes to these special rules regarding meal periods for public safety employees. The House Report reiterated the 1974 Congressional recognition of the continuous on-duty responsibilities of public safety employees and emphasized that Congress had established special provisions for these employees because of their unusually long hours (H. Rep., p. 6).

For the reasons discussed above, the Department has not revised the regulations with respect to the meal time rules for firefighters paid under section 7(k).

#### *Section 553.224 "Work period" defined.*

The FOP expressed concern that the regulations are unclear as to how a public employer exercises its right to use the section 7(k) exemption and whether it is a one-time or an ongoing alternative to section 7(a). In addition, the FOP suggested that the regulations clarify whether the length of the work period

can be changed without prior notice to employees and whether such a change can be made for the purpose of avoiding the accumulation of compensatory time or entitlement to overtime compensation.

Unlike FLSA section 7(o), which generally requires that there be an agreement or understanding concerning compensatory time prior to the performance of work, there is no requirement in the Act that an employer formally state its intention or obtain an agreement in advance to pay employees under section 7(k). Also, the Act does not provide that the decision to use section 7(k) is a one-time choice. As to the work period, its length and starting time may be changed without prior notice to employees. In light of these considerations, no changes have been made on these issues.

The Department agrees, however, that this section needs clarification concerning changing the length of the work period and has revised it to reflect the long-standing position under section 7(a) that an employer may not change the beginning of the workweek where the change is designed to evade the overtime compensation requirements of the FLSA (29 CFR 778.105).

#### Section 553.226 Training time.

A number of commenters, including the NLOC and representatives of various cities, suggested that time spent outside of normal working hours in training required by law for certification be excluded from hours worked if required by a higher level of government. They argued that the proposed test for exclusion from hours worked, namely that such training be required for both private and public sector employees, is too restrictive. They pointed out that State law for certain types of specialized training often only applies to public sector employees such as police, firefighters, jailers, etc., and not to employees performing similar activities (if any) in the private sector.

The Department agrees with these comments and has rewritten this section to clarify under what circumstances time spent in training required by law for certification does and does not constitute compensable hours of work. This has been accomplished by specifying two separate criteria, each of which, standing on its own, would constitute such training time as noncompensable. First, if the training is required for both private and public sector employees, the training time would not be compensable even when required by the employing agency's government (e.g., a State requirement

applicable to State employees). Second, if the training is required by law of a higher level of government (e.g., a State or county requirement imposed on city employees), the training time would not be compensable. However, there would still be situations when training time required by law for certification would be compensable hours of work. For example, if a city requires its emergency medical technicians to attend certain training for certification, but does not impose the same requirement on similar types of employees in the private sector, time spent in such training would be compensable. Also, where the training occurs during the course of regular working hours, the time is always compensable hours worked.

#### Section 553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

Various commenters, including the IAFC, stated that the maximum hours standards for firefighters established by the 1975 study of average hours worked by police and firefighters are inappropriate. They argued that firefighters generally work an average of 56 hours per week, compared with the 7-day work period standard of 53 hours in the proposed regulations and, therefore, the maximum hours standards should be increased.

The 1974 Amendments to the FLSA required that the Department conduct studies of the average hours in tours of duty of fire protection and law enforcement personnel in calendar year 1975. The Department conducted the studies using only data concerning Federal employees in light of the Supreme Court decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The results of these studies were challenged on various grounds and the Court held that the Department had erred in failing to take into consideration the hours worked by State and local government fire protection and law enforcement employees (*Jones v. Donovan*, 25 WH Cases 380 (D.D.C. 1981), aff'd per curiam, No. 81-1615 (D.C. Cir., March 2, 1982)). In accordance with this ruling, the Department recalculated the average hours by including data on State and local government employees. The final results of the studies were published in the *Federal Register* on September 8, 1983 (48 FR 40518).

In light of the specific statutory requirement in the 1974 Amendments that the maximum hours standards for employees subject to the section 7(k) exemption be based on the average hours worked by such employees in calendar year 1975 (with no provision for subsequent review and revision) and

the settled case law concerning this issue, the Department cannot revise the maximum hours standards.

#### Section 553.233 "Regular rate" defined.

The City of Plano, Texas, and the Texas Municipal League suggested that the proposed rule be revised to permit employers who utilize the fluctuating workweek method of calculating overtime compensation for salaried employees to pay the *half-time premium* in compensatory time. They believe that, under the proposed rule, the fluctuating workweek method can be utilized only by public employers who pay for overtime hours worked in cash.

Section 7(o) of the FLSA, as amended, requires that public agency employees receive compensatory time ". . . at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required . . ." (Emphasis added.) In view of this statutory language, the Department has not revised this section.

#### Classification—Executive Order 12291

These regulations, 29 CFR Part 553, have been reviewed in accordance with Executive Order 12291. The Department has concluded that these regulations should be deemed a "major rule" for purposes of the Executive Order. It has also been determined, in accordance with the Executive Order, that of the available alternatives which are consistent with the intent and purposes of the Fair Labor Standards Act (FLSA), these regulations provide the greatest net benefit to society and involve the least net cost.

#### Final Regulatory Impact Analysis

##### Introduction

The Preliminary Regulatory Impact Analysis for the proposed 29 CFR Part 553 concerning the application of the Fair Labor Standards Act (FLSA) to employees of State and local governments was published for comment in the *Federal Register* on July 16, 1986. The only comments received were from the Director of the Office of Management and Budget for the City of New York.

##### Discussion of Comments

The City of New York contends that the Department's analysis does not take into account: (1) The administrative cost of implementing the FLSA; (2) the increases in wages from 1980 to the present; and (3) the costs associated with a continual accumulation of compensatory time. There follows a summary of the comments and the

Department's analysis of these comments.

**A. Administrative cost.** The City of New York contends that State and local governments will have to redesign and develop recordkeeping, payroll, and classification systems to be in compliance with the FLSA. Although State and local governments will have to maintain basic information on employee hours of work, wages, and compensatory time, the format and method of maintaining such data is discretionary. The Department believes that much of this information is readily available within the existing record systems of State and local governments. While it is possible that the recordkeeping requirements may impose some additional costs on some governments, no data exist with which to estimate such costs.

**B. Wage increases from 1980 to present.** The City of New York contends that the method of updating the 1980 data to 1984 was "artificial", that nothing was done to adjust the data base to April 15, 1986, and that the adjustment did not take into account changes in collective bargaining agreements. The Department updated the May 1980 data using 1985 data from the Current Population Survey conducted monthly by the Bureau of the Census. The estimated aggregate wages paid in each of the months were computed from the survey data. Assuming the average for 1985 falls around mid-year, changes occurring up to April 1986 would be lagged about three quarters of a year. This is not deemed to have a significant influence on the estimates.

The Department agrees that structural changes could have occurred between May 1980 and April 1986 which affected the use of compensatory time and the number of overtime hours worked. However, there is no data available to indicate either the direction or magnitude of such changes.

**C. Compensatory time banks.** The City of New York states that the Department's estimated cost impact of the 1985 FLSA Amendment's is understated due to the following:

The annual cost estimate appears not to include the cost impact of an employee's ability to accumulate the permissible compensatory time bank of either 240 hours or 480 hours and the cash value of that time. An employee may choose to take the time when it is inconvenient to the employer or continue to accumulate the time until he is ready to separate from service. If the employee's bank is maintained at the permissible cap and the time is not drawn down, the employer will be required to compensate the employee in cash at the higher premium rate; and when that

employee leaves, the employer must cash out the bank at the then existing higher salary rate.

It is agreed that hours accumulated and banked will have to be paid when an employee terminates his or her employment at the rate of pay at termination and that some costs may be incurred due to unplanned terminations and the hiring of new employees. It is our contention that given the delay before any cost effects are felt, governments will manage their functions so as to limit the number of employees who actually leave service with large existing compensatory time balances. This is most easily done in the case of planned separations. Unplanned separations will not likely occur in any significant degree that would warrant a change in the cost analysis methodology. However, any such costs will decrease over time as governments institute policies to expand employment opportunities at straight-time rates and thereby constrain the build-up of compensatory hours banks for which there would be a monetary liability.

In view of the foregoing, the Department has adopted the Preliminary Regulatory Impact Analysis as the Final Regulatory Impact Analysis as set forth below:

#### **I. Methodology for Estimating the Fiscal Impact of the FLSA Overtime Provisions as a Result of the Garcia Decision**

##### *Background*

On February 19, 1985, the U.S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* (*Garcia*) overturned the 1976 *National League of Cities v. Usery* (426 U.S. 833) decision. In the *Garcia* decision, the Court ruled that State and local governments were subject to the minimum wage and overtime provisions of the Fair Labor Standards Act, as amended, (FLSA). As a result of the *Garcia* decision, State and local units of government were required, among other things, to compensate workers who work overtime with cash wages rather than compensatory time off.

The immediate impact of the *Garcia* decision was to bring approximately 13.8 million state and local employees under FLSA coverage of which about 7.5 million were subject to the minimum wage and 6.9 million were subject to overtime compensation. This situation evoked serious concern by State and local government administrators, taxpayers, union officials, and others about the fiscal impact of the *Garcia* decision on these units of government.

Efforts were made by a variety of State, local and city governments,

associations of units of government, union representing State and local government employees, the Congressional Budget Office, and others to measure the fiscal impact of the *Garcia* decision. Some of these estimates were provided to the Department of Labor (DOL) and others were provided to the Congress during hearings in 1985.

These efforts to estimate fiscal impact produced an annual budgetary cost ranging between \$500 million and \$3 billion. For example, the National League of Cities estimated the annual cost to cities of complying with the overtime provisions to be in excess of \$1 billion. The National Public Employer Labor Relations Association estimated the costs to range from \$1 to \$3 billion. The International City Managers Association estimated the additional overtime costs for all local governments to range from \$321 million to \$1.5 billion for the first year. The American Federation of State, County, and Municipal Employees estimated that complying with the overtime provisions would cost State and local governments an additional \$500 to \$700 million on an annual basis. The Congressional Budget Office estimated that the initial annual costs of complying with the minimum wage and overtime provisions of FLSA would run between \$0.5 billion and \$1.5 billion nationwide. The Department of Labor estimated the annual cost of the *Garcia* overtime provision at about \$733 million.

A number of large cities and large states produced cost estimates that, if realized, could result in reduced public service, increases in State or local taxes, or alteration of the kinds of goods and services provided through these units of government. Some effort was made to describe the sources of the estimates provided to DOL and the Congress, but overall there were serious limitations in the various approaches that made the comparisons of impact difficult. Many of the estimates were not supported by statistically reliable data sources and others were based on judgment and intuition rather than acceptable statistical estimating techniques.

As a consequence, DOL initiated a procedure to estimate the fiscal impact of the *Garcia* decision using published statistical data and conventional statistical techniques. What follows is a description of the data sources, assumptions, and methodology underlying the Department's estimates. Since the published data were not developed to directly address the impact questions, several key assumptions were needed to permit the estimates to be made. Commenters are urged to

examine the character of these assumptions in terms of their reasonableness and applicability to the fiscal impact issues.

**Data sources.** The primary data source was the May 1980 Current Population Survey (CPS) of Dual Jobholders in the United States. This survey was conducted by the Bureau of the Census to, among other things, estimate the extent of dual jobholding and the number of scheduled weekly hours worked on the primary job. This permitted estimating the weekly hours of work associated with State and local government employment. Also, important to this estimating procedure were the data collected on several key economic variables and the ability to identify State and local units of government and various occupational groups in the data. The CPS, Dual Jobholders Survey specifically provided the following:

- (1) Hours worked by occupation.
- (2) Premium pay by occupation.
- (3) Overtime hours worked by occupation.
- (4) Employment by occupation in State and local Government.
- (5) Total State and local nonsupervisory wage and salary income.

To further delimit the employees subject to the overtime provisions, criteria employed by the Minimum Wage Study Commission were used to exclude workers exempt under section 13(a)(1) of the FLSA. These criteria were identified in *Volume IV of the Report of the Minimum Wage Study Commission*, June 1981, pp. 235-272.

#### Assumptions

The assumptions used in this methodology are:

- (1) State and local employees who did not self-identify in the CPS survey as receiving premium pay, did not receive any premium pay for overtime work;
- (2) State and local units of government which paid overtime used an overtime rate of 150 percent of the straight time hourly rate for weekly hours in excess of the applicable weekly overtime hours standards;
- (3) Law enforcement and firefighting

personnel had overtime hours and compensation based on DOL regulatory standards under section 7(K) of the FLSA, e.g., 43 for law enforcement and 53 for firefighters;

(4) The May 1980 survey week is representative of the entire calendar year;

(5) There were no significant structural changes, e.g., occupational composition, coverage, etc., between 1980 and 1984 in State and local government employment.

#### Methodology<sup>1</sup>

The estimation methodology involved two separate calculations: (1) estimate the fiscal impact for calendar year 1980; and, (2) update the 1980 estimate to calendar year 1984, the last full year before the 1985 FLSA Amendments.

The first step in the process involved separating exempt executive, administrative and professional employees as defined by FLSA Section 13(a)(1) from nonexempt employees. Salary tests under Regulation 541 were applied to certain occupations to exclude employees exempt under FLSA section 13(a)(1). The occupation and salary test application was selected for May 1980 according to criteria employed by the Minimum Wage Study Commission in its study of the section 13(a)(1) exemption as it applies to data from the Current Population Survey (CPS).

The CPS data were then used to identify State and local government employees by occupation (police officers, fire fighters, and others) and to estimate the hours worked in excess of the applicable weekly hours standard—53 hours for fire fighters, 43 hours for police officers and 40 hours for all other employees.

The next step was to extract from the CPS data the number of employees who received premium pay, e.g., cash overtime wages. We assumed that those who received premium pay were compensated at a rate of at least time and one-half the regular rate.

The estimate for calendar year 1980 was then based on an assumed overtime

compensation rate of 150 percent of the straight time rate for hours exceeding the applicable hours standard. Multiplying the weekly estimate by 52 produced an annual overtime compensation rate of \$433 million.

To update the 1980 rate to 1984, the total annual wage bill for State and local employees was estimated utilizing CPS data. Then, the total annual wage bill for these employees was estimated for 1984. The changes in the 1980 and 1984 estimates were calculated by State and local categories. The percentage changes were then applied to each category and summed for a total projected annual cost in 1984 of \$733 million.

Separate estimates were made of the minimum wage impacts. Examination of wage structure data from the 1984 CPS indicated that about 2.9 percent of State and local employees earned less than \$3.35 per hour. Raising the wages of these 280,000 workers to \$3.35 per hour would produce an annual cost to State and local government of about \$396 million. This annual cost is about three tenths of one percent of the total annual wage bill of nonsupervisory State and local employees.

These fiscal impact estimates exclude Puer Ricoto, the Virgin Islands, and American Samoa because data limitations did not permit independent estimates for these jurisdictions. However, the Commonwealth of Puerto Rico did provide an estimated fiscal impact of the *Garcia* decision of \$150 million for the first year.

#### Summary

These estimates described the annual fiscal impact of the *Garcia* decision of State and local government units. The annual wage bill for these units of government would increase approximately \$733 million due to compliance with the FLSA's overtime compensation provisions and about \$396 million to comply with the FLSA minimum wage requirements, assuming no structural changes in the personnel practices of State and local governments (see Tables I and II). The total annual wage bill impact of *Garcia* decision is estimated at \$1,129 million.

<sup>1</sup> See Appendix I for alternative methodology.

TABLE I.—PROJECTED ANNUAL COST, AS OF MAY 1980 AND ANNUAL AVERAGE COSTS FOR 1984 FOR PAYMENT OF OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT PRIOR TO THE 1985 FLSA AMENDMENTS

[Full-time nonsupervisory workers in State and local government, May 1980\*]

	Total full-time nonsupervisory workers (in thousands) <sup>1</sup>	Weekly hours standard <sup>2</sup>	Worked over hours standard, May 1980 and not paid premium		Projected annual cost, May 1980 (in millions)	Projected annual cost, 1984
			Workers (in thousands) <sup>3</sup>	Average hours over <sup>4</sup>		
State and local government .....	5,001		364		\$433	733
Firefighters .....	112	53	80	7.9	85	103
Policemen .....	340	43	63	7.3	106	174
Other .....	4,549	40	221	10.4	242	456
State .....	1,546	40	86	8.4	99	136
Local .....	3,003	40	136	11.5	142	320

Note: \*Details may not add to totals due to rounding. Due to data limitations, these estimates exclude Puerto Rico, the Virgin Islands, and American Samoa. On March 27, 1985, Representatives of the Commonwealth of Puerto Rico provided an estimate to the Department of Labor of the impact of the *Garcia* decision on the Commonwealth. "The additional prospective cost, including the effect on fringe benefits, would be approximately \$150 million for the first year."

Source: Current Population Survey, May 1980 with Dual Job Supplement and 1984 monthly data.

<sup>1</sup> Estimate of *only fulltime* nonsupervisory workers in State and local government.

<sup>2</sup> Weekly hours standard applying to State and local government workers.

<sup>3</sup> Estimate of workers exceeding the weekly hours standard.

<sup>4</sup> Average hours exceeding the weekly hours standard.

TABLE II.—ESTIMATED NUMBER OF EMPLOYEES AFFECTED AND ESTIMATED ANNUAL COST OF MEETING THE MINIMUM WAGE STANDARD UNDER THE FAIR LABOR STANDARDS ACT, FOR STATE AND LOCAL GOVERNMENT, 1984 \*

	Nonsupervisory <sup>1</sup> wage and salary workers (in thousands)	Annual wage <sup>2</sup> bill for nonsupervisory employees (in millions)	Employees earning <sup>3</sup> less than \$3.35 (in thousands)	Percent of <sup>4</sup> employees earning less than \$3.35	Annual cost <sup>5</sup> (in millions)	Percent of <sup>6</sup> annual wages
State and local government .....	8,660	\$139,164	260	2.9	\$396	0.3
State Government .....	2,420	34,764	82	3.4	156	.4
Local Government .....	6,440	104,400	178	2.8	242	.2

Note: \*Details may not add to totals due to rounding. (See footnote on Table I).

Source: Current Population Survey, 1984.

<sup>1</sup> The number of nonsupervisory wage and salary workers in units of State and local government.

<sup>2</sup> Annual wage bill in 1984 for all nonsupervisory employees in units of State and local government.

<sup>3</sup> The estimate of the number of State and local employees earning *less than* \$3.35 per hour.

<sup>4</sup> The estimated percent of State and local employees earning *less than* \$3.35 per hour.

<sup>5</sup> The annual cost of raising the State and local employees earning less than \$3.35 per hour to \$3.35 per hour.

<sup>6</sup> The percent increase in the total wage bill of raising all State and local employees to \$3.35 per hour.

## II. Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments

### Cost Impact of Section 7(o)

Section 7(o) of the FLSA Amendments provided some relief from the imposition of the overtime provisions of the FLSA by permitting, within defined limits, compensatory time off in lieu of monetary payment. Such compensatory time is earned at a rate of not less than one and one-half hours for each hour of overtime. It is this provision which requires a change in the methodologies followed in estimating the impact for the *Garcia* decision.

Section 7(o) permits covered and nonexempt employees engaged in public safety, emergency response, and

seasonal activities to accrue 480 hours of compensatory time. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time. This provides State and local governments and individual employees some flexibility which would not otherwise be available as a result of the *Garcia* decision. The cost effect of this provision will depend upon the necessity for governments to provide a given service. For example, certain services such as police protection must be maintained consistently, and as a result, the hours of work committed to that activity cannot be reduced or postponed, and additional people with necessary skills are not immediately available. In other words, the demand

for and supply of people providing that service are inelastic. Another factor which must be taken into account is the propensity of employees to "bank" or save their compensatory time earned. To the extent that employees "bank" their compensatory time, there will be a delay in the cost impact of the FLSA Amendments. Thus, for the cost estimate, it is necessary to:

- Identify employees qualifying for 480 hours of compensatory time—those engaged in public safety, emergency response, and seasonal activities. (All other covered and non exempt employees qualify for 240 hours of compensatory time.)

- Identify occupations for which the demand and supply is inelastic.
- Identify the accrual or "banking" tendencies of State and local government employees with regard to compensatory time earned.

*Employees qualifying for 480 hours of compensatory time:* For estimating purposes, the two-digit industry classifications (1970 census) and three-digit occupational classifications (1970 census) were reviewed, and employees in the following industries and occupations were designated under this category. (Note: These classifications were selected for estimating purposes only. The Department does not intend to imply that employees in these industries meet the statutory requirements to be considered engaged in "public safety," "emergency response" or "seasonal" activities under section 7(o) of the FLSA.):

Industry	Census code
Entertainment and recreation.....	41
Forestry and fisheries.....	47
Agricultural services.....	02

Occupations	Census code
Telephone line installers and splicers.....	554
Gardeners and groundskeepers.....	755
Chain, rod & ax persons; surveying.....	605
Fire fighters, fire protection.....	961
Marshals and constables.....	963
Police officers and detectives.....	964
Sheriffs and bailiffs.....	965

*Employees in occupations with inelastic demand and supply:* For estimating purposes, the three digit occupational classifications were reviewed, and the following occupations were included in this category:

Occupations	Census code
Radio operators.....	171
Dispatchers.....	315
Estimators and investigators, not elsewhere classified.....	321
Insurance adjusters, examiners, and investigators.....	326
Computer and peripheral equip. oper.....	343
Inspectors, scalers, and graders; log and lumber.....	450
Inspectors, not elsewhere classified.....	452
Data processing machine repair persons.....	475
Stationary firs.....	666
Bus drivers.....	703
Conductors and motor operators, urban rail transit.....	704
Fire fighters, fire protection.....	961
Marshals and constables.....	963
Police officers and detectives.....	964
Sheriffs and bailiffs.....	965

*Accrual of compensatory time:* Data on the accrual of compensatory time by State and local government employees are not readily available. Because

Federal government employees can accumulate and carry-over from year to year a maximum of 240 hours of annual leave, their "banking" pattern was selected as a proxy for the accrual tendencies of State and local government employees. Although a distribution of all Federal employees by the number of hours of annual leave accrued could not be obtained, such data were obtained for all DOL employees and used as the proxy for the propensity of State and local government employees to accrue compensatory time. It should be noted that the actual accrual pattern of State and local government employees may differ from that of DOL employees. This could be due to such factors as dissimilar workforce characteristics (staffing patterns, length of service, occupations, age composition, etc.) or employee fringe benefits (paid leave, severance pay, etc.).

*Methodology.* The estimating procedure is the same as that described above for the *Garcia* decision with the following modifications:

1. Employees were grouped according to the applicable hours accrual cap—480 or 240 hours.

2. Employees in occupations for which the demand and supply were deemed inelastic were separated from other employees. Schematically, we have:

(A) 480 hours accrual group.

(1) Employees in designated two digit industries.

(2) Employees in designated three digit occupational classes.

(a) Employees in occupations with inelastic demand and supply.

(B) 240 hours accrual group.

(1) Employees in designated two digit industries.

(2) Employees in designated three digit occupational classes.

(a) Employees in occupation with inelastic demand and supply.

3. Based on the employee's scheduled weekly hours of work (CPS data), the number of hours in excess of the applicable "weekly hours standard" were calculated. For firefighters, the "applicable weekly standard" is 53 hours (the 212 hour exemption of section 7(k) for 28 day work periods divided by 4 weeks); for law enforcement, the "standard" is 43 hours (the 171 hour exemption of section 7(k) for 28 day work periods divided by 4 weeks); and for all other employees, the "weekly hours standard" is 40 hours.

4. For each of the categories,

employees were distributed by the number of hours worked in excess of the applicable "weekly hours standard."

5. The estimated propensity to accrue compensatory time was applied to each interval in the distributions of step 4. This process indicates the points in time when the applicable compensatory hours cap or accrual limit is reached. The assumptions are that State and local government employees (1) work the reported scheduled weekly hours (CPS) every week and (2) "bank" their compensatory time in the same pattern exhibited by DOL employees. For example, assume 2,600 law enforcement people worked 51 hours a week, which is 8 hours in excess of the applicable "weekly standard," and the estimated propensity to accrue compensatory time shows that 20 percent save all hours. Thus, in the example, 520 or 20% of the 2,600 employees will reach their 480 hours cap in 40 weeks (8 hrs. x 40 wks. = 320 hrs.)

6. For all employees in occupations with inelastic demand and supply, the additional cost attributable to overtime hours worked by those who reach the accrual limit (320 hours worked for the 480 hour limit and 160 hours worked for the 240 hour limit) or upon reaching a lower accrual level indicated by their propensity to save hours was computed at one-half times the employee's regular wage rate. Prior to reaching these limits, there was no cost required by the overtime hours. By definition, the services provided by these employees have to be provided and there is no supply of additional labor available at straight time rates. Continuing the example in step 5, the 520 employees reached their accrual limit in the 40th week; after that, all hours worked in excess of their applicable "weekly standard" would be paid for at time and one-half their regular rates of pay.

*Note.*—For employees other than those in occupations with inelastic demand and supply, overtime hours worked in excess of their accrual limit do not result in additional costs under this methodology. For these employees, it is assumed that State and local governments can and will make adjustments for such hours. Although unlikely, such adjustments may result in a change in the level or mix of services provided to the public. If such adjustments occur, they would not be costless to the population segments dependent on these services. In fact, while we cannot estimate the economic costs of these changes, it is reasonable to assume that reduced services or changes in the mix of

services may impose direct and indirect costs on individuals in the economy and possibly identifiable groups in the society. For example, if the governmental unit reduces the hours of operation of the local park, swimming pools, or other recreational facility, those who use these facilities will receive fewer benefits from reduced utilization. If the jurisdiction reduces the number of inspections (building, food, safety, automobile, etc.), one could reasonably assume that additional costs would accrue to the population segments protected by these activities.

In summary, we recognize that the cost impacts provided by the regulatory analysis do not identify or measure these opportunity costs, if any, attributable to actions that State and local government may take in response to the changes in the legislation. (Commenters are urged to examine this assumption in terms of its reasonableness and effect on the estimates of fiscal impact.)

7. The costs for all covered and nonexempt employees were computed on an annualized basis for three month intervals commencing with the April-June 1986. As indicated in Table III below, the added cost incurred during the first quarter, on an annualized basis is estimated at \$119 million. In the second quarter as more employees reach their "accrual limit," the cost of the regulations has increased to \$218 million on an annual basis. By the seventh quarter, virtually the full cost of the regulations is incurred, adding an estimated \$316 million per year to State and local government expenses.

#### Summary

The 1985 FLSA Amendments reduced the fiscal impact on State and local units of government. The fiscal impact<sup>2</sup> is summarized as follows:

	Overtime payroll costs
Cost of Garcia Decision (1984 data reference).	\$733 million.
Savings resulting from 1985 Amendments (1985 data reference).	517 million.
Remaining cost .....	216 million.

<sup>2</sup> The 1985 FLSA Amendments did not change the status of minimum wage workers in relation to the Garcia decision with the possible exception of the use of volunteers. Therefore, there is no minimum wage payroll cost impact estimated for the 1985 FLSA Amendments. The estimated minimum wage impact of the Garcia decision for calendar year 1984 was \$396 million.

TABLE III.—ESTIMATED SCHEDULE OF FISCAL PAYMENTS TO MEET OVERTIME STANDARDS OF THE FAIR LABOR STANDARDS ACT, WITH BANKING OF COMPENSATORY HOURS PROVIDED UNDER THE 1985 AMENDMENTS

Year and quarter	Annual rate of Payment (millions of 1985 dollars) <sup>1</sup>	
1986:		
April-June.....	\$119	
July-September.....	218	
October-December.....	237	
1987:		
January-March .....	289	
Estimated fiscal payments—April 1986-March 1987 .....		\$216 <sup>2</sup>
April-June.....	310	
July-September.....	310	
October-December.....	316	
1988:		
January-March .....	316	
Estimated fiscal payments—April 1987-March 1988 .....		313 <sup>2</sup>
Projected annual cost for subsequent years .....		332
Projected annual savings for subsequent years .....		401 <sup>3</sup>

Source: Current Population Survey.

<sup>1</sup> Constant person-hours assumed.

<sup>2</sup> From April 1986 through March 1987 approximately \$216 million will be paid in overtime premium payments; from April 1987 through March 1988, approximately \$313 million will be paid in overtime premium payments.

<sup>3</sup> The estimate for the Garcia decision was \$733 million. The projected annual savings estimate assumes that state and local governments did not change any of their employment practices to accommodate the overtime costs associated with the decision.

#### III. Volunteers

State and local governments provide a significant portion of their services to the public through the efforts of volunteers in a wide range of activities. Volunteers are commonly engaged in firefighting, health care, education, social services, crime prevention, environmental work, and other civic functions.

While interpretations issued under the FLSA traditionally have provided for the exclusion of volunteers from the Act's coverage, the criteria for such exclusion reflected volunteer practices in the private sector. Following the Garcia decision, the Congress recognized that certain legitimate practices with respect to public agency volunteers could bring into question their status as bona fide volunteers, rather than employees, under FLSA and thus result in increased

monetary liabilities for State and local governments. The 1985 Amendments addressed this issue by providing special rules on volunteers for the public sector which permit the continuation of such common practices as reimbursement for expenses, reasonable benefits, and nominal fees.

However, under the 1985 Amendments employees of public agencies, as is the case in the private sector, continue to be precluded from "volunteering" extra hours of work in their usual occupations for their employers. While it is not clear how widespread this practice is today, the requirement that such extra hours be compensated at the minimum wage will result in some additional cost to State and local governments.

The Department in examining the issue of volunteers under the 1985 Amendments, has concluded that no reliable, comprehensive data exist which could be used to evaluate the impact on public agencies of FLSA coverage with respect to individuals who volunteer to perform services for public agencies for less than the minimum wage and who will now be entitled to the full minimum wage. However, it is clear that any potential cost impact of the Garcia decision has been reduced as a result of the 1985 Amendments and final implementing regulations. Under the final rules, public agency volunteers may receive reimbursement for any expenses they incur, including payments for meals, transportation, tuition, books, supplies, or other materials essential to their training or services. They may receive certain fringe benefits, such as insurance benefits provided to employees who perform similar work. Further, such volunteers may be given a fee, or stipend, provided that the fee is "nominal" in the context of the economic circumstances in which it is provided. The final rules are consistent with the statutory language and legislative history of the 1985 Amendments and thus do not diminish the savings to State and local governments with respect to volunteers which resulted from these amendments. While no reliable data is available, it is apparent, therefore, that the 1985 Amendments permit greater numbers of individuals to be considered public agency volunteers under the FLSA than would have been the case prior to the Amendments.

#### Appendix I—Alternative Methodology for Estimating Garcia Decision Impact

The Garcia decision impact was

estimated as described in Section I of this Final Regulatory Impact Analysis. These estimates were generated in early 1985 in conjunction with a series of external efforts to measure the fiscal cost of implementing the *Garcia* decision. A number of assumptions were incorporated into the estimation procedure because of the limitations in the available data and the time constraints on the estimation process. The DOL estimates and those provided by external organizations were incorporated into the 1986 FLSA 4(d)(1) report to the Congress.

The 1985 FLSA Amendments provided flexibility to State and local governmental units in the utilization of overtime work. The methodology used in the analysis of the cost impact of the 1985 FLSA Amendments is described in Section II of this Final.

#### Regulatory Impact Analysis

That methodology is based on the same primary data sources and in principle the same set of assumptions used in the impact analysis of the *Garcia* decision. However, it included an occupational dichotomy not used in the impact estimates for the *Garcia* decision. We sorted the occupations in State and local government into those that are relatively inelastic in demand and supply and those that are relatively elastic. The idea was that some occupations afforded governmental units more flexibility in terms of utilizing replacement workers or, in some cases, in delivering the type and level of services found in the pre-Amendment period. To the extent that governmental units adopted this flexibility, they could delay the fiscal impact of the overtime provisions of the 1985 Amendments until some time in the future. In other words, if certain occupations were characterized as relatively flexible in terms of when the service was provided by the governmental unit, the governmental unit could transfer the fiscal impact into future time periods. We have in fact assumed that governmental units will adopt a variety of adjustment mechanisms described in Section II to permit the fiscal impact to be accommodated over a period of time.

The following cost impact estimates for this alternative methodology are based on an adaptation of the original *Garcia* cost impact estimates by incorporating the occupational dichotomy described above. While useful in a comparative analysis of cost impact, it is our belief that the savings estimates presented below are probably at the lower end of a continuum. The estimation process used assumed a simple dichotomy of elastic and inelastic demand and supply categories.

There is undoubtedly a continuous range of occupational elasticity along the continuum of inelastic to elastic. Available data, however, do not permit us to subdivide the elastic segment into these various gradations and therefore, they are still considered in the perfectly elastic (very flexible) category. If this variability in elasticity could be estimated, it would probably yield greater savings.

In any event, with the incorporation of the occupation dichotomy into the original *Garcia* estimation methodology, the impact estimates are as follows:

#### Overtime Payroll Costs

Cost of <i>Garcia</i> Decision (1984 data reference).	\$300 million.
Savings resulting from 1985 Amendments.	\$84 million.
Remaining Cost.....	\$216 million.

#### Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 requires agencies to prepare regulatory flexibility analyses, and to develop alternatives whenever possible, in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The following analysis, in addition to the cost impact analysis summarized above, assessed the impact of these regulations on small entities as required by the Act.

#### (1) Reasons Why Action by Agency is Being Considered

On November 13, 1985 the Fair Labor Standards Amendments (the amendments) were enacted into law. These amendments changed certain provisions of the Fair Labor Standards Act (FLSA) as they related to employees of States and local governments. Section 6 of the amendments requires the Secretary of Labor to promulgate such regulations as may be required to implement the amendments. This final rule is being issued to implement sections 2, 3, 4, 5, and 6 of the amendments.

#### (2) Objectives of and Legal Basis for Rule

This final rule is issued pursuant to section 6 of the FLSA amendments of 1985. Its objective is to guide State and local government employers and employees in applying the 1985 Amendments.

#### (3) Number of Small Entities Covered Under Rule

This final rule is applicable to all State and local government employers (approximately 83,000) covered by the

provisions of the Fair Labor Standards Act (29 U.S.C. 201 et. seq.). Approximately 50,000 of such employers would be classified as small governmental jurisdictions under the Regulatory Flexibility Act (governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand).

#### (4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The final rule establishes recordkeeping requirements for State and local government employers with respect to the maintenance and preservation of records for each public employee subject to the compensatory time and compensatory time off provisions of section 7(o) of the Act, as well as for each employee subject to the partial overtime exemption in section 7(k) of the Act.

#### (5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

There is no duplication of existing Wage-Hour requirements. Certain similar recordkeeping is required by the Internal Revenue Service (IRS) in 26 CFR Part 31. However, while the FLSA and IRS recordkeeping require similar information, the FLSA regulations do not require duplication of those records required by IRS.

#### (6) Differing Compliance and Recordkeeping Requirements

The language set forth in this regulation closely tracks the requirements imposed by the language of the FLSA amendments and accompanying legislative history. The burdens imposed by these requirements on employers are generally those imposed by statute, and the Department of Labor has no discretion to make exceptions under the statutory scheme.

However, in developing the proposed rule, which was published on April 18, 1986 (51 FR 13402), the Department conducted informal discussions with employer and employee representatives to explore possible regulatory alternatives. The goal was to insure that the regulations were fully consistent with the statutory language and legislative history of the 1985 Amendments.

The Department has concluded that the final regulations closely track the statutory requirements and reflect legislative intent.

As for the minimal recordkeeping requirements included in this regulation, it was decided that a standard format would not be required of employers.

Employers can thus decide which method of recordkeeping best suits their circumstances. This will help those small entities that have limited resources for recordkeeping. Under the regulations, small entities can maintain required information in any order or form deemed most appropriate to their needs.

**(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements**

As noted above, the recordkeeping requirements in the final rule simplify the task of employers now covered under the Act, especially small entities, by permitting the use of any format for collecting and preserving essential information which meets the needs of FLSA enforcement. No comments were received on these recordkeeping requirements.

**(8) Use of Other Standards**

Appropriate alternative standards that would impose even less regulatory burdens on covered employers, especially small entities, are not available.

**(9) Exemptions of Small Entities From Coverage of the Rule**

An exemption from the recordkeeping requirements of the final rule for small entities is not feasible, since records are necessary for the enforcement of the Act regardless of the size of the entity.

**Paperwork Reduction Act**

Information collection requirements contained in the regulation (§§ 553.50 and 553.51) 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 OMB control number 1215-0017.

**Conclusion**

The Department has determined in accordance with Executive Order 12291 that this regulation falls within the authority delegated to the Secretary of Labor by the Fair Standards Act (FLSA) (29 U.S.C. 201 et. seq.). The Department has also determined that this regulation is consistent with the congressional intent of the application of the FLSA to employees of the State and local governments. Finally, it has been determined that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention given to the comments.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour

Division, Employment Standards Administration, U.S. Department of Labor.

**List of Subjects in 29 CFR Part 553**

Minimum wages, Overtime pay, State and local government employees, Volunteers, Firefighters, Government employees, Law enforcement officers, Prisons, Wages.

For reasons set forth above, 29 CFR Part 553 is revised as set forth below.

Signed at Washington, DC, on this 12th day of January, 1987.

William E. Brock,

Secretary of Labor.

Susan R. Meisinger,

Deputy Under Secretary for Employment Standards.

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**PART 553—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS**

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**Subpart A—General**

**Introduction**

**§ 553.1 Definitions.**

(a) "Act" or "FLSA" means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219).

(b) "1985 Amendments" means the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150).

(c) "Public agency" means a State, a political subdivision of a State or an interstate governmental agency.

(d) "State" means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other Territory or possession of the United States (29 U.S.C. 203(c) and 213(f)).

#### § 553.2 Purpose and scope.

(a) The 1985 Amendments to the Fair Labor Standards Act (FLSA) changed certain provisions of the Act as they apply to employees of State and local public agencies. The purpose of Part 553 is to set forth the regulations to carry out the provisions of these Amendments, as well as other FLSA provisions previously in existence relating to such public agency employees.

(b) The regulations in this part are divided into three subparts. Subpart A interprets and applies the special FLSA provisions that are generally applicable to all covered and nonexempt employees of State and local governments. Subpart A also contains provisions concerning certain individuals (i.e., elected officials, their appointees, and legislative branch employees) who are excluded from the definition of "employee" and thus from FLSA coverage. This subpart also interprets and applies sections 7(o), and 7(p)(2), 7(p)(3), and 11(c) of the Act regarding compensatory time off, occasional or sporadic part-time employment, and the performance of substitute work by public agency employees, respectively.

(c) Subpart B of this part deals with "volunteer" services performed by individuals for public agencies. Subpart C applies various FLSA provisions as they relate to fire protection and law enforcement employees of public agencies.

#### § 553.3 Coverage—general.

(a)(1) In 1966, Congress amended the FLSA to extend coverage to State and local government employees engaged in the operation of hospitals, nursing homes, schools, and mass transit systems.

(2) In 1972, the Education Amendments further extended coverage to employees of public preschools.

(3) In 1974, the FLSA Amendments extended coverage to virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 legislation.

(b) Certain definitions already in the Act were modified by the 1974 Amendments. The definition of the term "employer" was changed to include public agencies and that of "employee" was amended to include individuals employed by public agencies. The definition of "enterprise" contained in

section 3(r) of the Act was modified to provide that activities of a public agency are performed for a "business purpose." The term "enterprise engaged in commerce or in the production of goods for commerce" defined in section 3(s) of the Act was expanded to include public agencies.

#### Section 3(e)(2)(C) Exclusions

##### § 553.10 General.

Section 3(e)(2)(C) of the Act excludes from the definition of "employee", and thus from coverage, certain individuals employed by public agencies. This exclusion applies to elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. In addition, the 1985 Amendments exclude employees of legislative branches of State and local governments. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency.

##### § 553.11 Exclusion for elected officials and their appointees.

(a) Section 3(e)(2)(C) provides an exclusion from the Act's coverage for officials elected by the voters of their jurisdictions. Also excluded under this provision are personal staff members and officials in policymaking positions who are selected or appointed by the elected public officials and certain advisers to such officials.

(b) The statutory term "member of personal staff" generally includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such official. The term typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

(c) In order to qualify as personal staff members or officials in policymaking positions, the individuals in question must not be subject to the civil service laws of their employing agencies. The term "civil service laws" refers to a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment of employees under civil service, except for cause, is provided. In addition, such personal staff members must be appointed by, and serve solely

at the pleasure or discretion of, the elected official.

(d) The exclusion for "immediate adviser" to elected officials is limited to staff who serve as advisers on constitutional or legal matters, and who are not subject to the civil service rules of their employing agency.

##### § 553.12 Exclusion for employees of legislative branches.

(a) Section 3(e)(2)(C) of the Act provides an exclusion from the definition of the term "employee" for individuals who are not subject to the civil service laws of their employing agencies and are employed by legislative branches or bodies of States, their political subdivisions or interstate governmental agencies.

(b) Employees of State or local legislative libraries do not come within this statutory exclusion. Also, employees of school boards, other than elected officials and their appointees (as discussed in § 553.11), do not come within this exclusion.

#### Section 7(o)—Compensatory Time and Compensatory Time Off

##### § 553.20 Introduction.

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

##### § 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation,

compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) Pursuant to—

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A) (ii). Except as provided in the previous sentence, the provisions of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3) (A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) Who has accrued compensatory time

off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) The term "overtime compensation" means the compensation required by subsection (a), and

(B) The terms "compensatory time" and "compensatory time off" means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

**§ 553.22 "FLSA compensatory time" and "FLSA compensatory time off".**

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

**§ 553.23 Agreement or understanding prior to performance of work.**

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement

between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement of understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time are consistent so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April

15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an

agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

**§ 553.24 "Public safety", "emergency response", and "seasonal" activities.**

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in "public safety", "emergency response", or "seasonal" activity. Employees whose work includes "seasonal", "emergency response", or "public safety" activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve "seasonal", "emergency response", or "public safety" activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in "public safety", "emergency response", or "seasonal" activities, who transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

(c) "Public Safety Activities": The term "public safety activities" as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in §§ 553.210 (a) and (b) and § 553.211 (a) thru (c), and (f). An employee whose work regularly

involves such activities will qualify for the 480-hour accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in "public safety" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.201)

(d) "Emergency Response Activity": The term "emergency response activity" as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with "public safety" and "seasonal" activities, an employee must regularly engage in "emergency response" activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in "emergency response" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.215.)

(e) (1) "Seasonal Activity": The term "seasonal activity" includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number of compensatory time hours available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather.

As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240 compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

**§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").**

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time off and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other compensatory time" (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable

period of his or her making a request for use of such time.

(c) *Reasonable Period.* (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) *Unduly Disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

**§ 553.26 Cash overtime payments.**

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See § 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR Part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at

which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include ". . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause." As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

**§ 553.27 Payments for unused compensatory time.**

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than—

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase "last 3 years of employment" means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as a new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term "regular rate" is defined in § 778.108 of 29 CFR Part 778. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does

not require employers to compensate employees on an hourly basis.

**§ 553.28 Other compensatory time.**

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered "other" compensatory time. The term "other" compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a nonovertime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are "overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered "other" compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of "other" compensatory time.

(d) The FLSA does not require that the rate at which "other" compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which "other" compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to "other" compensatory time as described above.

**Other Exemptions**

**§ 553.30 Occasional or sporadic employment—section 7(p)(2).**

(a) Section 7(p)(2) of the FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the

same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability under the Act.

(b) "Occasional or sporadic". (1) The term "occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee's regular work.

(2) In order for an employee's occasional or sporadic work on a part-time basis to qualify for exemption under section 7(p)(2), the employee's decision to work in a different capacity must be made freely and without coercion, implicit or explicit, by the employer. An employer may suggest that an employee undertake another kind of work for the same unit of government when the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

(3) Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (e.g., concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of State or local government agencies even where the need can be anticipated because it recurs seasonally (e.g., a holiday concert at a city college, a program of scheduled sports events, or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly

works additional hours on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

(c) "Different capacity".

(1) In order for employment in these occasional or sporadic activities not to be considered subject to the overtime requirements of section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, i.e., it must not fall within the same general occupational category.

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* (except in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.

(3) For example, if a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer and subject to the Act's overtime requirements because it is not in a "different capacity". This would be the case even though the work was "occasional or sporadic", and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a "different capacity".

(4) However, if a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on the regular job. A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity.

(5) In addition, any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.)

will not be considered as employment in a "different capacity." However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a "different capacity", provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

#### § 553.31 Substitution—section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done.

Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

#### § 553.32 Other FLSA exemptions.

(a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain employees of public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.

(b) Section 7(k) of the Act provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). In addition, section 13(b)(20) provides a complete overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement activities, if the public agency employs less than five employees in such activities. (See Subpart C of this Part.)

(c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as these terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

(d) Section 7(j) of the Act provides that a hospital or residential care establishment may, pursuant to a prior agreement or understanding with an employee or employees, adopt a fixed work period of 14 consecutive days for the purpose of computing overtime pay in lieu of the regular 7-day workweek. Workers employed under section 7(j) must receive not less than one and one-half times their regular rates of pay for all hours worked over 8 in any workday, and over 80 in the 14-day work period. (See § 778.601 of this Title.)

(e) Section 13(a)(3) of the Act provides a minimum wage and overtime pay exemption for any employee employed by an amusement or recreational establishment if (1) it does not operate for more than 7 months in any calendar year or (2) during the preceding calendar year, its average receipts for any 6 months of such year were not more than 33 1/3 percent of its average receipts for the other 6 months of such year. In order to meet the requirements of section 13(a)(3)(B), the establishment in the previous year must have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months. State and

local governments operate parks and recreational areas to which this exemption may apply.

(f) Section 13(b)(1) of the Act provides an exemption from the overtime pay requirements for "Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." (recodified at section 3102, 49 U.S.C.). With regard to State or local governments, this overtime pay exemption may affect mass transit systems engaged in interstate commerce. This exemption is applicable to drivers, driver's helpers, loaders, and mechanics employed by a common carrier whose activities directly affect the safety of operation of motor vehicles in the transportation on the public highways of passengers or property. (See Part 782 of this title.)

(g) Section 7(n) of the Act provides that, for the purpose of computing overtime pay, the hours of employment of a mass transit employee do not include the time spent in charter activities if (1) pursuant to a prior agreement the time is not to be so counted, and (2) such charter activities are not a part of the employee's regular employment.

(h) Additional overtime pay exemptions which may apply to employees of public agencies are contained in sections 13(b)(2) (employees of certain common carriers by rail), 13(b)(9) (certain employees of small market radio and television stations), and section 13(b)(12) (employees in agriculture) of the Act. Further, section 13(a)(6) of the Act provides a minimum wage and overtime pay exemption for agricultural employees who work on small farms. (See Part 780 of this Title.)

#### Recordkeeping

##### § 553.50 Records to be kept of compensatory time.

For each employee subject to the compensatory time and compensatory time off provisions of section 7(o) of the Act, a public agency which is a State, a political subdivision of a State or an interstate governmental agency shall maintain and preserve records containing the basic information and data required by § 516.2 of 29 CFR Part 516 and, in addition:

(a) The number of hours of compensatory time earned pursuant to section 7(o) each workweek, or other applicable work period, by each employee at the rate of one and one-half hour for each overtime hour worked;

(b) The number of hours of such compensatory time used each workweek, or other applicable work period, by each employee;

(c) The number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and

(d) Any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off. If such agreement or understanding is not in writing, a record of its existence must be kept.

**§ 553.51 Records to be kept for employees paid pursuant to section 7(k).**

For each employee subject to the partial overtime exemption in section 7(k) of the Act, a public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall maintain and preserve records containing the information and data required by § 553.50 and, in addition, make some notation on the payroll records which shows the work period for each employee and which indicates the length of that period and its starting time. If all the workers (or groups of workers) have a work period of the same length beginning at the same time on the same day, a single notation of the time of day and beginning day of the work period will suffice for these workers.

**Subpart B—Volunteers**

**§ 553.100 General.**

Section 3(e) of the Fair Labor Standards Act, as amended in 1985, provides that individuals performing volunteer services for units of State and local governments will not be regarded as "employees" under the statute. The purpose of this subpart is to define the circumstances under which individuals may perform hours of volunteer service for units of State and local governments without being considered to be their employees during such hours for purposes of the FLSA.

**§ 553.101 "Volunteer" defined.**

(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord

with sections 3(e)(4) (A) and (B) of the FLSA and the guidelines in this subpart.

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

**§ 553.102 Employment by the same public agency.**

(a) Section 3(e)(4)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.

(b) Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

**§ 553.103 "Same type of services" defined.**

(a) The 1985 Amendments provide that employees may volunteer hours of service to their public employer or agency provided "such services are not the same type of services which the individual is employed to perform for such public agency." Employees may volunteer their services in one capacity or another without contemplation of pay for services rendered. The phrase "same type of services" means similar or identical services. In general, the Administrator will consider, but not as the only criteria, the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* in determining whether the volunteer activities constitute the "same type of services" as the employment activities. Equally important in such a determination will be the consideration of all the facts and circumstances in a

particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.

(b) An example of an individual performing services which constitute the "same type of services" is a nurse employed by a State hospital who proposes to volunteer to perform nursing services at a State-operated health clinic which does not qualify as a separate public agency as discussed in § 553.102. Similarly, a firefighter cannot volunteer as a firefighter for the same public agency.

(c) Examples of volunteer services which do not constitute the "same type of services" include: A city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; an employee of the city parks department who serves as a volunteer city firefighter; and an office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours as an act of charity.

**§ 553.104 Private individuals who volunteer services to public agencies.**

(a) Individuals who are not employed in any capacity by State or local government agencies often donate hours of service to a public agency for civic or humanitarian reasons. Such individuals are considered volunteers and not employees of such public agencies if their hours of service are provided with no promise expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106. There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies.

(b) Examples of services which might be performed on a volunteer basis when so motivated include helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals or nursing homes; assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer as firefighters or auxiliary police, or volunteer to perform such tasks as working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, soliciting contributions or participating in civic or charitable benefit programs and volunteering other

services needed to carry out charitable or educational programs.

**§ 553.105 Mutual aid agreements.**

An agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies pursuant to said agreement. For example, where Town A and Town B have entered into a mutual aid agreement related to fire protection, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of volunteer service for Town B counted as part of his or her hours of employment with Town A. The mere fact that services volunteered to Town B may in some instances involve performance in Town A's geographic jurisdiction does not require that the volunteer's hours are to be counted as hours of employment with Town A.

**§ 553.106 Payment of expenses, benefits, or fees.**

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for purposes of the FLSA. A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service. (A uniform allowance must be reasonably limited to relieving the volunteer of the cost of providing or maintaining a required uniform from personal resources.) Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.

(c) Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. Likewise, the volunteer status of such individuals is not lost if they are provided books, supplies, or other materials essential to their volunteer

training or reimbursement for the cost thereof.

(d) Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in (f) below.

(e) Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

(f) Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

**Subpart C—Fire Protection and Law Enforcement Employees of Public Agencies**

**General Principles**

**§ 553.200 Statutory provisions: section 13(b)(20).**

(a) Section 13(b)(20) of the FLSA provides a complete overtime pay exemption for "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than

5 employees in fire protection or law enforcement activities, as the case may be."

(b) In determining whether a public agency qualifies for the section 13(b)(20) exemption, the fire protection and law enforcement activities are considered separately. Thus, if a public agency employs less than five employees in fire protection activities, but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, or between employees on duty and employees on leave status, and all such categories must be counted in determining whether the exemption applies. Individuals who are not considered "employees" for purposes of the FLSA by virtue of section 3(e) of the Act "volunteers" including persons who are within the meaning of § 553.101, and "elected officials and their appointees" within the meaning of § 553.11) are not counted in determining whether the section 13(b)(20) exemption applies.

(c) The section 13(b)(20) exemption applies on a workweek basis. It is therefore possible that employees may be subject to maximum hours standard in certain workweeks, but not in others. In those workweeks in which the section 13(b)(20) exemption does not apply, the public agency is entitled to utilize the section 7(k) exemption which is explained below in § 553.201.

**§ 553.201 Statutory provisions: section 7(k).**

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § 553.230 below, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

(b) As specified in §§ 553.20 through 553.28 of Subpart A, workers employed under section 7(k) may, under certain conditions, be compensated for overtime hours worked with compensatory time off rather than immediate overtime premium pay.

#### § 553.202 Limitations.

The application of sections 13(b)(20) and 7(k), by their terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

#### Exemption Requirements

##### § 553.210 Fire protection activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the

fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as maintenance and office personnel who do not fight fires on a regular basis. It may include such employees during emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section.

Additionally, for those persons who actually engage in those fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

##### § 553.211 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their

law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.215.

(c) Typically, employees engaged in law enforcement activities include city police; district or local police, sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(d) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdiction. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C), and see § 553.11. Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(e) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities" as that term is used in sections 7(k) and 13(b)(20). Employees who normally would not meet each of these tests include (1) building inspectors (other than those defined in § 553.213(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employees who direct vehicular and pedestrian

traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(f) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(g) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical

services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

**§ 553.212 Twenty-percent limitation on nonexempt work.**

(a) Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. (See § 553.30.) The performance of such work does not affect the application of the section 13(b)(20) or 7(k) exemptions with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in (a) above.

**§ 553.213 Public agency employees engaged in both fire protection and law enforcement activities.**

(a) Some public agencies have employees (often called "public safety officers") who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat either the section 13(b)(20) or 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.210 and 553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within

the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.

(b) As specified in § 553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

**§ 553.214 Trainees.**

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in § 553.210 or § 553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

**§ 553.215 Ambulance and rescue service employees.**

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it

was not the purpose of those Amendments to deny the Act's protection of previously covered and nonexempt employees. This would include, for example, employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

#### § 553.216 Other exemptions.

Although the 1974 Amendments to the FLSA provided special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of sections 13(b)(20) and 7(k). For example, section 13(a)(1) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR Part 541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as "executive" employees. Similarly, certain criminal investigative agents may qualify as "administrative" employees under section 13(a)(1). However, the election to take the section 13(a)(1) exemption for an employee who qualifies for it will not result in excluding that employee from the count that must be made to determine the application of the section 13(b)(20) exemption to the agency's other employees.

#### Tour of Duty and Compensable Hours of Work Rules

##### § 553.220 "Tour of duty" defined.

(a) The term "tour of duty" is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be

on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include "shifts" assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the "shift" which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in § 553.227. The tour of duty does not include time spent working on an occasional or sporadic and part-time basis in a different capacity from the regular work as provided in § 553.30. The tour of duty does not include time spent substituting for other employees by mutual agreement as specified in § 553.31.

(d) The tour of duty does not include time spent in volunteer firefighting or law enforcement activities performed for a different jurisdiction, even where such activities take place under the terms of a mutual aid agreement in the jurisdiction in which the employee is employed. (See § 553.105.)

##### § 553.221 Compensable hours of work.

(a) The general rules on compensable hours of work are set forth in 29 CFR Part 785 which is applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (§ 553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (§ 553.223). Part 785 does not discuss the special provisions that apply to State and local government workers with respect to the treatment of substitution, special details for a separate and independent employer, early relief, and work performed on an occasional or sporadic and part-time basis, all of which are covered in this subpart.

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or

permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits. An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call.

(d) Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

(g) The fact that employees cannot return home after work does not necessarily mean that they continue on duty after their shift. For example, firefighters working on a forest fire may be transported to a camp after their shift in order to rest and eat a meal. As a practical matter, the firefighters may be

precluded from going to their homes because of the distance of the fire from their residences.

#### § 553.222 Sleep time.

(a) Where a public employer elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude sleep time from hours worked if all the conditions in 29 CFR 785.22 are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where (1) the employee is on a tour of duty of less than 24 hours, which is the general rule applicable to all employees under 29 CFR 785.21, and (2) where the employee is on a tour of duty of exactly 24 hours, which is a departure from the general rules in Part 785.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

#### § 553.223 Meal time.

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the tests in 29 CFR 785.19 are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in 29 CFR 785.19 are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates Congressional intent to mandate a departure from the usual FLSA "hours of work" rules and adoption of an overtime standard keyed to the unique concept of "tour of duty" under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours, which is a departure from the general rules in 29 CFR 785.22.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the tests in 29 CFR 785.19 and 785.22 are met.

#### § 553.224 "Work period" defined.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

#### § 553.225 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be

added to the employee's tour of duty and treated as compensable hours of work.

#### § 553.226 Training time.

(a) The general rules for determining the compensability of training time under the FLSA are set forth in 29 CFR 785.27 through 785.32.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

(3) Time spent in the training described in (1) or (2) above is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

#### § 553.227 Outside employment.

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two

employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in 29 CFR Part 791.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

#### Overtime Compensation Rules

##### § 553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

##### § 553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in § 553.230. The rules for compensatory time off are set forth in §§ 553.20 through 553.28.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

##### § 553.232 Overtime pay requirements.

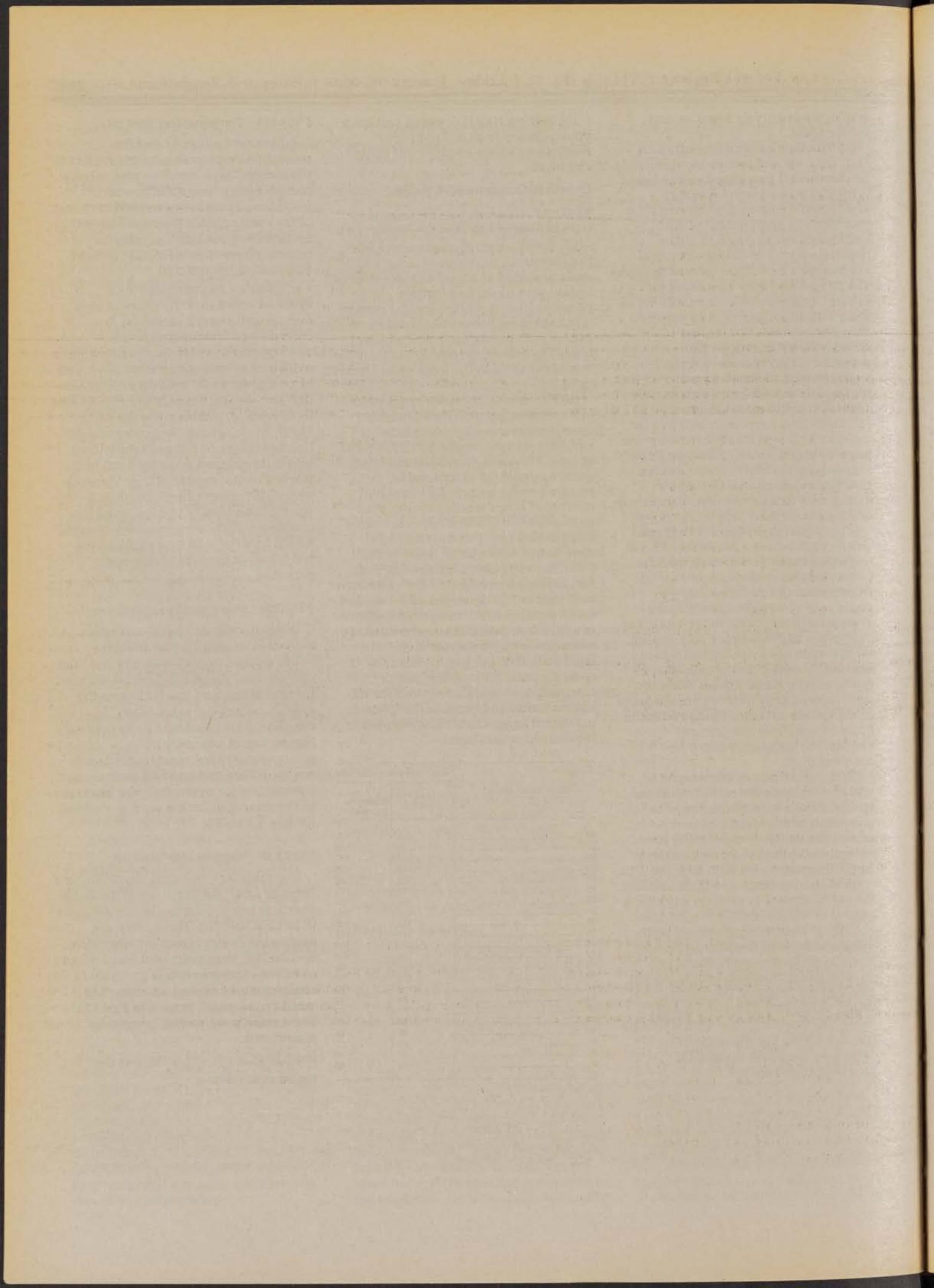
If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay. In addition, employees who have accrued the maximum 480 hours of compensatory time must be paid cash wages of time and one-half their regular rates of pay for overtime hours in excess of the maximum for the work period set forth in § 553.230.

##### § 553.233 "Regular rate" defined.

The rules for computing an employee's "regular rate", for purposes of the Act's overtime pay requirements, are set forth in 29 CFR Part 778. These rules are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages. However, wherever the word "workweek" is used in Part 778, the words "work period" should be substituted.

[FR Doc. 87-877 Filed 1-15-87; 8:45 am]

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# Federal Register

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Friday  
January 16, 1987

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## Part III

### Department of the Treasury

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Bureau of Alcohol, Tobacco, and  
Firearms

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27 CFR Part 178  
Commerce in Firearms and Ammunition;  
Temporary Rule and Proposed Rule

## DEPARTMENT OF THE TREASURY

## Bureau of Alcohol, Tobacco, and Firearms

## 27 CFR Part 178

[T.D. ATF-247]

## Commerce in Firearms and Ammunition

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

**ACTION:** Temporary rule (Treasury decision).

**SUMMARY:** This temporary rule amends regulations in 27 CFR Part 178, relating to firearms, to implement provisions of Pub. L. 99-408 (100 Stat. 920), approved August 28, 1986. The regulations implement the law restricting the manufacture, importation, and sale of armor piercing ammunition. In the Proposed Rules portion of this **Federal Register**, ATF is issuing a notice of proposed rulemaking inviting comments on the temporary rule for a 90-day period after the publication date of this temporary rule.

**DATES:** The temporary regulations are effective on January 16, 1987, except for § 178.42 relating to licensing provisions which are effective on December 1, 1986.

**ADDRESSES:** Send written comments to: Chief, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 189, Washington, DC 20044-0189.

**FOR FURTHER INFORMATION CONTACT:** Daniel E. Crowley, ATF Specialist, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, Ariel Rios Federal Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20226; (202) 566-7591.

**SUPPLEMENTARY INFORMATION:** On October 29, 1986, a temporary rule, T.D. ATF-241, was published in the **Federal Register** (51 FR 39612) amending regulations in 27 CFR Parts 72, 178 and 179 to implement provisions of Pub. L. 99-308 (100 Stat. 449), approved May 19, 1986, and a subsequent amendment thereto, Pub. L. 99-360 (100 Stat. 766), approved July 8, 1986. The effective date for T.D. ATF-241 is November 15, 1986, except for certain provisions relating to machine guns which were effective May 19, 1986. On August 28, 1986, Pub. L. 99-408 (100 Stat. 920) was approved to regulate the manufacture, importation, and sale of armor piercing ammunition. This temporary rule implements provisions of Pub. L. 99-408 and amends the temporary rules in T.D. ATF-241

which relate to armor piercing ammunition.

Some of the new statutory provisions which necessitate regulation changes are:

(1) No person may manufacture or import armor piercing ammunition and no manufacturer or importer may sell or deliver such ammunition except:

(a) For the use of the the United States or any department of agency thereof or any State or any department, agency or political subdivision thereof;

(b) For the purpose or exportation; or  
(c) For the purposes of testing or experimentation as authorized by the Director.

(2) Armor piercing ammunition may only be manufactured, imported, sold or delivered by licensed manufacturers and importers. Such licenses have a fee or \$1,000 per year.

(3) Licensed importers and licensed manufacturers must mark all armor piercing projectiles and packages containing such projectiles for distribution.

(4) The Director may, after notice and opportunity for hearing, revoke the license of a licensed dealer who willfully transfers armor piercing ammunition. The Director must furnish information to each licensed dealer defining which projectiles are considered armor piercing ammunition. Provision is made for dealers to dispose of existing inventories of armor piercing ammunition to governmental entities only.

(5) Recordkeeping provisions are provided for all armor piercing ammunition dispositions.

(6) Procedures are established for approval to receive armor piercing ammunition for testing or experimentation.

**Regulatory Flexibility Act**

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this temporary rule because it is not required to be preceded by a notice of proposed rulemaking under 5 U.S.C. 553 or any other law.

**Executive Order 12291**

In compliance with Executive Order 12291, 46 FR 13193 (1981), ATF has determined that this temporary rule is not a "major rule" since it will not result in:

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

(b) A major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

(c) Significant adverse effects or 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.

**Paperwork Reduction Act**

The collection of information contained in this temporary rule have been reviewed and approved by the Office of Management and Budget for review under Sec. 3507 of the Paperwork Reduction Act 1980, Pub. L. 96-511, 44 U.S.C. Chapter 35.

**Drafting Information**

The principal author of this document is Daniel E. Crowley, ATF Specialist, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms.

**Administrative Procedure Act**

Because the provisions of Public Law 99-408 became effective on August 28, 1986, except for the amendments made to the provisions on license fees which become effective on December 1, 1986, it is hereby found to be impractical and unnecessary to issue this Treasury decision with notice and public procedure thereon under 5 U.S.C. 553(b) or subject to the effective date limitation of 5 U.S.C. 553(d).

**List of Subjects in 27 CFR Part 178**

Administrative practice and procedure, Arms and munitions, Authority delegation, Customs duties and inspection, Export, Imports, Military personnel, Penalties, Reporting requirements, Research, Seizures and forfeitures, and Transportation.

**Authority and Issuance**

Accordingly, ATF is issuing a temporary rule to amend Title 27 of the Code of Federal Regulations and, by a notice of proposed rulemaking published in this **Federal Register**, is requesting comments by April 16, 1987.

**PART 178—[AMENDED]**

**Paragraph 1.** The authority citation for Part 178 continues to read as follows:

Authority: 18 U.S.C. 926.

**Par. 2.** In the table of contents, §§ 178.37 and 178.149 are added, the headings to §§ 178.92 and 178.148 are revised to include armor piercing ammunition, and existing § 178.149 is redesignated as § 178.150 to read as follows:

**Part 178—COMMERCE IN FIREARMS AND AMMUNITION****Subpart A—Introduction**

Sec.

178.37 Manufacture, importation and sale of armor piercing ammunition.

178.92 Identification of firearms and armor piercing ammunition.

178.148 Armor piercing ammunition intended for sporting or industrial purposes.

178.149 Armor piercing ammunition manufactured or imported for purpose of testing or experimentation.

178.150 Seizure and forfeiture.

**Par. 3.** Section 178.11 is amended by adding a definition of "handgun"; by revising the definitions "Crime punishable by imprisonment for a term exceeding 1 year" and "State of residence" to read as follows:

**§ 178.11 Meaning of terms.**

*Crime punishable by imprisonment for a term exceeding 1 year.* Any Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year. The term shall not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices or (b) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from possessing any firearms.

*Handgun.* Any firearm including a pistol or revolver designed to be fired by the use of a single hand. The term includes any combination of parts from which a handgun can be assembled.

*State of residence.* The States in which an individual regularly resides, or

maintains a home, or if such person is on active duty as a member of the United States Armed Forces, the State in which the person's permanent duty station is located: *Provided*, That an alien who is legally in the United States shall be considered to be a resident of the State in which (a) the alien is residing or has so resided for a period of at least 90 days prior to the date of sale or delivery of a firearm, or (b) the alien's embassy or consulate is located if the principal officer of such embassy or consulate issues a written statement to such alien authorizing the alien to acquire a firearm. Temporary sojourn in a State does not make the State of temporary sojourn the State of residence.

*Example 1.* A maintains a home in State X. A travels to State Y on a hunting, fishing, business or other type of trip. A does not become a resident of State Y by reason of such trip.

*Example 2.* A maintains a home in State X and a home in State Y. A resides in State X except for the summer months of the year and in State Y for the summer months of the year. During the time that A actually resides in State X, A is a resident of State X, and during the time that A actually resides in State Y, A is a resident of State Y.

**Par. 4.** Section 178.37 is added to read as follows:

**§ 178.37 Manufacture, importation and sale of armor piercing ammunition.**

No person shall manufacture or import, and no manufacturer or importer shall sell or deliver, armor piercing ammunition, except:

(a) The manufacture or importation, or the sale or delivery by any manufacturer or importer, of armor piercing ammunition for the use of the United States or any department or agency thereof or any State or any department, agency or political subdivision thereof;

(b) The manufacture, or the sale or delivery by a manufacturer or importer, of armor piercing ammunition for the purpose of exportation; or

(c) The sale or delivery by a manufacturer or importer of armor piercing ammunition for the purposes of testing or experimentation as authorized by the Director under the provisions of § 179.149.

**Par. 5.** Section 178.41(b) is revised to include armor piercing ammunition to read as follows:

**§ 178.41 General.**

(b) Each person intending to engage in business as a firearms or ammunition importer or manufacturer, or dealer in firearms shall file an application, with the required fee (see § 178.42), with ATF

in accordance with the instructions on the form (see § 178.44), and, pursuant to § 178.47, receive the license required for such business from the Regional director (compliance). Except as provided in § 178.50, a license must be obtained for each business and each place at which the applicant is to do business. A license as an importer or manufacturer of firearms or ammunition, or a dealer in firearms shall, subject to the provisions of the Act and other applicable provisions of law, entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce and to engage in the business specified by the license, at the location described on the license, and for the period stated on the license. However, it shall not be necessary for a licensed importer or a licensed manufacturer to also obtain a dealer's license in order to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured. Payment of the license fee as an importer or manufacturer of destructive devices, ammunition for destructive devices or armor piercing ammunition or as a dealer in destructive devices includes the privilege of importing or manufacturing firearms other than destructive devices and ammunition for other than destructive devices or ammunition other than armor piercing ammunition, or dealing in firearms other than destructive devices, as the case may be, by such a licensee at the licensed premises.

**Par. 6.** Section 178.42 is revised to prescribe a license fee of \$1,000 for importers and manufacturers of armor piercing ammunition to read as follows:

**§ 178.42 License fees.**

Each applicant shall pay a fee at a yearly rate for obtaining a firearms license or ammunition license, a separate fee being required for each business or collecting activity at each place of such business or activity, as follows:

- (a) For a manufacturer:
- (1) Of destructive devices, ammunition for destructive devices or armor piercing ammunition—\$1,000 per year.
  - (2) Of firearms other than destructive devices—\$50 per year.
  - (3) Of ammunition for firearms other than ammunition for destructive devices or armor piercing ammunition—\$10 per year.
- (b) For an importer:
- (1) Of destructive devices, ammunition for destructive devices or

armor piercing ammunition—\$1,000 per year.

(2) Of firearms other than destructive devices or ammunition for firearms other than destructive devices or ammunition other than armor piercing ammunition—\$50 per year.

Par. 7. Section 178.92 is amended by designating the existing text as paragraph (a), by adding a heading for new paragraph (a), and adding a new paragraph (b) to read as follows:

§ 178.92 Identification of firearms and armor piercing ammunition.

(a) Firearms. \* \* \*
(b) Armor piercing ammunition.—(1) Marking of ammunition. Each licensed manufacturer or licensed importer of armor piercing ammunition shall identify such ammunition by means of painting, staining or dyeing the exterior of the projectile with an opaque black coloring. This coloring must completely cover the point of the projectile and at least 50 percent of that portion of the projectile which is visible when the projectile is loaded into a cartridge case.

(2) Labeling of packages. Each licensed manufacturer or licensed importer of armor piercing ammunition shall clearly and conspicuously label each package in which armor piercing ammunition is contained, e.g., each box, carton, case, or other container. The label shall include the words "ARMOR PIERCING" in block letters at least 1/4 inch in height. The lettering shall be located on the exterior surface of the package which contains information concerning the caliber or gauge of the ammunition. There shall also be placed on the same surface of the package in block lettering at least 1/4 inch in height the words "FOR GOVERNMENTAL ENTITIES OR EXPORTATION ONLY." The statements required by this subparagraph shall be on a contrasting background.

Par. 8. Section 178.99 is amended by adding titles for paragraphs (a), (b) and (c) and by revising paragraphs (d) and (e) to read as follows:

§ 178.99 Certain prohibited sales or deliveries.

- (a) Interstate sales or deliveries.
(b) States or deliveries to underaged persons.
(c) Sales or deliveries to prohibited categories of persons.
(d) Manufacture, importation, and sale of armor piercing ammunition by

licensed importers and licensed manufacturers. A licensed importer or licensed manufacturer shall not import or manufacture armor piercing ammunition or sell or deliver such ammunition, except:

(1) For use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(2) For the purpose of exportation; or

(3) For the purpose of testing or experimentation authorized by the Director under the provisions of § 178.149.

(e) Transfer of armor piercing ammunition by licensed dealers. A licensed dealer shall not willfully transfer armor piercing ammunition: Provided, That armor piercing ammunition received and maintained by the licensed dealer as business inventory prior to August 28, 1986, may be transferred to any department or agency of the United States or any State or political subdivision thereof if a record of such ammunition is maintained in the form and manner prescribed by § 178.125(c). Any licensed dealer who violates this paragraph is subject to license revocation. See Subpart E of this part. For purposes of this paragraph, the Director shall furnish each licensed dealer information defining which projectiles are considered armor piercing. Such information may not be all-inclusive for purposes of the prohibition on manufacture, importation, or sale or delivery by a manufacturer or importer of such ammunition or 18 U.S.C. 929 relating to criminal misuse of such ammunition.

Par. 9. Section 178.100(c) is revised to remove a reference to armor piercing ammunition to read as follows:

§ 178.100 Conduct of business away from licensed premises.

(c) Licensees conducting business at gun shows shall maintain firearms records in the form and manner prescribed by Subpart H of this part. In addition, records of receipt and disposition of firearms transactions

conducted at gun shows shall include the location of the sale or other disposition and been entered in the required records of the licensee and retained on the premises specified on the license.

Par. 10. Section 178.101 is revised to remove a reference to ammunition to read as follows:

§ 178.101 Record of transactions.

Every licensee shall maintain firearms and armor piercing ammunition records in such form and manner as is prescribed by Subpart H of this part.

Par. 11. Section 178.122 (b) and (d) are revised to prescribe the records required to be kept by licensed importers disposing of armor piercing ammunition to read as follows:

§ 178.122 Records maintained by importers.

(b) A record of firearms disposed of by a licensed importer to another licensee and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provisions of § 178.149 shall be maintained by the licensed importer on the licensed premises. For firearms, the record shall show the quantity, type, model, manufacturer, country of manufacture, caliber, size or gauge, serial number of the firearms so transferred, the name and license number of the licensee to whom the firearms were transferred, and the date of the transaction. For armor piercing ammunition, the record shall show the manufacturer, caliber or gauge, quantity, the name and address of the transferee to whom the armor piercing ammunition was transferred, and the date of the transaction. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction, and such information shall be recorded under the following formats:

IMPORTER'S FIREARMS DISPOSITION RECORD

Table with 9 columns: Quantity, Type, Manufacturer, Country of manufacture, Caliber or gauge Model, Model, Serial No., Name and license No. of licensee to whom transferred, Date of the transaction.

IMPORTER'S ARMOR PIERCING AMMUNITION DISPOSITION RECORD

Date	Manufacturer	Caliber or gauge	Quantity of projectiles	Purchaser	
				Name and address	

(d) Each licensed importer shall maintain separate records of the sales or other dispositions made of firearms to nonlicensees. Such records shall be maintained in the form and manner as prescribed by §§ 178.124 and 178.125 in regard to firearms transaction records and records of acquisition and disposition of firearms.

(Approved by the Office of Management and Budget under control number 1512-0387)

Par. 12. Section 178.123 (b) and (d) are revised to prescribe the records required to be kept by licensed manufacturers disposing of armor piercing ammunition to read as follows:

§ 178.123 Records maintained by manufacturers.

(b) A record of firearms disposed of by a manufacturer to another licensee and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 178.149 shall be maintained by the licensed manufacturer on the licensed premises. For firearms, the record shall show the quantity, type, model, manufacturer, country of manufacture, caliber, size or gauge, serial number of the firearms so transferred, the name and license number of the licensee to whom the firearms were transferred, and the date of the transaction. For armor piercing ammunition, the record shall show the manufacturer, caliber or gauge, quantity, the name and address of the transferee to whom the armor piercing ammunition was transferred, and the date of the transaction. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction, and such information shall be recorded under the format prescribed by § 178.122, except that the name of the manufacturer of a firearm or armor piercing ammunition need not be recorded if the firearm or armor piercing ammunition is of the manufacturer's own manufacture.

nonlicensees. Such records shall be maintained in the form and manner as prescribed by §§ 178.124 and 178.125 in regard to firearms transaction records and records of acquisition and disposition of firearms.

(Approved by the Office of Management and Budget under control number 1512-0369)

Par. 13. Section 178.125 is amended by revising paragraphs (a) and (b); by adding a new paragraph (c); by revising and redesignating existing paragraph (c) as paragraph (d); and redesignating existing paragraphs (d) through (h) as paragraphs (e) through (i) respectively to read as follows:

§ 178.125 Record of receipt and disposition.

(a) *Armor piercing ammunition sales by licensed collectors to nonlicensees.*

The sale or other disposition of armor piercing ammunition by licensed collectors shall be recorded in a bound record at the time a transaction is made. The bound record shall be maintained in chronological order by date of sale or disposition of the armor piercing ammunition, and shall be retained on the licensed premises of the licensee for a period not less than two years following the date of the recorded sale or disposition of the armor piercing ammunition. The bound record entry shall show:

- (i) The date of the transaction;
- (ii) The name of the manufacturer;
- (iii) The caliber or gauge;
- (iv) The quantity of armor piercing ammunition;
- (v) The name, address, and date of birth of the nonlicensee; and
- (vi) The method used to establish the identity of the armor piercing ammunition purchaser.

The format required for the bound record is as follows:

DISPOSITION RECORD OF ARMOR PIERCING AMMUNITION

Date	Manufacturer	Caliber or gauge	Quantity of projectiles	Purchaser		Enter a (x) in the "known" column if purchaser is personally known to you. Otherwise, establish the purchaser's identification.		
				Name and address	Date of birth	Known	Driver's license	Other type (specify)

However, when a commercial record is made at the time a transaction is made, a licensee may delay making an entry into the bound record if the provisions of paragraph (d) of this section are complied with.

(b) *Armor piercing ammunition sales by licensed collectors to licensees.* Sales or other dispositions of armor piercing ammunition from a licensed collector to another licensee shall be recorded and maintained in the manner prescribed in § 178.122(b) for importers: *Provided*, That the license number of the transferee may be recorded in lieu of the transferee's address.

(c) *Armor piercing ammunition sales by licensed dealers to governmental entities.* A record of armor piercing ammunition disposed of by a licensed dealer to a governmental entity pursuant to § 178.99(e) shall be maintained by the licensed dealer on the licensed premises and shall show the name of the manufacturer, the caliber or gauge, the quantity, the name and address of the entity to which the armor piercing ammunition was transferred, and the

date of the transaction. Such information shall be recorded under the format prescribed by § 178.122(b). Each licensed dealer disposing of armor piercing ammunition pursuant to § 178.99(e) shall also maintain a record showing the date of acquisition of such ammunition which shall be filed in an orderly manner separate from other commercial records maintained and be readily available for inspection. The records required by this paragraph shall be retained on the licensed premises of the licensee for a period not less than two years following the date of the recorded sale or disposition of the armor piercing ammunition.

(d) *Commercial records of armor piercing ammunition transactions.* When a commercial record is made at the time of sale or other disposition of armor piercing ammunition, and such record contains all information required by the bound record prescribed by paragraph (a) of this section, the licensed collector transferring the armor piercing ammunition may, for a period

(d) Each licensed manufacturer shall maintain separate records of the sales or other dispositions made of firearms to

not exceeding 7 days following the date of such transfer, delay making the required entry into such bound record: *Provided*, That the commercial record pertaining to the transfer is: (1) Maintained by the licensed collector separate from other commercial documents maintained by such licensee, and (2) is readily available for inspection on the licensed premises until such time as the required entry into the bound record is made.

§ 178.125 [Amended]

Par. 14. Due to the redesignation of paragraphs in § 178.135, references appearing in these paragraphs are amended. The reference to paragraph (f) in redesignated § 178.125(e) is changed to paragraph (g). The reference to paragraph (f) in redesignated § 178.125(f) is changed to paragraph (g). The reference to paragraphs (d) and (e) in redesignated § 178.125(g) is changed to paragraphs (e) and (f). The reference to paragraphs (a), (d) and (e) in redesignated § 178.125(h) is changed to paragraphs (a), (e) and (f).

§ 178.125a [Amended]

Par. 15. Section 178.125a is amended to change the two § 178.125(d) references in paragraph (a) to § 178.125(e).

Par. 16. Section 178.142(b) is revised to read as follows:

§ 178.142 Effect of pardons and expunctions of convictions.

(b) A pardon granted by the Governor of a State or other State pardoning authority or by the pardoning authority of a foreign jurisdiction with respect to a conviction, or any expunction, reversal or setting aside of a conviction or other proceeding rendering a conviction nugatory shall remove any disability which otherwise would be imposed by the provisions of this part with respect to the conviction, unless (1) the pardon, expunction, setting aside, or other proceeding expressly provides that the person may not ship, transport, possess or receive firearms, or (2) the pardon, expunction, setting aside, or other proceeding did not fully restore the rights of the person to ship, transport, possess or receive firearms under the law of the jurisdiction where the pardon, expunction, setting aside or other proceeding occurred.

§ 178.148 [Amended]

Par. 17. In § 178.148 the hyphen is removed from the word "armor piercing" in the section heading and in the first sentence of the section.

§ 178.149 [Redesignated as § 179.150]

Par. 18. Section 178.149 is redesignated as section 178.150 and a new § 178.149 is added to provide for the testing or experimentation of armor piercing ammunition to read as follows:

§ 178.149 Armor piercing ammunition manufactured or imported for the purpose of testing or experimentation.

The provisions of §§ 178.37 and 178.99(d) with respect to the

manufacture or importation of armor piercing ammunition and the sale or delivery of armor piercing ammunition by manufacturers and importers shall not apply to the manufacture, importation, sale or delivery of armor piercing ammunition for the purpose of testing or experimentation as authorized by the Director. A person desiring such authorization to receive armor piercing ammunition shall submit a letter application, in duplicate, to the Director. Such application shall contain the names and addresses of the persons directing or controlling, directly or indirectly, the policies and management of the applicant, the nature or purpose of the testing or experimentation, a description of the armor piercing ammunition to be received, and the identity of the manufacturer or importer from whom such ammunition is to be received. The approved application shall be submitted to the manufacturer or importer who shall retain a copy as part of the records required by Subpart H of this Part.

Signed: November 5, 1986.

Stephen E. Higgins,

Director.

Approved: December 11, 1986.

Francis A. Keating, II,

Assistant Secretary (Enforcement).

[FR Doc. 87-821 Filed 1-15-87; 8:45 am]

BILLING CODE 4810-31-M

**DEPARTMENT OF THE TREASURY****Bureau of Alcohol, Tobacco and Firearms****27 CFR Part 178**

[Notice No. 616]

**Commerce in Firearms and Ammunition**

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

**ACTION:** Proposed rulemaking cross-referenced to temporary regulations.

**SUMMARY:** In the rules and regulations portion of this *Federal Register*, the Bureau of Alcohol, Tobacco and Firearms is issuing temporary regulations regarding the implementation of Pub. L. 99-408 (100 Stat. 920), approved August 28, 1986. These regulations implement the law restricting the manufacture, importation, and sale of armor piercing ammunition. The temporary regulations serve as the text of this notice of proposed rulemaking for final regulations.

**DATES:** The effective date of the temporary regulations is January 16, 1987, except for the licensing provisions (§ 178.42) which will be effective on December 1, 1986. Written comments must be delivered or mailed by April 16, 1987.

**ADDRESS:** Send written comments to: Chief, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 189, Washington, DC 20044-0189.

Any written comments received will be available for public inspection during normal business hours at: ATF Reading Room, Room 4406, Ariel Rios Federal Building, 1200 Pennsylvania Avenue NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Daniel E. Crowley, ATF Specialist,

Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms (202) 566-7591.

**Regulatory Flexibility Act**

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this document because it was not required to be preceded by a general notice of proposed rulemaking under 5 U.S.C. 553, and because the impact of this rulemaking on small businesses flows directly from the statute. Likewise, any significant secondary or incidental effects flow directly from the statute.

**Executive Order 12291**

In compliance with Executive Order 12291, 46 FR 13193 (1981), ATF has determined that this document is not a "major rule" since it will not result in:

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

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

(c) Significant 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.

**Paperwork Reduction Act**

The requirements to collect information proposed in the final rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. Chapter 35. Comments relating to ATF's compliance with 5 CFR Part 1320—Controlling Paperwork Burdens on the Public—should be submitted to: Office of Information and Regulatory

Affairs, Attention: ATF Desk Officer, Office of Management and Budget, Washington, DC 20503.

**Drafting Information**

The principal author of this document is Daniel E. Crowley, ATF Specialist, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms.

**SUPPLEMENTARY INFORMATION:****Public Participation—Written Comments**

ATF is issuing this document requesting comments concerning amendments to 27 CFR Part 178. ATF will not recognize any material or comments as confidential. Comments may be disclosed to the public. Any material which the respondent considers to be confidential or inappropriate for disclosure to the public should not be included in the comment. The name of any person submitting a comment is not exempt from disclosure. Any person who desires an opportunity to comment orally at a public hearing on the temporary regulations should submit a written request to the Director within the comment period. However, the Director reserves the right to determine whether a public hearing should be held.

The temporary regulations in this part of the issue of the *Federal Register* revises and adds new regulations in 27 CFR Part 178. For the text of the temporary regulations, see T.D. ATF-247 published in this issue of the *Federal Register*.

Signed: November 5, 1986.

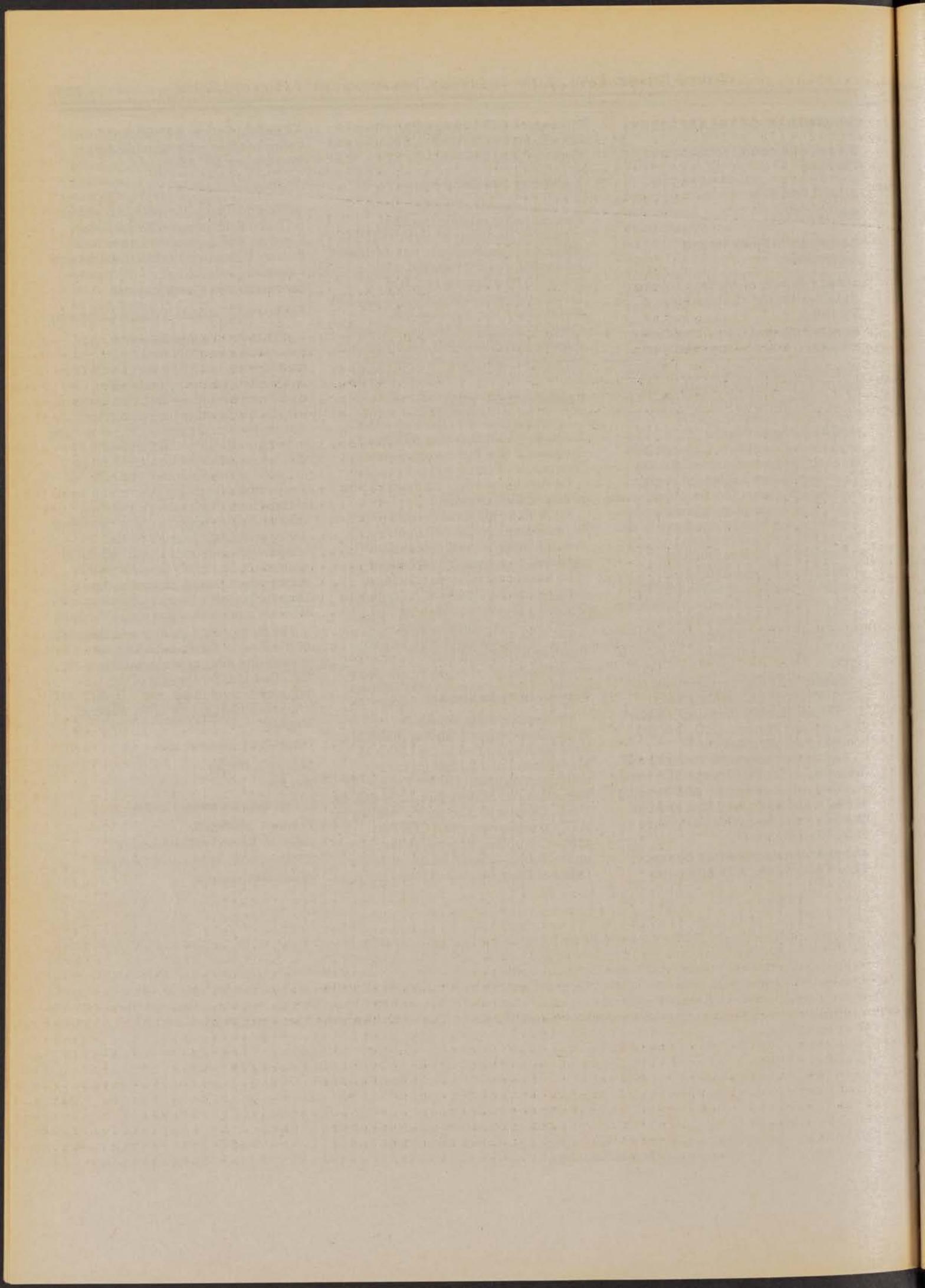
Stephen E. Higgins,  
Director.

Approved: December 11, 1986.

Francis A. Keating, II,  
Assistant Secretary (Enforcement).

[FR Doc. 87-822 Filed 1-15-87; 8:45 am]

BILLING CODE 4810-31-M



# Federal Register

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Friday  
January 16, 1987

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## Part IV

### Office of Personnel Management

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5 CFR Parts 841, 842, and 843  
Federal Employees Retirement System;  
Interim Rules

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 841

#### Federal Employees Retirement System—General Administration; Employee Deductions and Agency Contributions

**AGENCY:** Office of Personnel  
Management.

**ACTION:** Interim rule with request for  
comments.

**SUMMARY:** Office of Personnel  
Management (OPM) is issuing interim  
rules and requesting comment on those  
rules to implement the employee  
deduction and Government contribution  
provisions of the Federal Employees  
Retirement System (FERS) Act of 1986.

**DATE:** Interim rules effective January 1,  
1987; comments must be received on or  
before March 17, 1987.

**ADDRESS:** Send comments to Frank D.  
Titus, Director, FERS Implementation  
Task Force, Retirement and Insurance  
Group, P.O. Box 884, Washington, DC  
20044, or deliver to OPM, Room 3311,  
1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**  
Cynthia C. McClelland, (202) 632-5560.

**SUPPLEMENTARY INFORMATION:** The  
FERS Act of 1986, Pub. L. 99-335, as  
amended by The Federal Employees'  
Retirement System Technical  
Corrections Act of 1986, Pub. L. 99-556,  
created a new retirement system for  
some Federal employees. Regulations  
concerning which employees are  
covered by FERS are contained in  
Subpart A of Part 842 of Title 5, Code of  
Federal Regulations. Regulations  
concerning the amount and computation  
of the normal cost rates for each  
category of employee covered by FERS  
are contained in Subpart D of Part 841 of  
Title 5, Code of Federal Regulations.  
These rules regulate the payment by  
employing agencies of the cost of  
benefits for their employees and the  
related deduction of the applicable  
percentage from their employees' basic  
pay.

Agencies need to be aware that "basic  
pay" for retirement purposes is not the  
same as the pay subject to social  
security taxes or for thrift savings plan  
purposes.

Section 841.501 sets forth the purpose  
of these regulations.

Section 841.502 contains definitions  
for use in this subpart. Section 841.502  
does not contain definitions which are:  
(1) Defined in FERS and (2) used with  
their statutory meaning. These terms  
are: (1) "Air traffic controller," as

defined in section 2109(1) of title 5,  
United States Code; (2) "Basic pay," as  
defined in section 8401(4) of title 5,  
United States Code; (3) "Congressional  
employee," as defined in section  
8401(11)(B) of title 5, United States Code;  
(4) "Firefighter," as defined in section  
8401 (14) of title 5, United States Code;  
(5) "Law enforcement officer," as  
defined in section 8401(17) of title 5,  
United States Code and; (6) "Member,"  
as defined in section 8401(20) of title 5,  
United States Code.

Section 841.503 provides the rates for  
employee deductions from basic pay.  
For most employees, deductions will be  
at the rate of 7.0% less the Social  
Security OASDI rate, or 1.30% of basic  
pay in 1987, 0.94% in 1988 and 1989, and  
0.80% after 1989.

For certain groups of employees,  
including Members of Congress, law  
enforcement officers, firefighters, air  
traffic controllers and congressional  
employees, deductions will be at the  
rate of 7.5% less the Social Security  
OASDI rate, or 1.80% of basic pay in  
1987, 1.44% in 1988 and 1989, and 1.30%  
after 1989.

Agencies need to determine the  
correct percent of social security tax  
which is (or would be) applicable to a  
payment, whether or not social security  
tax is actually applicable or deducted.  
This percent is then subtracted from  
7.0% or 7.5%, as appropriate, and the  
result is the percent of FERS employee  
deductions.

Section 841.504 sets forth agency  
responsibilities for making the proper  
employee deductions, paying the Civil  
Service Retirement and Disability Fund  
(the Fund) the total normal cost (which  
includes both employee deductions and  
Government contributions), and  
reporting to OPM.

Section 841.505 regulates agency  
correction of error when less than the  
correct total normal cost amount has  
been paid to the Fund.

Section 841.506 provides additional  
information about computing the normal  
cost percentage of basic pay and  
employee deductions when an  
"unjustified and unwarranted"  
personnel action is corrected, and  
making the appropriate payment to the  
Fund.

Section 841.507 states that FERS  
employee deductions are effective on  
the later of the first day of the first pay  
period beginning in 1987 or the first day  
an employee is covered under FERS.  
This section implements section 505 of  
Pub. L. 99-556, which allows OPM to  
provide by regulation for the effective  
date of Government contributions and  
employee deductions to be the first day

of the first pay period beginning on or  
after January 1, 1987.

For employees with less than five  
years of service as of December 31, 1986,  
who are automatically converted to  
FERS on January 1, 1987, FERS  
deductions will begin the first day of the  
first pay period which begins in 1987.  
For employees who are newly-hired  
under FERS or otherwise acquire FERS  
coverage, FERS deductions will begin on  
the first day of FERS coverage, unless  
this is before the first day of the first  
pay period which begins in 1987. From  
January 1, 1987 until the first day of the  
first pay period beginning in 1987,  
retirement deductions will be withheld,  
or continue to be withheld, under the  
Federal Employees' Retirement  
Contribution Adjustment Act of 1983.

Under section 553 (b)(3)(B) and (d)(3)  
of title 5, United States Code, I find that  
there is good reason to make these  
amendments effective without prior  
publication of notice of proposed rules.  
Technical amendments provide for  
Government contributions and  
employee deductions to be effective the  
first day of the first pay period  
beginning on or after January 1, 1987.  
The volume of regulation necessary to  
implement an entire new retirement  
system and the need to have those  
regulations in place in advance of the  
statutory effective date of that system  
(January 1, 1987) so that necessary forms  
and information pamphlets can be  
prepared, ordered, and distributed, to  
allow the new retirement system to  
begin operation on its effective date and  
to allow Government contributions and  
employee deductions to begin on the  
correct date makes impracticable the  
publication of proposed rules.

#### E.O. 12291, Federal Regulation

I have determined that this is not a  
major rule as defined under section 1(b)  
of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not  
have a significant economic impact on a  
substantial number of small entities  
because the regulations will only affect  
payment by Federal agencies to OPM of  
the normal cost of their employees'  
FERS benefits, and deduction by Federal  
agencies of the appropriate amount from  
Government employees' pay.

#### List of Subjects of 5 CFR Part 841

Administrative practice and  
procedure, Claims, Disability benefits,  
Firefighters, Government employees,  
Income taxes, Intergovernmental  
relations, Law enforcement officer,  
Pensions, Retirement.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending 5 CFR Part 841 by adding Subpart E to read as follows:

**PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION**

\* \* \* \* \*

**Subpart E—Employee Deductions and Government Contributions**

Sec.

841.501 Purpose.

841.502 Definitions.

841.503 Amounts of employee deductions.

841.504 Agency responsibilities.

841.505 Correction of error.

841.506 Correction of unjustified or unwarranted personnel action.

841.507 Effective date.

\* \* \* \* \*

**Subpart E—Employee Deductions and Government Contributions**

Authority: 5 U.S.C. 8461(g); § 841.504 also issued under 5 U.S.C. 8522; § 841.507 also issued under section 505 of Pub. L. 99-335.

**§ 841.501 Purpose.**

This subpart contains regulations concerning deductions from employees' pay and government contributions for FERS coverage.

**§ 842.502 Definitions.**

In this subpart—

"Employee" means employee as defined in § 842.102 of this chapter or Member as defined in section 8401(20) of title 5, United States Code.

"Employee deduction" means the portion of the normal cost of FERS coverage which is deducted from an employee's basic pay.

"FERS" means chapter 84 of title 5, United States Code.

"Fund" means the Civil Service Retirement and Disability Fund.

"Normal cost percentage" or "Normal cost" means the entryage normal cost of the provisions of FERS which relate to the Fund, computed by the Office in accordance with generally accepted actuarial practice and standards (using dynamic assumptions) and expressed as a level percentage of aggregate basic pay. Normal cost percentage or normal cost include both agency and employee contributions.

"Social security" means old age, survivors and disability insurance under section 3101(a) of the Internal Revenue Code of 1954.

**§ 841.503 Amounts of employee deductions.**

(a) Except as provided in paragraph (b) of this section, the rate of employee deductions from basic pay for FERS coverage is seven percent of basic pay minus the percent of tax which is (or would be) in effect for the payment, for the employee cost of social security.

(b) The rate of employee deductions from basic pay for FERS coverage for a Member, law enforcement officer, firefighter, air traffic controller, or Congressional employee is seven and one-half percent of basic pay, minus the percent of tax which is (or would be) in effect for the payment, for the employee cost of social security.

(c) Employee deductions will be at the rate in paragraph (a) or (b) of this section as if social security deductions were being made even if social security deductions have ceased because of the amount of earnings during the year, or are not made for any other reason.

**§ 841.504 Agency responsibilities.**

(a) Each employing agency is required to contribute the total amount of the normal cost percentage for each category of its employees, determined under § 841.413 of this part, to the Fund.

(b) Each employing agency must withhold the appropriate amount of employee deductions from the basic pay paid each covered employee for each pay period. No employee deduction is due if an employee receives no basic pay for a pay period.

(c) An employing agency must record the appropriate amount of employee deductions on an individual retirement record maintained for each employee in the manner prescribed by OPM.

(d) When an employee separates, transfers to another agency or to a position serviced by another payroll office, or transfers to a position in which he or she is not covered by FERS, the agency must close the employee's individual retirement record and forward it to OPM within the time standards prescribed by OPM.

(e) An agency must maintain payroll systems and records in such manner as to permit accurate and timely reporting to OPM, in the manner prescribed by OPM.

(f) An agency must report the employee deduction and agency contribution amounts for each pay period in the manner prescribed by OPM.

(g) An agency must make such other reports of the normal cost, employee deductions and Government contributions amounts as are prescribed and in the manner prescribed by OPM.

(h) An agency must remit in full the total amount of normal cost (which includes both employee deductions and Government contributions), so that payment is received by the Fund on the day of payment to the employee of the basic pay from which the employee deductions were made.

**§ 841.505 Correction of error.**

(a) When it is determined that an agency has paid less than the correct total amount of the normal cost for any or all of its current or past employees, for any reason whatsoever, including but not limited to, coverage decisions, correction of the percentage applicable or of the amount of basic pay, or additional payment of basic pay, the agency must pay the total additional amount payable under 5 U.S.C. 8423 and Subpart D of this part to the Fund.

(b) The agency withholds the appropriate employee deduction from any payment of additional basic pay which is part of, or the result of, the corrective action.

(c) The payment to the Fund described in paragraph (a) of this section shall be made as soon as possible, but not later than provided by standards established by OPM, regardless of whether or when the portion which should have been deducted from employee basic pay is recovered by the agency.

(d) Any portion of the payment to the Fund described in paragraph (a) of this section which should have been deducted, but was not, from employee basic pay constitutes an overpayment of pay, subject to collection by the agency from the employee, unless waived under applicable authority such as 5 U.S.C. 5584.

(e) Corrections and the related agency payments and employee deductions will be reported to OPM in the manner prescribed by OPM.

**§ 841.506 Correction of unjustified or unwarranted personnel action.**

(a) When an "appropriate authority" determines that there has been an "unjustified or unwarranted personnel action" as these terms are defined in Subpart H of Part 550 of this title, the employing agency will pay the Fund the amount of the normal cost percentage of the basic pay included in back pay. The normal cost percentage owed the Fund is computed on the amount of gross basic pay without regard to deductions described in § 550.805(e) of this chapter for other amounts earned or erroneous payments received.

(b) The agency will withhold the appropriate employee deductions from the amount of basic pay included in

gross back pay without regard to deductions described in § 550.805(e) of this chapter for other amounts earned or erroneous payments received.

(c) The payment to the Fund described in paragraph (a) of this section shall be made within the time period established by OPM standards.

#### § 841.507 Effective date.

The employee deductions specified in § 841.503 are effective on the later of the first day of the first pay period beginning in 1987 or the first day an employee is covered by FERS.

[FR Doc. 87-908 Filed 1-15-87 8:45 am]

BILLING CODE 6325-01-M

### 5 CFR Part 841

#### Federal Employees Retirement System—General Administration; Waiver of Benefits

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules and requesting comments on the rules governing waiver of annuity benefits under the Federal Employees' Retirement System (FERS) Act of 1986.

**DATES:** Interim rules effective January 1, 1987; comments must be received on or before March 17, 1987.

**ADDRESS:** Send comments to Frank D. Titus, Director, FERS Implementation Task Force, Retirement and Insurance Group, P.O. Box 884, Washington, DC 20044; or deliver to OPM, Room 3311, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Joseph Parker, (202) 632-5560.

**SUPPLEMENTARY INFORMATION:** The FERS Act of 1986, Pub. L. 99-335, allows a FERS retiree to decline to receive all or any part of his or her annuity benefit. These rules implement 5 U.S.C. 8465, the waiver provision of FERS. Section 8465 also permits allotment and assignment of benefits. However, allotment and assignment of annuity benefits will not be addressed in this rulemaking.

An annuitant must specify that a specific dollar amount per month be waived.

An annuitant may not make a retroactive waiver, even if he or she is prepared to reimburse OPM for the overpayment that would exist were such a retroactive adjustment permissible.

Section 841.803 states the method for making a waiver; and explains the effective dates for a waiver,

cancellation, or change in a waiver; the forfeiture of monies waived; the effect of a waiver on survivor benefits; and the effect of cost-of-living adjustments while a waiver is in effect.

Section 841.804 references § 841.905(b) for handling waivers involving court orders in connection with, or incident to, divorce, annulment, or legal separation.

#### Waiver of Notice of Proposed Rulemaking and 30-Day Delay of Effective Date.

Under 5 U.S.C. 553 (b)(3)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. OPM must issue regulations to implement an entire new retirement system which is effective on January 1, 1987. The rules that must be in place to allow the new retirement system to begin operation on its effective date, along with the need to prepare, publish, and distribute essential forms and informational materials, make the publication of proposed rules impracticable.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations will only affect retirement payments to retired Government employees and their survivors.

#### List of Subjects in 5 CFR Part 841

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance Horner,  
Director

Accordingly, OPM is amending Part 841 of Title 5, Code of Federal Regulations, by adding Subpart H, to read as follows:

#### PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

\* \* \* \* \*

#### Subpart H—Waiver of Benefits

Sec.  
841.801 Purpose.  
841.802 Definitions.

Sec.  
841.803 Waiver of annuity.  
841.804 Waiver and court orders.  
\* \* \* \* \*

#### Subpart H—Waiver of Benefits

Authority: 5 U.S.C. 8461.

#### § 841.801 Purpose.

This subpart regulates the statutory provision on waiver of annuity benefits under the Federal Employees' Retirement System.

#### § 841.801 Definitions.

As used in this subpart—

"Annuitant" means a person receiving or who is entitled and has made application to receive retirement or survivor benefits under subchapter II, IV, or V of chapter 84 of title 5, United States Code.

"Annuity" means the gross monthly annuity rate payable before any authorized deductions (such as those for health benefits and life insurance premiums).

"Qualifying court order" means a qualifying court order as defined in § 841.902 of this part.

"Waiver" means an annuitant's written request to forfeit a specified amount of annuity as described in this subpart.

#### § 841.802 Waiver of annuity.

(a) An annuitant may decline to accept all or any part of the amount of his or her annuity by a waiver signed and filed with the Office of Personnel Management (OPM).

(b) A waiver is effective the first day of the month following the month in which it is received in OPM, unless a later effective date is specified by the annuitant.

(c) A waiver remains in effect until revoked or changed by the annuitant in writing, except as provided in paragraph (f) of this section. The effective date of a revocation or change will be the first day of the month following the month in which the request to revoke or change is received in OPM, unless a later date is specified by the annuitant.

(d) The amount of annuity that is waived is forfeited during the period the waiver is in effect and cannot be recovered.

(e) An annuity which has a waiver in effect will not be increased by cost-of-living adjustments (COLA) authorized under 5 U.S.C. 8462. Upon cancellation of a waiver, the rate of annuity will be increased by any COLA authorized during the period a waiver was in effect.

(f) Upon the death of an annuitant with a waiver in effect, any survivor

annuity payable will be authorized at the full rate of annuity as though the waiver had not been in effect, unless the survivor annuitant executes a waiver.

#### § 841.804 Waivers and court orders.

The effect of a qualifying court order on a waiver is controlled by § 841.905(b) of this part.

[FR Doc. 87-906 Filed 1-15-87; 8:45 am]

BILLING CODE 6325-01-M

### 5 CFR Part 842

#### Federal Employees Retirement System—Basic Annuity; Survivor Elections

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules and requesting comment on those rules to implement the survivor election provisions of the Federal Employees Retirement System Act of 1986. These regulations explain the survivor annuity elections available to retirees, and retiring employees and Members, and the actions that they must take to provide these survivor annuities.

**DATES:** Interim rules effective January 1, 1987; comments must be received on or before March 17, 1987.

**ADDRESS:** Send comments to Frank D. Titus, Director, FERS Implementation Task Force; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 884; Washington, DC 20044; or deliver to OPM, Room 3311, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Harold L. Siegelman (202) 632-5560.

**SUPPLEMENTARY INFORMATION:** The Federal Employees Retirement System (FERS) Act of 1986, Pub. L. 99-335, created a new retirement system for Federal employees. These rules implement the survivor election provisions of FERS. (The survivor benefit elections available to retiring employees and retirees under FERS are similar to those under the Civil Service Retirement System (CSRS).)

The terms "fully reduced annuity," "insurable interest rate," "partially reduced annuity," and "self-only annuity" are used to describe benefits that are payable to former employees and Members. "Current spouse annuities" and "former spouse annuities" are payments to survivors of former employees and Members.

"Time of retirement" is defined as the date when a retiree's annuity commences (i.e., when the annuity benefits begin to accrue). The definition of "time of retirement" includes the rule for determining marital status at the time of retirement. Marital status is determined as of the date that the annuity commences.

Section 842.603(b) of the interim regulations applies to cases when a former spouse, by a court order, has preempted the current spouse annuity under section 8467 of title 5, United States Code. Under these regulations: (1) A qualifying court order that awards a former spouse annuity will require an appropriate reduction in the retiree's annuity (regardless of any election to provide a current spouse annuity); (2) the retiree must make an election regarding the current spouse's survivor annuity at the time of retirement (even though that annuity has been wholly or partially preempted by a court-ordered former spouse annuity); (3) the current spouse's consent must be given (or waived) to permit a retiree to elect something other than a reduced annuity to provide a current spouse annuity; (4) in the event of the retiree's death, payment of the current spouse annuity will be wholly or partially prevented as long as the former spouse remains eligible for a former spouse annuity.

Under FERS, a retiring employee cannot elect a partial reduction to provide a partial survivor benefit. FERS permits partial reductions only to comply with court orders or as a result of the termination of the rights of a former spouse who is sharing a survivor annuity. The reduction formula under FERS is a flat 10 percent (rather than the graded or stepped formula under CSRS).

The reduction in annuity to provide a current spouse annuity terminates in accordance with section 8419(b) of title 5, United States Code. Generally, the reduction will terminate upon the death of a current spouse for whose benefit the reduction was made or upon dissolution of the marriage to that spouse. Even if the latter condition is met, a reduction will not be terminated when that spouse has acquired entitlement (in the dissolution decree or by election under § 842.611) to a survivor benefit as a former spouse under section 8417(b) of title 5, United States Code.

Section 842.604 implements section 8417 of title 5, United States Code, which permits an employee or Member to elect to provide a survivor annuity for a former spouse or spouses at the time of retirement.

Section 842.605 regulates insurable interest annuities under section 8420 of title 5, United States Code.

Section 842.605(c) implements section 8420(b) of title 5, United States Code, which provides that a current spouse may not be the beneficiary of both a fully or partially reduced annuity and an insurable interest annuity. Section 842.605(c) requires spousal consent giving up the right to a current spouse annuity before an insurable interest election can be made to benefit that spouse. The consent requirement prevents the spouse from receiving both annuities. To prevent an unintended inequity, we have provided that this pro forma consent will be cancelled if the employee cancels the insurable interest election under § 842.608 or fails to meet the requirements to make the election (e.g., fails to prove that he or she is in good health). Similarly, § 842.605(h) provides the right to cancel the pro forma consent when all former spouses' entitlements terminate, if the insurable interest annuity was elected to benefit the current spouse because the former spouse(s) had prior right to the spousal annuity.

Because of the large reduction frequently required (up to 40% of the self-only annuity) to elect an insurable interest election, § 842.605(f) requires a written confirmation of election after OPM has informed the retiree of the amount of the reduction.

Within 2 years after the death, or remarriage before age 55, of the former spouse for whom a retiree is providing a former spouse annuity, § 842.605(h) permits a retiree to end an insurable interest reduction elected to provide for a current spouse and to elect a reduced annuity to provide a current spouse annuity. The conversion will provide a survivor annuity for the current spouse at a lower cost to the retiree than maintaining the insurable interest annuity. However, if the retiree elects to convert, he or she may not thereafter reinstitute the insurable interest annuity to provide for someone else.

Section 842.605(i) provides that a retiree cannot convert an insurable interest rate for the benefit of a former spouse into a reduced annuity to provide a former spouse annuity upon the death of a current spouse. Although section 8419(b)(2) of title 5, United States Code, authorizes an annuity reduction to provide a former spouse annuity (after the death or remarriage of the former spouse) to be continued for the purpose of providing a current spouse annuity, nothing in FERS authorizes a corresponding continuation

to benefit a former spouse after the death of a current spouse.

Section 842.605(k) implements section 8416(b)(3) of title 5, United States Code. This section of the law provides for automatic termination of an insurable interest rate if the retiree marries after retirement and elects a reduced annuity to provide a current spouse annuity for that spouse.

Section 842.606 implements the spousal consent requirement discussed in connection with § 842.603. Section 842.606(c) imposes a notarization requirement to discourage forged or coerced consent.

Section 842.607 presents the requirements for waiver of spousal consent. FERS requires that OPM provide that a married employee may elect, without spousal consent, something other than a reduced annuity to provide a current spouse annuity when the spouse's whereabouts are unknown to the employee or, "due to exceptional circumstances," it would be "inappropriate" to require the employee to seek the spouse's consent. OPM is requiring in § 842.607(a) proof that the employee does not know the spouse's whereabouts before the waiver can be granted on that ground. Waiver for exceptional circumstances (e.g., the spouse is suffering from diminished mental capacity, the spouse and the employee have been maintaining separate residences with no financial relationship for several years, the spouse abandoned the employee but, for religious or other reasons, the parties choose not to divorce) are permitted by § 842.607(b). However, before a waiver for exceptional circumstances is allowed, the regulations generally require documentation from a judicial body that substantiates the request for waiver. This procedure is necessary to guarantee that the current spouse receives due process before he or she loses the right to a survivor annuity without his or her consent.

Sections 842.608 through 842.610 concern changes of elections at the time of retirement and when those elections become final. Generally, the election becomes irrevocable after OPM sends rate information to the retiring employee or Member and the employee confirms the election. If the retiring employee does not respond to the request for confirmation, the election made on the retirement application becomes irrevocable 30 days after the date of the notice that includes the rate information. However, an election of an insurable interest rate or, in the case of a married retiree, a self-only annuity must be confirmed within the applicable time limit or the election will be cancelled.

Section 842.610(b) implements section 8417(d) of title 5, United States Code. This section of the law allows married retirees who elected not to take a reduced annuity to provide a current spouse annuity and 18-month period to change the election. However, to exercise that right, the retiree must comply with a substantial deposit requirement.

Section 842.611 (a) and (b) implements section 8417(b) of title 5, United States Code, which permits a retired employee or Member to elect to provide a survivor annuity for a former spouse within 2 years after the dissolution of the marriage to the former spouse. Section 842.611(c) implements the deposit requirement of section 8418 of title 5, United States Code. Section 842.611(d) implements section 8419(b)(2) of title 5, United States Code, that provides for termination of the annuity reduction.

Section 842.612 concerns "post-retirement" elections of survivor benefits for spouses acquired after retirement. The election must be made within 2 years after the marriage. As under § 842.603, a court ordered annuity merely blocks payment of a current spouse annuity. Retirees who wish to provide a current spouse annuity for a spouse acquired after retirement should elect to do so within the 2-year time limit even if the retiree is receiving a reduced annuity because of a court order.

Section 842.613 implements the maximum survivor provisions of sections 8442(h) and 8445(b) of title 5, United States Code.

Section 842.614 provides the method for computing the partial reductions when authorized. Section 8419 of title 5, United States Code, requires OPM to establish a formula by regulation. For these cases, the reduction will be 10 percent of the portion of the annuity forming the base for the partial survivor annuity. If one-half of the full survivor annuity is payable (under a court order) to a former spouse, the reduction would be 10 percent of one-half of the normal reduction or 5 percent of the retiree's annuity. Likewise, if two-thirds of the survivor annuity is awarded in the court order, the reduction would be 10 percent of two-thirds of 6.666667 percent of the retiree's annuity.

Section 842.615 regulates the collection of the deposits (including interest) required in making post-retirement elections under § 842.611 or § 842.612. These payments are not subject to the procedures for the collection of annuity overpayments because the retiree is deemed to consent to the collection.

Section 842.615(c) permits the spouse to complete the deposit if the retiree dies before making the entire deposit. Because the deposit is a prerequisite to payment of a survivor annuity, the deposit must be fully paid before the survivor annuity can be paid.

Under section 553(b)(3)(B) of title 5, United States Code, I find that good reason exists for waiving the general notice of proposed rulemaking. The volume of regulations necessary to implement the entire new retirement system and the need to have these regulations in place on the statutory effective date of the system (January 1, 1987) so that the necessary forms and information pamphlets can be prepared, ordered, and distributed, and to allow the new retirement system to begin operation on its effective date, makes impracticable the publication of proposed rules.

Under section 553(d)(3) of title 5, United States Code, I find that there is good reason to make these amendments effective in less than 30 days. The regulations are effective January 1, 1987, the effective date of the survivor benefit provisions under this part. Delaying rulemaking would be contrary to the public interest as expressed in FERS because such a delay could delay payments to survivors of employees who die while covered by FERS. Although later payment to such survivors could be retroactive to January 1, 1987, when entitlement attached on that date, delay could seriously harm entitled persons with an immediate need for payment.

#### **E.O 12291, Federal Regulation**

I have determined that this is not a major rule as defined under section 1(b) of E.O 12291, Federal Regulation.

#### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations will only affect retirement payments to retired Government employees, spouses, and former spouses.

#### **List of Subjects in 5 CFR Part 842**

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending 5 CFR Part 842 adding Subpart F to read as follows:

**PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY**

**Subpart F—Survivor Elections**

Sec.

- 842.601 Purpose.
- 842.602 Definitions.
- 842.603 Election at time of retirement of a reduced annuity to provide a current spouse annuity.
- 842.604 Election at time of retirement of a reduced annuity to provide a former spouse annuity.
- 842.605 Election of insurable interest rate.
- 842.606 Election of self-only annuity by married employees and Members.
- 842.607 Waiver of spousal consent requirement.
- 842.608 Changes of election before final adjudication.
- 842.609 Finality of elections.
- 842.610 Changes of election after final adjudication.
- 842.611 Post-retirement election of reduced annuity to provide a former spouse annuity.
- 842.612 Post-retirement election of reduced annuity to provide a current spouse annuity.
- 842.613 Division of a survivor annuity.
- 842.614 Computation of partial annuity reduction.
- 842.615 Payments of required deposits.

**Subpart F—Survivor Elections**

Authority: 5 U.S.C. 8461; §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418.

**§ 842.601 Purpose.**

This subpart explains the survivor annuity elections available under FERS for retirees, and retiring employees and Members, and the actions that they must take to provide these survivor annuities.

**§ 842.602 Definitions.**

In this subpart—

"Current spouse" means a living person who is married to the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

"Current spouse annuity" means a recurring benefit under FERS that is payable (after the employee's, Member's or retiree's death) to a current spouse

who meets the requirements of § 843.303 of this chapter.

"Deposit" means a deposit required to provide a survivor benefit. "Deposit," as used in this subpart, does not include a service credit deposit or re-deposit.

"FERS" means chapter 84 of title 5, United States Code.

"Former spouse" means a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service under FERS. The "former spouse's" marriage to the employee must have been terminated prior to the death of the employee, Member, or retiree.

"Former spouse annuity" means a recurring benefit under FERS that is payable to a former spouse after the employee's, Member's, or retiree's death.

"Insurable interest rate" means the recurring payments under FERS to a retiree who has elected a reduction in annuity to provide a survivor annuity to a person with an insurable interest in the retiree.

"Marriage" has the same meaning as in § 843.102 of this chapter.

"Member" means a Member of Congress.

"Net annuity" means the net annuity as defined in § 841.902 of this chapter.

"Qualifying court order" means a court order that meets the qualifications of § 841.903 of this chapter.

"Reduced annuity" means the recurring payments under FERS received by a retiree who has elected a reduction in his or her annuity to provide a current spouse annuity and/or a former spouse annuity or annuities.

"Retiree" means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. "Retiree," as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity.

"Self-only annuity" means the recurring unreduced payments under FERS to a retiree with no survivor annuity payable to anyone.

"Time of retirement" means the effective commencing date for retired employee's or Member's annuity. An employee or Member is unmarried at the time of retirement for all purposes under this subpart only if the employee or Member was unmarried on the date that the annuity begins to accrue.

**§ 842.603 Election at time of retirement of a reduced annuity to provide a current spouse annuity.**

(a) A married employee or Member retiring under FERS will receive a

reduced annuity to provide a current spouse annuity unless—

(1) The employee or Member, with the consent of the current spouse, elects a self-only annuity or a reduced annuity to provide a former spouse annuity, in accordance with § 842.604(b) or § 842.606; or

(2) The employee or Member elects a self-only annuity or a reduced annuity to provide a former spouse annuity, and a current spousal consent is waived in accordance with § 842.607.

(b) Qualifying court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 842.613.

(c) The amount of the reduction to provide a current spouse annuity is 10 percent of the retiree's annuity.

**§ 842.604 Election at time of retirement of a reduced annuity to provide a former spouse annuity.**

(a) An unmarried employee or Member retiring under FERS may elect a reduced annuity to provide a former spouse annuity or annuities.

(b) A married employee or Member retiring under FERS may elect a reduced annuity to provide a former spouse annuity or annuities instead of a reduced annuity to provide a current spouse annuity, if the current spouse consents to the election in accordance with § 842.606 or spousal consent is waived in accordance with § 842.607.

(c) An election under paragraphs (a) or (b) of this section is void if it—

(1) Conflicts with a qualifying court order; or

(2) Would cause the total of current spouse annuities and former spouse annuities payable based on the employee's or Member's service to exceed the maximum amount of survivor annuity that the employee or Member is entitled to provide under § 842.613.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse dies or remarries before age 55, unless—

(1) The retiree elects, within 2 years after the former spouse's death or remarriage, to continue the reduction to provide a former spouse annuity for another former spouse, or to provide a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) Except as provided in § 842.614, the amount of the reduction to provide a former spouse annuity equals 10 percent of the employee's or Member's annuity.

**§ 842.605 Election of insurable interest rate.**

(a) At the time of retirement, an employee or Member in good health and who is applying for a non-disability annuity may elect an insurable interest rate. An election under this section does not exempt a married employee or Member from the provisions of § 842.603(a).

(b) An insurable interest rate may be elected by an employee or Member electing a reduced annuity to provide a current spouse annuity or a former spouse annuity or annuities.

(c)(1) In the case of a married employee or Member, an election under this section may not be made on behalf of a current spouse unless that current spouse has consented to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1).

(2) A consent (to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1)) required by paragraph (c)(1) of this section to be eligible to be the beneficiary of an insurable interest rate is cancelled if—

- (i) The retiree fails to qualify to receive the insurable interest rate; or
- (ii) The retiree changes his or her election to receive an insurable interest rate under § 842.608; or
- (iii) The retiree elects a reduced annuity to provide a current spouse annuity under § 842.610.

(3) If a retiree who had elected an insurable interest rate to benefit a current spouse elects a reduced annuity to provide a current spouse annuity under § 842.610(b), the election of the insurable interest rate is cancelled.

(d) To elect an insurable interest rate, an employee or Member must indicate the intention to make the election on the application for retirement and must submit a certificate of good health in a form prescribed by OPM.

(e) An insurable interest rate may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with—

- (i) The current spouse;
- (ii) A blood or adopted relative closer than first cousins;
- (iii) A former spouse;
- (iv) A person to whom the employee or Member is engaged to be married;
- (v) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages.

(2) When an insurable interest is not presumed, the employee or Member

must submit affidavits from one or more persons with personal knowledge of the named beneficiary's having an insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(3) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth.

(f) OPM will notify the employee or Member of initial monthly annuity rates with and without the election of an insurable interest rate and the initial rate payable to the named beneficiary. No election of an insurable interest rate is effective unless the employee or Member confirms the election in writing or dies no later than 60 days after the date of the notice described in this paragraph.

(g)(1) When an employee or Member elects both an insurable interest rate and a reduced annuity, the combined reduction may exceed the maximum 40 percent reduction in the retired employee's or Member's annuity permitted under section 8420 of title 5, United States Code, applicable to insurable interest annuities.

(2) The additional reduction to provide a current spouse annuity or a former spouse annuity is not considered in determining the rate of annuity payable to a beneficiary of an insurable interest election.

(h)(1) Except as provided in § 842.604(d), if a retiree who is receiving a reduced annuity to provide a former spouse annuity has also elected an insurable interest rate to benefit a current spouse and the eligible former spouse dies or remarries before age 55 and no other former spouse is entitled to a survivor annuity based on an election made in accordance with § 842.611 or a qualifying court order, the retiree may elect, within 2 years after the former spouse's death or remarriage, to convert the insurable interest rate to a reduced annuity to provide a current spouse annuity. The new rate will be effective on the first day of the month following the death or remarriage of the former spouse.

(2) An election under paragraph (h)(1) of this section cancels any consent not to receive a current spouse annuity required by paragraph (c) of this section for the current spouse to be eligible for an annuity under this section.

(3) When a former spouse receiving an annuity under section 8445 of title 5, United States Code, loses eligibility to that annuity, a beneficiary of an insurable interest rate who was the current spouse at both the time of the retiree's retirement and death may, within 2 years after the death or remarriage of the former spouse, elect to receive a current spouse annuity instead of the annuity he or she had been receiving.

(i) Upon the death of the current spouse, a retiree whose annuity is reduced to provide both a current spouse annuity and an insurable interest benefit for a former spouse is not permitted to convert the insurable interest rate to a reduced annuity to provide a former spouse annuity.

(j) An employee or Member may name only one natural person as the named beneficiary of an insurable interest rate. OPM will not accept the designation of contingent beneficiaries and such a designation is void.

(k)(1) An election under this section prospectively voided by an election of a reduced annuity to provide a current spouse annuity under § 842.612 that would benefit the same person.

(2)(i) If the current spouse is not the beneficiary of the election under this section, a retiree may prospectively void an election under this section at the time the retiree elects a reduced annuity to provide a current spouse annuity under § 842.612.

(ii) A retiree's election to void an election under paragraph (k)(2)(i) of this section must be filed at the same time as the election under § 842.612.

**§ 842.606 Election of self-only annuity by married employees and Members.**

(a) A married employee may not elect a self-only annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 842.607.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) The spousal consent form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(d) A request for waiver of the spousal consent requirement must be by letter and fully state the basis for the request.

**§ 842.607 Waiver of spousal consent requirement.**

(a) The spousal consent requirement will be waived upon a showing that the spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(1) A judicial determination that the spouse's whereabouts cannot be determined; or

(2)(i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the current spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as tax returns filed separately or newspaper stories about the spouse's disappearance.

(b) The spousal consent requirement will be waived based on exceptional circumstances when—

(1)(i) The employee's or Member's annuity begins to accrue before the date on which the employee or Member applies for retirement; and

(ii) The employee or Member was married on the date when his or her annuity begins to accrue; and

(iii) The marriage terminates by death, divorce, or annulment prior to the date on which the employee or Member applies for retirement; or

(2) The employee or Member presents a judicial determination regarding the current spouse that would warrant waiver of the consent requirement based on exceptional circumstances.

**§ 842.608 Changes of election before final adjudication.**

An employee or Member may name a new survivor or change his or her election of type of annuity if, not later than the date when the election becomes final under § 842.609, the named survivor dies or the employee or Member files with OPM a new written election. All required evidence of spousal consent or justification for waiver of spousal consent, if applicable, must accompany any new written election under this section.

**§ 842.609 Finality of elections.**

(a) Except as provided in §§ 842.605(f) and 842.610(b) and paragraphs (c) and (d) of this section, survivor elections at the time of retirement become irrevocable at the earlier of—

(1) Thirty days after the date of the confirmation notice described in paragraph (b) of this section; or

(2) When confirmed.

(b) OPM will notify retiring employees and Members of the rate of annuity they will receive with the survivor elections

made on their retirement application, as well as the rate of a self-only annuity, and, if applicable, the rate of a reduced annuity to provide a current spouse annuity. The notice will request the retiree to confirm the election.

(c)(1) Except as provided in § 842.605(f), if the retiring employee or Member fails to confirm the election within the 30-day time limit the election will be treated as confirmed at the end of the 30-day period unless the retiring employee or Member files a written request to change the election before the end of the 30-day period.

(2) A written request to change an election must include any supporting evidence and/or spousal consent forms that would have been required if the election had been made at the time of application.

(d) Except as provided in § 842.605, if the retiring employee or Member who has not confirmed an election dies before 30 days after the date of the confirmation notice the election will be considered confirmed; except that if such a retiring employee or Member was married at the time of retirement and elected a self-only annuity, he or she is presumed to have elected a reduced annuity to provide a current spouse annuity.

**§ 842.610 Changes of election after final adjudication.**

(a) Except as provided in § 842.611, § 842.612, or paragraph (b) of this section, an employee or Member may not revoke or change the election or name another survivor later than 30 days after the date when the election becomes final under § 842.609.

(b)(1) Except as provided in § 842.605 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected a self-only annuity, a reduced annuity to provide a former spouse annuity, or an insurable interest rate may elect, no later than 18 months after the time of retirement, a reduced annuity to provide a current spouse annuity.

(2) A current spouse annuity based on an election under paragraph (b)(1) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 842.613.

(3) To make an election under paragraph (b)(1) of this section, the retiree must pay, in full, a deposit equal to the sum of the monthly differences between the annuity paid to the retiree and the annuity that would have been in effect since the time of retirement, plus 24.5 percent of the retiree's annual

annuity, plus 6 percent interest on both, no later than 18 months after the time of retirement.

(4) If a retiree makes an election under paragraph (b)(1) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended 30 days after OPM sends the notice of the amount of the deposit.

(5) An election under paragraph (b)(1) of this section cancels any spousal consent under § 842.603.

(6) An election under paragraph (b)(1) of this section is void unless filed with OPM before the retiree dies.

**§ 842.611 Post-retirement election of reduced annuity to provide a former spouse annuity.**

(a) Except as provided in paragraphs (b) and (c) of this section, when a retiree's marriage terminates after retirement, the retiree may elect in writing a reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(b) An election under paragraph (a) of this section will not be permitted—

(1) If it conflicts with a qualifying court order; or

(2) If it would cause the combined current and former spouse annuities to exceed the maximum survivor annuity permitted under § 842.613; or

(3) In the case of a married retiree, if the current spouse does not consent to the election on the form described in § 842.606(c) and spousal consent is not waived by OPM in accordance with § 842.607; or

(4) To the extent that it provides a former spouse annuity for the spouse who was married to the retiree at the time of retirement in an amount that is inconsistent with any joint designation or waiver made at the time of retirement under § 842.603(a) (1) or (2).

(c) An election under this section is not permitted unless the retiree agrees to deposit the amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (a) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest (computed under § 841.107 of this chapter) from the date when each difference occurred.

(d) The annuity reduction under this section terminates under the conditions stated in § 842.604(d).

**§ 842.612 Post-retirement election of reduced annuity to provide a current spouse annuity.**

(a) Except as provided in paragraph (c) of this section, a retiree who was unmarried at the time of retirement may elect, within 2 years after a post-retirement marriage, a reduced annuity to provide a current spouse annuity.

(b) Except as provided in paragraph (c) of this section, a retiree who was married at the time of retirement may elect, within 2 years after a post-retirement marriage, a reduced annuity to provide a current spouse annuity if—

(1) The retiree was awarded a reduced annuity under § 842.603 at the time of retirement; or

(2) The election at the time of retirement was made with a waiver of spousal consent in accordance with § 842.607; or

(3) The marriage at the time of retirement was to a person other than the spouse who would receive a current spouse annuity based on the post-retirement election.

(c) An election under paragraph (a) or (b) of this section is not effective if it conflicts with a qualifying court order or would cause the combined current and former spouse annuities to exceed the maximum survivor annuity permitted under § 842.613.

(d)(1) Except as provided in paragraph (d)(2) of this section, a retiree making an election under this section must deposit an amount equal to the difference between the amount of the annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (b)(1) or (b)(2) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest from the date when each difference occurred.

(2) An election under this section may be made without deposit, if that election prospectively voids an election of an insurable interest annuity.

(e) Any reduction in an annuity to provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless—

(1) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity; or

(2) A qualifying court order requires the retiree to provide a former spouse annuity.

**§ 842.613 Division of a survivor annuity.**

(a) The maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest rate) payable based on the service of a former employee or Member equals 50 percent of the rate of the self-only annuity that otherwise would have been paid to the employee, Member, or retiree.

(b) By using the elections available under this subpart or to comply with a court order under Subpart I of Part 841 of this chapter, a survivor annuity may be divided into a combination of former spouse annuities and a current spouse annuity so long as the aggregate total of the current and former spouse annuities does not exceed the maximum limitation in paragraph (a) of this section.

(c) Upon termination of former spouse annuity payments because of death or remarriage of the former spouse, or by operation of a court order, the current spouse will be entitled to a current spouse annuity or an increased current spouse annuity if—

(1) The employee or Member died while employed in a position covered under FERS; or

(2) The current spouse was married to the employee or Member continuously from the time of retirement and did not consent to an election not to provide a current spouse annuity; or

(3) The current spouse married a retiree after retirement and the retiree elected, under § 842.612, to provide a current spouse annuity for that spouse in the event that the former spouse annuity payments terminate.

**§ 842.614 Computation of partial annuity reduction.**

If a court order or the death of a current or former spouse results in providing less than the maximum permitted survivor reduction under § 842.613, the reduction in the employee's annuity will be 10 percent of the amount of the employee's annuity on which the survivor benefits will be computed (called the "base").

**§ 842.615 Payments of required deposits.**

(a) The deposits required to elect reduced annuities under §§ 842.610, 842.611, and 842.612 are not annuity overpayments and their collection is not subject to waiver.

(b) If a retiree fails to make a deposit required by § 842.611 or § 842.612 within 2 years after the date of the post-retirement marriage or divorce, the deposit will be collected by offset from his or her annuity in installments equal to 25 percent of the retiree's net annuity (as defined in § 841.902 of this chapter).

(c) If a retiree dies before a deposit required under § 842.611 or § 842.612 is fully made, the deposit will be collected from the survivor annuity (for which the election required the deposit) before any payments of the survivor annuity are made.

[FR Doc. 87-905 Filed 1-15-87; 8:45 am]

BILLING CODE 5325-01-M

**5 CFR Part 842**

**Federal Employees Retirement System—Basic Annuity; Alternative Forms of Annuity**

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rules with requests for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules to implement provisions of the Federal Employees' Retirement System (FERS) Act of 1986, which require OPM to offer alternative forms of annuity to employees who retire under the Federal Employees Retirement System. These interim rules specify what types of benefits will be offered and how OPM will administer them.

**DATES:** Interim rules effective January 1, 1987; comments must be received on or before March 17, 1987.

**ADDRESSES:** Send comments to Frank D. Titus, Director, FERS Implementation Task Force, Retirement and Insurance Group, P.O. Box 884, Washington, DC 20044; or deliver to OPM, Room 3311, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Robert Rosenblatt, (202) 632-5560.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The FERS Act of 1986, Pub. L. 99-335, as amended by the Federal Employees' Retirement System Technical Corrections Act of 1986, Pub. L. 99-556, created a new retirement system for some Federal employees.

Section 8420a of title 5, United States Code, as added by the FERS Act of 1986, requires OPM to offer alternative forms of annuities in lieu of the basic annuity benefits which would otherwise be payable to employees retiring under the new system. These interim regulations establish the rules OPM will use in administering section 8420a.

**II. Eligibility**

Section 8420a states that retiring employees (and Members of Congress) may elect to receive benefits other than

those otherwise payable under FERS. Eligibility for the alternative forms of annuities is limited to non-disability annuitants. Also ineligible is any employee who has a former spouse entitled by court order to receive a portion of the employee's annuity or a survivor annuity based on the employee's service.

Section 842.703 (a) through (c) of the interim regulations restate these basic eligibility requirements, specifying that the employee's status at the time of retirement will govern OPM's determination. This gives effect to the statutory language of section 8420a(a), which provides that the employee may make the election "at the time of retiring." "Time of retirement" is defined to mean the date on which the annuity benefit begins to accrue. In the case of employees who are eligible, under 5 U.S.C. 8412, for an immediate annuity, but who elect to postpone receipt, "time of retirement" means the date selected by the individual. Likewise, for individuals who are eligible, under 5 U.S.C. 8413, to select a date before age 62 on which to begin receiving a deferred annuity, "time of retirement" means the earlier commencing date selected by the individual.

### III. Election requirements

Section 842.704(a) provides that an election of an alternative form of annuity must be filed on a form prescribed by OPM and that the form will require, in the case of a married annuitant, that the spouse of the retiree consent to the specific election of the alternative form of annuity made by the retiree. The regulatory requirement that the spouse consent to the exact election made by the retiree will ensure that the spouse is fully informed of the election.

Section 842.704(b) provides a time limit for electing an alternative form of annuity consistent with the limits imposed under Subpart F of this part for making survivor benefit elections.

Sections 842.704 (d) and (e) provide for situations in which a retiree dies before making an election regarding the alternative form of annuity. Under the method of computing the alternative forms of annuity (described in paragraph IV) the rate of survivor benefits will be the same regardless of whether the retiree elects to receive an alternative form of annuity (and the lump-sum credit) or just the annuity otherwise payable under FERS. Therefore, if a retiree dies before making an election, OPM will deem the annuitant to have elected the full survivor benefit for any current spouse plus the alternative form of annuity (and the lump-sum credit). The regulations

provide one exception to this rule: If the retiree had submitted to OPM a valid election of survivor benefits in which the current spouse consented not to receive a survivor benefit, and the election named a former spouse to receive a survivor benefit, OPM will honor that election by paying the former spouse the survivor benefit that had been elected by the decedent and will also deem that the decedent elected the alternative form of annuity. Under both the general rule and the exception, the lump-sum credit will be paid in the order of precedence for lump-sum payments in section 8424(d) of title 5, United States Code.

### IV. Alternative Forms of Annuity Available

Section 8420a(b) requires OPM to offer at least 2 alternative forms of annuity, each of which includes payment of the employee's lump-sum credit (excluding interest), plus an annuity payable for the life of the annuitant. Under one of these mandatory offerings, no survivor annuity would be payable; and under the other, a survivor benefit for the spouse would be payable.

Under § 842.705(a), OPM will offer any of the 4 types of annuity otherwise available under FERS: (1) A self-only annuity; (2) an annuity with a reduction to provide an annuity for the current spouse; (3) an annuity with a reduction to provide a survivor annuity to a named person having an insurable interest; and (4) an annuity with a reduction to provide an annuity for a former spouse. Certain combinations of these types of annuities are available under the rules governing survivor benefit elections (Subpart F of 5 CFR Part 842), and will also be available as section 8420a benefits. The rate of annuity payable to the annuitant will be further reduced in accordance with § 842.706.

Section 842.705(b) provides that once OPM has established the rate of annuity payable to retirees who have elected to receive an alternative form of annuity (and the lump-sum credit), OPM will treat these annuitants and their survivors in the same way as other annuitants with regard to post-retirement rights and obligations that would be otherwise applicable to annuitants under FERS. The established rate of annuity payable will be increased by applicable cost-of-living adjustments under 5 U.S.C. 8462. Survivor benefits (including children's benefits) will be payable and terminable in accordance with 5 U.S.C. 8441 through 8445. Recomputations of annuity, as in the case of a post-retirement marriage,

divorce, or remarriage will be calculated in accordance with 5 U.S.C. 8416 through 8420, and subject to the same notice requirements, if any. Subsequent changes in post-retirement statutory or regulatory provisions are similarly applied equally to both the alternative and non-alternative annuitants.

### V. Computation of the Alternative Forms of Annuity

With regard to computation of the alternative form of annuity, section 8420a simply requires that the present value of the combined lump-sum credit and alternative form of annuity payable to the retiree be "actuarially equivalent" to the present value of the annuity (plus the annuity supplement, if any) otherwise payable to the retiree under FERS. The law provides no specific guidance on determining actuarial equivalence under section 8420a. These interim regulations provide that OPM will use the dynamic interest and inflation assumptions currently adopted by the Board of Actuaries: A 6.5 percent interest rate and a 5 percent rate of inflation. OPM will also use its mortality tables (life expectancy) for non-disability annuitants under the Civil Service Retirement System, since no such tables have yet been established under FERS.

The present value of an annuity is the amount of money, together with interest, needed at the time of retirement to fund an annuity for the life of the annuitant. This amount of money (present value) earns interest at an assumed rate (6.5% per year in this case) and the annuity increases at an assumed rate (4% per year in this case). Using these assumptions, the annuity payments gradually deplete the initial amount of money, until by the end of the expected lifetime, the amount is reduced to zero. Of course, this computation is done at the time of retirement and is based on actuarially-determined assumptions and expectancies for a large group rather than on individual cases.

The present value of an annuity may be determined by multiplying the monthly rate of annuity by a "present value factor" defined under § 842.702. Using the elements described above, OPM's Office of the Actuary has created the following tables for this purpose. The tables apply equally to men and women, even though their life expectancies are slightly different. These unisex tables were obtained by averaging separate present value factors for male and female retirees weighted by the total dollar value of annuities typically paid to new retirees under CSRS. Table I applies to those

employees who retire prior to attainment of age 62 under provisions of FERS which permit them to receive cost-of-living adjustments prior to age 62 (i.e., law enforcement officers and firefighters retiring under 5 U.S.C. 8412(d); air traffic controllers retiring under 5 U.S.C. 8412(e); and military reserve technicians who retire under 5 U.S.C. 8414(c) and whose separation from service is a result of disability). Table II applies to all other employees.

TABLE I.—PRESENT VALUE FACTORS (APPLICABLE TO RETIREES LISTED IN 5 U.S.C. 8462(c)(3)(B)(ii) EXCEPT 62 AND OVER)

Age at retirement	Present value of a monthly annuity
40	283.1
41	278.4
42	273.6
43	268.7
44	263.7
45	258.5
46	253.4
47	248.4
48	243.4
49	238.4
50	233.4
51	228.4
52	223.2
53	217.9
54	212.4
55	206.9
56	201.3
57	195.7
58	190.0
59	184.4
60	178.7
61	173.1
62	167.5
63	161.8
64	156.2
65	150.7
66	145.2
67	139.7
68	134.4
69	129.1
70	123.9
71	118.8
72	113.8
73	108.8
74	103.9
75	99.2
76	94.7
77	90.3
78	86.0
79	81.8
80	77.6
81	73.7
82	69.9
83	66.2
84	62.7
85	59.3
86	56.1
87	53.0
88	50.0
89	47.2
90	44.5

TABLE II.—PRESENT VALUE FACTORS (APPLICABLE TO RETIREES NOT LISTED IN 5 U.S.C. 8462(c)(3)(B)(ii))

Age at retirement	Present value of a monthly annuity
40	181.2
41	180.9
42	180.6
43	180.2
44	179.5

TABLE II.—PRESENT VALUE FACTORS (APPLICABLE TO RETIREES NOT LISTED IN 5 U.S.C. 8462(c)(3)(B)(ii)—Continued

Age at retirement	Present value of a monthly annuity
45	178.3
46	176.6
47	174.9
48	174.0
49	173.2
50	172.4
51	172.2
52	172.2
53	172.1
54	172.0
55	171.8
56	172.0
57	172.4
58	173.0
59	174.0
60	175.7
61	176.8
62	174.2
63	168.4
64	162.6
65	156.9
66	151.6
67	146.5
68	141.1
69	135.9
70	130.7
71	125.8
72	121.0
73	115.9
74	110.4
75	105.5
76	101.5
77	96.6
78	91.0
79	85.5
80	80.7
81	76.6
82	73.1
83	69.9
84	66.9
85	63.7
86	60.2
87	56.8
88	53.5
89	50.4
90	47.4

The present value factor of 171.8 in Table II, for example, represents the amount of money (the present value) earning interest at 6.5 percent theoretically needed at the time of retirement to fund the annuity of a 55-year-old retiree if the annuity starts out at the rate of \$1 per month and is payable for the annuitant's lifetime with yearly cost-of-living increases of 4 percent. If the table must be changed because of changes in underlying assumptions or mortality rates, OPM will publish a **Federal Register** notice of the proposed change at least 30 days before the effective date of the change.

The actuarial equivalence between (i) the present value of the lump-sum credit/alternative form of annuity and (ii) the annuity and annuity supplement ordinarily payable (without the lump-sum credit payment) may be determined in either of 2 ways that produce mathematically identical results. The first method is:

(1) Monthly annuity ordinarily payable under FERS (including any annuity supplement payable and any

reductions for survivor benefits elected), multiplied by

- (2) Present value factor, yields
- (3) Present value of benefit ordinarily payable, minus
- (4) Lump-sum credit, yields
- (5) Present value of alternative form of annuity, divided by
- (6) Present value factor, yields
- (7) Monthly rate of alternative form of annuity, rounded to the next lowest dollar.

The second method (which is prescribed into the regulations at § 842.706) simply produces the dollar reduction in the commencing rate of annuity attributable to the payment of the lump-sum credit:

- (1) Lump-sum credit, divided by
- (2) Present value factor, yields
- (3) Monthly reduction (in dollars, rounded up), subtracted from the monthly rate ordinarily payable, yields
- (4) Monthly rate of alternative form of annuity.

#### Examples

Under the first method, for an annuitant to whom Table II applies whose commencing date of annuity is his or her 55th birthday, OPM would compute the rate of his or her alternative form of annuity as follows, assuming his or her ordinarily payable monthly rate would be \$1000 (after a reduction to provide a survivor annuity):

- (1) \$1000, multiplied by
- (2) 171.8, yields
- (3) \$171,800 minus
- (4) \$20,000, yields
- (5) \$151,800, divided by
- (6) 171.8, yields
- (7) \$883.

Using the second method for the same retiree, OPM will compute the reduction attributable to the payment of the lump-sum credit, as follows:

- (1) \$20,000, divided by
- (2) 171.8, yields
- (3) \$117, subtracted from \$1000, yields
- (4) \$883.

It should be noted that survivor benefits are not reduced by a retiree's election of the alternative form of annuity. An election to provide survivor benefits requires a reduction in the retiree's annuity, but this reduction is made before computing the alternative form of annuity. Therefore, the reduction in annuity to provide the survivor benefit is the same for the alternative form of annuity as for the annuity ordinarily available. Because the reduction for survivor benefits is the same regardless of the payment of the lump-sum credit, the rate of survivor annuity is unaffected by election of the alternative form of annuity. This

methodology is intended to give effect to the language in 5 U.S.C. 8420a(c) requiring OPM to consider only "the annuity which would otherwise be provided" under 5 U.S.C. 8415 and 8421 in determining actuarial equivalence.

In the event of a recomputation of an annuity, for example because of a post-retirement marriage or divorce, which may give rise to a new survivor reduction in the retiree's annuity or elimination of the reduction, OPM recomputes the annuity in the same way as if there has been no election of the alternative form of annuity. OPM then applies the same reduction attributable to payment of the lump-sum credit as was currently in effect at the time of the recomputation.

#### VI. Waiver of Notice of Proposed Rulemaking and 30-Day Delay of Effective Date

Under 5 U.S.C. 553 (b)(3)(B) and (d)(3), I find that good cause exists to make these amendments effective without prior publication of notice of proposed rules and in less than 30 days. OPM must issue regulations to implement an entire new retirement system which is effective January 1, 1987. In addition, clear rules must be in place to allow preparation of materials and distribute them world-wide to employees who are eligible to elect FERS coverage during the "open season" between July 1 and December 31, 1987. These tasks, along with the necessity to prepare, publish, and distribute necessity forms and informational materials make impracticable the publication of proposed rules.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations will affect only retired Government employees and spouses.

#### List of Subjects in 5 CFR Part 842

Administrative practice and procedures, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.  
Constance Horner,  
Director.

Accordingly, OPM is amending Part 842 of title 5 of the Code of Federal

Regulations to add a new Subpart G to read as follows:

### PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

#### Subpart G—Alternative Forms of Annuities

Sec.	
842.701	Purpose.
842.702	Definitions.
842.703	Eligibility.
842.704	Election requirements.
842.705	Alternative forms of annuities available.
842.706	Computation of alternative form of annuity.

#### Subpart G—Alternative Forms of Annuities

Authority: 5 U.S.C. 8461.

##### § 842.701 Purpose.

This subpart explains the benefits available to employees and Members who elect alternative forms of annuity under section 8420a of title 5, United States Code.

##### § 842.702 Definitions.

In this subpart—

"Alternative form of annuity" means the benefit elected under § 842.705.

"Current spouse annuity" has the same meaning as in § 842.602.

"Former spouse annuity" has the same meaning as in § 842.602.

"Present value factor" represents the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that (a) starts out at the rate of \$1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants; and (b) increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging sex-distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

"Time of retirement" has the same meaning as in § 842.602.

##### § 842.703 Eligibility.

(a) Except as provided in paragraphs (b) and (c) of this section, an employee or Member who retires under any provision of subchapter II of chapter 84 of title 5, United States Code, may elect

an alternative form of annuity instead of any other benefits under the subchapter.

(b) An employee or Member who, at the time of retirement, has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a qualifying court order as defined by § 841.902 may not elect an alternative form of annuity.

(c) An employee or Member who is married at the time of retirement may not elect an alternative form of annuity unless the employee's or Member's spouse specifically consents to the election. OPM may waive spousal consent only under the conditions prescribed by § 842.607.

##### § 842.704 Election requirements.

(a) The election of an alternative form of annuity and evidence of spousal consent must be filed on a form prescribed by OPM within the time limit prescribed in paragraph (b)(1) of this section. The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent to the specific election as executed by the retiree, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(b)(1) Except as provided in paragraph (d) of this section, an alternative form of annuity will not be allowed unless the employee or Member files with OPM an affirmative election within 30 days after the date of the notice described in paragraph (c) of this section.

(2) The election of an alternative form of annuity cannot be revoked after OPM authorizes any payment pursuant to that election.

(c) OPM will notify each retiring employee or Member of the amounts payable if an alternative form of annuity is elected. The notice will be sent to the employee or Member only after separation from service, and will include instructions for completing the election.

(d) Except as provided in paragraph (e), an annuitant who dies before the time limit prescribed in paragraph (b)(1) of this section is deemed to have made an affirmative election under § 842.703(a) with a reduced annuity to provide a current spouse annuity, regardless of any election completed under § 842.606, and the lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code.

(e) If an annuitant described in paragraph (d) has completed an election under § 842.604 (a) or (b)—

(1) The lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code; and

(2) The election under § 842.604 (a) or (b) will be honored.

**§ 842.705 Alternative forms of annuities available.**

(a) An employee or Member who is eligible to make an election under § 842.703 may elect to receive his or her lump-sum credit, excluding interest, plus an annuity computed in accordance with sections 8415 and 8421 of title 5, United States Code, for which they qualify (including any reduction for survivor benefits) and reduced under § 842.706.

(b) A retired employee or Member who elected an alternative form of annuity is subject to all provisions of subchapters II and IV of chapter 84 of title 5, United States Code, as would otherwise apply to a retired employee or Member who did not elect an alternative form of annuity.

**§ 842.706 Computation of alternative form of annuity.**

(a) To compute the beginning rate of annuity payable to a retiree who elects an alternative form of annuity, OPM will first compute the monthly rate of annuity (and annuity supplement, if any), otherwise payable under subchapter II of chapter 84 of title 5, United States Code, including all reductions provided under the subchapter other than those in section 8420a of that title. That monthly rate is then reduced by an amount equal to the retiree's lump-sum credit, excluding interest, divided by the applicable present value factor for the retiree's attained age (in full years) at the time of retirement. The reduced monthly rate is then rounded to the next lowest dollar and becomes the rate of annuity payable.

(b) OPM will publish a notice in the *Federal Register* announcing any proposed adjustments in present value factors at least 30 days before the effective date of the adjustments.

[FR Doc. 87-903 Filed 1-15-87; 8:45 am]

BILLING CODE 6325-01-M

**5 CFR Part 842**

**Federal Employees Retirement System—Basic Annuity; Law Enforcement Officers; Firefighters; and Air Traffic Controllers**

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with comments requested.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules implementing special retirement provisions for law enforcement officers, firefighters, and air traffic controllers employed under the new Federal Employees Retirement System (FERS). These regulations are intended to provide for efficient administration of the program by delegating to employing agencies the authority to determine whether their employees qualify under the new provisions.

**DATES:** Interim rules effective on January 1, 1987; comments must be received on or before March 17, 1987.

**ADDRESS:** Send written comments to Frank Titus, Director of FERS Implementation Task Force, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 884, Washington, DC 20044; or deliver to OPM, Room 3311, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** John E. Landers, (202) 632-5560.

**SUPPLEMENTARY INFORMATION:** The Federal Employees Retirement System Act of 1986, Pub. L. 99-335, effective January 1, 1987, created the Federal Employees Retirement System (FERS). FERS is a new system intended to supplement social security coverage for Federal employees who were hired after 1983 and for others who may elect to come under it.

These interim regulations address coverage of special provisions of FERS concerning air traffic controllers, firefighters, and law enforcement officers. Under FERS, an employee who is subject to the special provisions for these employees will be required to pay an extra one-half percent of basic pay; they may retire earlier (after 25 years of covered service at any age, or at age 50 with 20 years of covered service); and their annuity is based on a higher percentage of average salary (1.7% per year rather than 1%). (Computation of benefits for these employees will be determined in accordance with other FERS regulations to be published as soon as possible.)

The law requires agencies to pay the full cost (minus the employee contributions) of the special entitlements. Therefore, for each employee who falls into one of these special categories, the agency contribution to the retirement system will reflect the cost of the special entitlements.

The general intent of these interim regulations is to provide efficient administration of these provisions by placing the responsibility for determining who is and is not entitled to

the special coverage with the heads of the employing agencies. (See § 842.803.) The FERS law contains new definitions for these types of employees and these regulations provide the standards to be used by agencies in interpreting the statutory definitions. Because of the potentially significant impact of the coverage decisions on an agency's budget, these interim regulations require that coverage determinations be approved by the agency head. In executive departments, the agency head is the department head rather than the head of any component of the department. The agency head's authority is not delegable. Agency decisions on coverage under the new definitions are appealable to the Merit Systems Protection Board.

The definitions of firefighter and law enforcement officer for the purposes of FERS are found in law at 5 U.S.C. 8401 (14) and (17). These definitions (which are substantively different from the current definitions of these terms under the Civil Service Retirement System (5 U.S.C. 8331 (20) and (21))) take effect on January 1, 1987, and are applicable only to employees subject to the new system. For an employee under the current system, the current definitions remain applicable until such time as he or she becomes subject to FERS, either automatically (for short service employees) or by election after June 30, 1987.

Under FERS, an employee designated as "firefighter" or "law enforcement officer" must occupy, for at least 10 years, a position that is so "rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." Under these interim regulations, each agency that has such "rigorous positions" must officially establish its own maximum entry age for positions in which service will be covered under this requirement. (Employees who meet the 10-year requirement and who move into a supervisory or administrative position without a break in service of more than 3 days retain coverage under the special provisions.) Section 842.809 of these interim regulations provides special rules for employees with past service under the current system who become subject to FERS.

**Waiver of notice of proposed rulemaking**

Under 5 U.S.C. 553 (b)(3)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. Publication of proposed

rulemaking would be impracticable. The provisions being implemented are effective January 1, 1987. Agencies must make determinations whether their positions are subject to the special provisions by the effective date to establish the proper rate of withholding and Government contributions and to recruit for and fill the positions based on the determination of coverage under these regulations.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that within the scope of the Regulatory Flexibility Act, these regulations will not have a significant economic impact on a substantial number of small entities because they affect Federal employees and retirees only.

#### List of Subjects in 5 CFR Part 842

Administrative practice and procedure, Air traffic controllers, Claims, Firefighters, Government employees, Law enforcement officers, Pensions, Retirement.

Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending Part 842 of Title 5 of the Code of Federal Regulations to add Subpart H to read as follows:

#### PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

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#### Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

Sec.

- 842.801 Applicability and purpose.
- 842.802 Definitions
- 842.803 Conditions for coverage.
- 842.804 Evidence.
- 842.805 Withholdings and contributions.
- 842.806 Mandatory separation.
- 842.807 Review of decisions.
- 842.808 Oversight of coverage determinations.
- 842.809 Transitional provisions.

#### Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

Authority: 5 U.S.C. 1104 and 8461(g).

##### § 842.801 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

- (1) 5 U.S.C. 8412 (d) and (e) and 8414(c), which establish special

retirement eligibility for law enforcement officers, firefighters, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a)(2)(B), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of chapter 84 of title 5 of the United States Code, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies.

##### § 842.802 Definitions.

In this subpart—

"Agency head" means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. 105; for the legislative branch, the Secretary of the Senate, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the judicial branch, the Director of the Administrative Office of the United States Courts; for the Postal Service, the Postmaster General; and for any other independent establishment that is an entity of the Federal Government, the head of the establishment.

"Air traffic controller" means a civilian employee of the Department of Transportation or the Department of Defense in an air traffic control facility or flight service station facility who is actively engaged in the separation and control of air traffic or in providing preflight, inflight, or airport advisory service to aircraft operators, as provided in 5 U.S.C. 2109. Also included in this definition is an employee who supervises any air traffic controller.

"Detention duties" means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). (See 5 U.S.C. 8401(17).)

"Employee" means an employee as defined by 5 U.S.C. 8401(11).

"Firefighter" means an employee occupying a rigorous position, whose primary duties are to perform work directly connected with the control and extinguishment of fires, as provided in 5 U.S.C. 8401(14). Also included in this definition in an employee occupying a

rigorous firefighter position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b).

"First-level supervisors" are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a rigorous position or a secondary position if the appropriate definition is met.

"Frequent direct contact" means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

"Law enforcement officer" means an employee occupying a rigorous position, whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or the protection of officials of the United States against threats to personal safety, as provided in 5 U.S.C. 8401(17). Also included in this definition is an employee occupying a rigorous law enforcement officer position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b). Except as provided above, the definition does not include an employee whose primary duties involve maintaining order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States.

"Primary duties" means those duties of a position that—

(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(b) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(c) Are assigned on a regular and recurring basis. Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

"Rigorous position" means a position the duties of which are so rigorous that employment opportunities are required to be limited to young and physically vigorous individuals whose primary duties are—

(a) To perform work directly connected with controlling and extinguishing fires; or

(b) Investigating, apprehending, or detaining individuals suspected or convicted of offenses against the criminal laws of the United States or protecting the personal safety of United States officials.

The condition in this definition that employment opportunities be limited does not apply with respect to an employee who moves directly (i.e., without a break in service exceeding 3 days) from one rigorous law enforcement officer position to another or from one rigorous firefighter position to another.

"Secondary position" means a position that—

(a) Is clearly in the law enforcement or firefighting field;

(b) Is in an organization having a law enforcement or firefighting mission; and

(c) Is either—  
 (1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of law enforcement officer or firefighters in rigorous positions; or  
 (2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in the law enforcement or firefighting field is a mandatory prerequisite.

#### § 842.803 Conditions for coverage.

(a) *Rigorous positions.* An employee's service in a position that has been determined by the employing agency head to be a rigorous position is covered under the provisions of 5 U.S.C. 8412(d). An employee who is not in a rigorous position nor covered while in a secondary position and is detailed to a rigorous position is not covered under the provisions of 5 U.S.C. 8412(d).

(b) *Secondary positions.* (1) An employee's service in a position that has been determined to be a secondary position by the employing agency head is covered under the provisions of 5 U.S.C. 8412(d), if all of the following criteria are met:

(i) The employee moves directly (i.e., without a break in service exceeding 3 days) from a rigorous position to a secondary position;

(ii) The employee has completed 10 years of service in a rigorous position (which may include a position as first-level supervisor if the appropriate conditions are met); and

(iii) The employee has been continuously employed in a secondary position or positions since transferring from a rigorous position without a break in service exceeding 3 days, except that a break in employment in secondary

positions that begins with an involuntary separation (nor for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose. The head of the agency from which an employee was separated, or the agency head's representative (an agency official not below the level of Director of Personnel), must determine whether the separation qualifies as an involuntary separation for the purposes of this paragraph. The determination must be entered in the employee's permanent record file.

(2) An employee who is not in a rigorous position, nor covered while in a secondary position, and who is detailed to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

(c) *Air traffic controller.* An employee's service in a position that has been determined to be an air traffic controller position by the employing agency head is covered under the provisions of 5 U.S.C. 8412(e).

(d) Except as specifically provided in paragraph (b)(1)(iii) of this section, an agency head's authority under this section cannot be delegated.

#### § 842.804 Evidence.

(a) An agency head's determination under § 842.803(a) (finding that a position is a rigorous position) must be based solely on the official position description of the position in question and any other official description of duties and qualifications. The official documentation for the position must establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if over a certain age or failing to meet certain physical qualifications, as determined by the employing agency head based on the personnel management needs of the agency for the positions in question.

(b) A determination under §§ 842.803 (b) or (c) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(2)(B), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is

presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

#### § 842.805 Withholding and contributions.

(a) During service covered under the conditions established by § 842.803 (a), (b), or (c), the employing agency will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(2)(B) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a)(1)(B) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) An employee (upon proper application to the agency), or a former employee or eligible survivor (upon proper application to OPM) will be paid a refund, without interest, of erroneous additional withholdings for service that is not found to have been covered service in a rigorous, secondary, or air traffic controller position.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a rigorous, secondary, or air traffic controller position is detailed to such a position, the additional withholdings

and agency contributions will not be made.

**§ 842.806 Mandatory separation.**

(a) The mandatory separation provisions of 5 U.S.C. 8425 apply to all law enforcement officers, firefighters, and air traffic controllers including those in secondary positions and supervisory air traffic controller positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under Part 752 of this chapter or a removal action under Part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in Part 831 of this chapter, such separation will be considered erroneous.

**§ 842.807 Review of decisions.**

The final decision of an agency head under § 842.803 may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

**§ 842.808 Oversight of coverage determinations.**

(a) Upon deciding that a position is a rigorous or secondary position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of the position(s) and the number of incumbents. The Director of OPM retains the authority to overrule an agency head's determination that a position is a rigorous or secondary position, except such a determination under 5 U.S.C. 8401(17)(C) (concerning certain positions primarily involved in detention activities).

(b) Each agency must establish a file containing all coverage determinations made by an agency head under § 842.803, and all background material used in making the determination.

(c) Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, an agency must submit to OPM a list of all covered positions and any other pertinent information requested. For rigorous positions, the list must show the specific entry age requirement and physical qualification requirements for each position.

**§ 842.809 Transitional provisions.**

(a) Any service as an air traffic controller, within the meaning of this term under 5 U.S.C. 2109 as in effect prior to January 1, 1987, is included in determining an employee's length of air traffic controller service under 5 U.S.C. 8412(e) for the purposes of retirement eligibility and for mandatory separation under 5 U.S.C. 8425(a). The definition of air traffic controller under 5 U.S.C. 2109 as in effect after January 1, 1987, is not applicable to service performed before such date.

(b) Any service as a law enforcement officer or firefighter, within the meaning of these terms under 5 U.S.C. 8331 (20) and (21), that was performed before the date on which an employee becomes subject to chapter 84 of title 5, United States Code, is included in determining the employee's length of law enforcement officer and firefighter service under 5 U.S.C. 8412(d) for the purposes of retirement eligibility and mandatory separation under 5 U.S.C. 8425(b). Service performed as a law enforcement officer or firefighter within the meaning of 5 U.S.C. 8331, other than service in a supervisory or administrative position, is considered to be service in a rigorous position for the purpose of the 10-year requirement of § 842.803(b)(1)(ii). The definitions of firefighter under 5 U.S.C. 8401(14) and law enforcement officer under 5 U.S.C. 8401(17) are not applicable to service performed before an employee becomes subject to chapter 84 of title 5, United States Code.

(c)(1) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of Subpart I of Part 831 of this chapter; and

(ii) Elects under section 301 of Pub. L. 99-335 to become subject to chapter 84 of such title and begins service in a secondary position with no break in service is considered to have met the transfer and 10-year requirements of §§ 842.803(b)(1)(i) and (ii) for coverage in a secondary position upon the effective date of the election.

(2) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or

administrative position, having already met the transfer requirement of Subpart I of Part 831 of this chapter; and

(ii) Automatically becomes subject to chapter 84 of title 5 of the United States Code (not by election under Section 301 of Pub. L. 99-335) serving in a secondary position is considered to have met the 10-year requirement of § 842.803(b)(1)(ii) for coverage in a secondary position. The employee is not covered as a law enforcement officer or firefighter in a secondary position if he or she had a break in coverage as a law enforcement officer or firefighter (within the meaning of 5 U.S.C. 8331) exceeding 3 days immediately before becoming subject to chapter 84 of title 5 of United States Code. However, a break in coverage in supervisory or administrative positions occurring before the individual becomes subject to such chapter 84 that began with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered to be a break in service for this purpose.

(d) If an employee or former employee or his or her survivor claims that any period of past service under chapter 84 of title 5, United States Code, was service as an air traffic controller, firefighter, or law enforcement officer, the determination of the validity of such claim must be made by the head of the agency in which the service was performed. If the agency of the successor agency no longer exists at the time the claim is made, the determination will be made by OPM.

(e) The determination of whether any service meets the definition of firefighter under 5 U.S.C. 8331(21) or law enforcement officer under 5 U.S.C. 8331(20) must be made in accordance with the provisions of Subpart I of Part 831 of this chapter.

[FR Doc. 87-904 Filed 1-15-87; 8:45 am]

BILLING CODE 6325-01-M

**5 CFR Part 843**

**Federal Employees Retirement System—Death Benefits and Employee Refunds**

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules and requesting comments on the rules to implement the death benefit and employee refunds provisions of the Federal Employees Retirement System (FERS) Act of 1986. These rules regulate

payments of refunds to separated employees and death benefits to survivors of employees, separated employees, and retirees. These rules also regulate the application and eligibility requirements for receiving these benefits.

**DATES:** Interim rules effective January 1, 1987; comments must be received on or before March 17, 1987.

**ADDRESS:** Send comments to Frank D. Titus, Director, FERS Implementation Task Force; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 884; Washington, DC 20044; or deliver to OPM, Room 3311, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Harold L. Siegelman (202) 632-5560.

**SUPPLEMENTARY INFORMATION:** The FERS Act of 1986, Pub. L. 99-335, created a new retirement system for Federal employees. These rules implement death benefits and employee refund provisions of FERS.

### I. General provisions

Subpart A of these rules contains rules of general applicability to survivor benefits. Section 843.102 contains the definitions for use throughout Part 843.

These definitions carefully distinguish between "employees," separated employees," and "retirees" because the person's employment status at the time of death is critical to what benefit is payable under FERS. Formal termination of a person's Federal employment by actual separation from the Federal service is required before the person loses the status of "employee." An "employee" includes anyone still on an agency's employment roll, even if the person had applied for disability retirement, the application had been approved, and the person was in a nonpay status (so that the person would have retroactive entitlement to benefits when separated). If the person had been separated and met all the requirements for retirement, he or she is considered a "retiree." If the person had been separated, but did not qualify for retirement or did not apply, he or she is considered a "separated employee."

The definition of "stepchild" clarifies that to qualify as a stepchild the child's parent must be validly married to the employee. This definition is consistent with the definition in Black's Law Dictionary, most standard dictionaries, and the ordinary, traditional meaning of the term.

### II. One-time payments

Subpart B of these interim rules regulates payments that are available only on a one-time basis. These benefits

are (1) payments of the employee's contributions called the "unexpended balance"; and (2) payments of annuity that had already accrued to a retiree's credit but were not paid prior to the retiree's death, called the "accrued benefit." The unexpended balance can be paid as an "employee refund" if it is paid to a separated employee, or as a death benefit if it is paid to a survivor of a deceased employee, separated employee, or retiree. The accrued benefit is always a death benefit.

Section 843.202 regulates payment of the unexpended balance as an employee refund. A separated employee who has been separated from a covered position for at least 31 days is generally eligible for an employee refund.

Section 843.203 regulates payment of the unexpended balance as a death benefit. The unexpended balance is not payable if someone is eligible for a survivor annuity. Section 843.204 regulates benefits payable even if someone is entitled to a survivor annuity.

Sections 843.208 and 843.209 concern the spousal notification requirement before an employee refund can be paid. These interim rules establish that as an alternative to submission of a notification form signed by the spouse, the employee may submit (1) affidavits of witnesses to the notification; (2) proof that the current or former spouse's whereabouts are unknown; or (3) the current or former spouse's current mailing address. The refund application will inform the employee that alternative 3 will result in a 6- to 8-week delay in payment of the refund while OPM notifies the spouse. It will also inform the employee that the refund will be denied if the notice cannot be delivered at the address provided.

### III. Spousal survivor benefits

Subpart C regulates spousal survivor benefits. These are benefits payable to a current or former spouse upon the death of an employee, separated employee, or retiree. Section 843.303 states the marriage duration requirements before a survivor annuity right attaches based on a death of a retiree, or an employee in a position under FERS. Section 8441(a) of title 5, United States Code, provides that a spouse must be married to an employee, Member, or retiree for the 9 months immediately preceding the death of the employee, Member, or retiree or be the parent of a child of that marriage to be eligible for a survivor annuity. Section 8442(e) of title 5, United States Code, provides that the requirement that a surviving spouse of an employee or Member for at least 9 months immediately before death is considered

satisfied in any case in which the death was accidental or in which the surviving spouse previously had been married to the individual and the aggregate time married is at least 9 months.

Section 843.303(d)(1) defines "accidental" for this purpose. Section 843.303(d)(2) provides that we will accept certain State determinations of the cause of death. Judicial determinations such as the finding, in insurance litigation, that double indemnity is payable or, in a criminal case, that the death was a homicide are typical examples. An administrative finding from a coroner's inquest or similar proceeding is included. Without other evidence, the statement on the death certificate will be accepted as proof that the death was accidental.

Section 843.305 regulates reinstatement of current and former spouse annuities that were terminated because the survivor remarried before age 55. Paragraph (a) provides for reinstatement of current spouse annuities in accordance with section 8442(d)(2) of title 5, United States Code. Because no statutory provision permits reinstatement of former spouse annuities, paragraph (b) provides that remarriage permanently extinguishes them. The solemnization of the remarriage is the event terminating the former spouse's entitlement. Accordingly, even if the remarriage is later annulled the entitlement is not reinstated.

Sections 843.306 and 843.307 state the rules governing eligibility and payment of basic benefits under FERS payable to a current or former spouse (if eligible) of a deceased retiree. The benefit is equal to 50 percent of the retiree's annuity, except in the case of a disability retiree who dies before age 62, for whom the computation is made as though the retiree were age 62 at the time of death. These rules are derived directly from section 8442 (a) and (g) of title 5, United States Code.

The current or former spouse of a deceased retiree may also qualify for a supplementary annuity under § 843.308, which is derived from section 8442(f) of title 5, United States Code. The supplementary annuity is payable only while the current or former spouse is not eligible for social security widow(er)'s (or former spouse) benefits. The supplementary annuity cannot exceed the difference between the FERS annuity and the amount that would have been paid to the spouse under CSRS. Subject to that maximum limitation, the supplementary annuity equals the amount of the widow(er)'s social security benefit that would result from

the deceased retiree's earnings except (1) for years of service under FERS, only the retiree's basic pay is considered to be wages; (2) for each year after age 21 in which the retiree did not work a full year under FERS, he or she is deemed to have wages in amounts determined by indexing the retiree's total pay in the first full year of service under FERS to compute the deemed wages that bear the same relationship to average total wages of all workers as the retiree's basic pay in the first full year of service under FERS. (See Average Total Wages Table in Appendix B to Subpart C.)

The supplementary annuity payable to current and former spouses, unlike the annuity supplement paid to retirees, is subject to cost-of-living increases computed under the FERS formula. The supplementary annuity is payable only to current and former spouses of retirees, not current and former spouses of employees or separated employees.

Section 843.309 provides that current and former spouses of deceased employees who have at least 18 months of creditable civilian service are entitled to a fixed-amount death benefit equal to \$15,000 (indexed) plus 50 percent of the employee's annual salary. This benefit may be taken as a lump sum, or may be used to purchase an actuarially equivalent 36-installment monthly annuity. This section is derived from section 8442 (b)(1)(A) and (b)(2) of title 5, United States Code.

Section 843.310 implements section 8442(b)(1)(B) of title 5, United States Code, by providing an annuity equal to 50 percent of the employee's potential annuity to a current or former spouse of a deceased employee who completed at least 10 years of service. No supplementary annuity is payable to current or former spouses of deceased employees.

Section 843.311 provides the benefits for the survivors of separated employees under section 8442(c) of title 5, United States Code. This section provides a choice of benefits for eligible current and former spouses. If the current or former spouse is the person entitled to the unexpended balance under the order of precedence in section 8424 of title 5, United States Code, he or she may elect to receive the unexpended balance instead of an annuity. Alternatively, an eligible current or former spouse may elect to receive an annuity commencing on the day after the employee's death or on the deceased separated employee's 62nd birthday. If the annuity commences on the deceased separated employee's 62nd birthday, it equals 50 percent of the annuity that the separated employee would have received when he or she attained age 62. If the current or former

spouse elects the earlier commencing date, the annuity is reduced using the factors in Appendix A to Subpart C of these regulations to make the annuity actuarially equivalent to the annuity that he or she would have received if it commenced on the retiree's 62nd birthday.

#### IV. Child annuities

Subpart C regulates child annuities. Section 843.402 states the statutory eligibility requirement for child annuity benefits under section 8443(a) of title 5, United States Code.

Section 843.404 places in regulation a definition of "adopted child" and the standards for proving adoption. The definition includes a child under section 8441(4)(A)(iv) of title 5, United States Code, who technically was not adopted by the employee or retiree but is given the same status as an adopted child.

Section 843.407 uses the standards established for determining continued eligibility for social security child's benefits in determining whether a child is "incapable of self-support" under FERS.

Section 843.408 regulates commencing and terminating dates of child annuities. Under FERS, the annuity of a disabled child who gains capability of self-support and later loses that ability because of the same disability can be restored.

Section 843.409 states the child annuity rates under FERS. All eligible children of the same employee are paid the same rate. That rate is computed under the statutory formula stated in section 8443(a) of title 5, United States Code. The rate is dependent on the total amount of benefits the children would receive under CSRS, the total amount the children are eligible to receive based on social security coverage, and the number of children.

#### V. Insurable interest annuities

Subpart E regulates eligibility and payment of insurable interest annuities. This Subpart is derived from section 8444 of title 5, United States Code.

Section 843.502 concerns eligibility. The basic requirement is that the person to receive the benefit must have been designated an insurable interest beneficiary under § 842.605. This section and the definition of insurable interest beneficiary in § 842.602 contain the rule regarding naming an insurable interest beneficiary.

Section 843.503 states the statutory rules that the beneficiary's annuity commences on the day after the retiree dies and terminates on the last day of the month before the insurable interest beneficiary dies. Section 843.504 states

the statutory annuity rate of 55 percent of the retiree's annuity after the insurable interest reduction.

Under section 553(b)(3)(B) of title 5, United States Code, I find that good reason exists for waiving the general notice of proposed rulemaking. The volume of regulations necessary to implement the entire new retirement system and the need to have these regulations in place by the statutory effective date of the system (January 1, 1987) so that the necessary forms and information pamphlets can be prepared, ordered, and distributed, and to allow the new retirement system to begin operation on its effective date, makes impracticable the publication of proposed rules.

Under section 553(d)(3) of title 5, United States Code, I find that there is good reason to make these amendments effective in less than 30 days. The regulations are effective January 1, 1987, the effective date of the survivor benefit provisions under FERS, to prevent harm to persons entitled to benefits under this part. Delaying rulemaking would be contrary to the public interest as expressed in FERS because such a delay could require delayed payments to survivors of employees who die while covered by FERS. Although later payment to such survivors could be retroactive to January 1, 1987, when entitlement attached on that date, delay could seriously harm entitled persons with an immediate need for income.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect retirement payments to retired Government employees, spouses, and former spouses.

#### List of Subjects in 5 CFR Part 843

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending Title 5, Code of Federal Regulations, to add a new Part 843 to read as follows:

**PART 843—FEDERAL EMPLOYEES  
RETIREMENT SYSTEM—DEATH  
BENEFITS AND EMPLOYEE REFUNDS**

**Subpart A—General Provisions**

- Sec.  
843.101 Purpose.  
843.102 Definitions.  
843.103 Application required.

**Subpart B—One-time Payments**

- 843.201 Purpose.  
843.202 Eligibility for payment of the unexpended balance to a separated employee.  
843.203 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if no one is eligible for an annuity.  
843.204 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if someone is eligible for an annuity.  
843.205 Designation of beneficiary—form and execution.  
843.206 Designation of beneficiary—proof of receipt.  
843.207 Agent of next of kin.  
843.208 Notification of current and/or former spouse before payment of unexpended balance to a separated employee.  
843.209 Waiver of notification requirement.  
843.210 Transfers between retirement systems.

**Subpart C—Current and Former Spouse Benefits**

- 843.301 Purpose.  
843.302 Time for filing applications for death benefits.  
843.303 Marriage duration requirements.  
843.304 Commencing and terminating dates of survivor annuities.  
843.305 Reinstatement.  
843.306 Basic benefits on death of a non-disability retiree.  
843.307 Basic benefits on death of a disability retiree.  
843.308 Supplementary benefits on death of a retiree.  
843.309 Basic employee death benefit.  
843.310 Annuity based on death of an employee.  
843.311 Annuity based on death of a separated employee.  
843.312 Payment to former spouses.  
Appendix A to Subpart C of Part 843—  
Present Value Conversion Factors for  
Earlier Commencing Date of Annuities of  
Current and Former Spouses of Deceased  
Separated Employees  
Appendix B to Subpart C of Part 843—  
Average Total Wages Table

**Subpart D—Child Annuities**

- 843.401 Purpose.  
843.402 Eligibility requirements.  
843.403 Proof of parentage.  
843.404 Proof of adoption.  
843.405 Dependency.  
843.406 Proof of dependency.  
843.407 Disabilities.  
843.408 Commencing and terminating dates of child annuities.  
843.409 Rates of annuities.

- 843.410 School attendance.  
843.411 Direct payments to children.

**Subpart E—Insurable Interest Annuities**

- 843.501 Purpose.  
843.502 Eligibility.  
843.503 Commencing and terminating dates.  
843.504 Rate of annuity.

**Subpart A—General Provisions**

Authority: 5 U.S.C. 8461.

**§ 843.101 Purpose.**

- (a) This part regulates death benefits and employee refunds under FERS.  
(b) This subpart contains definitions and regulations that have general application throughout this part.

**§ 843.102 Definitions.**

In this part—  
"Accrued benefit" means the accrued, unpaid annuity payable after the death of a retiree.

"Adult child" means a child who has attained age 18.

"Basic annuity" means the recurring payments (after the death of an employee, separated employee, or retiree) made to a current or former spouse of a deceased retiree, employee, or separated employee under subsection (a), (b)(1)(B), or (c)(2) of section 8442 of title 5, United States Code.

"Basic child's annuity rate" means the total amount that all surviving children of an employee or retiree would receive under CSRS.

"Basic employee death benefit" means the payment to the current spouse of a deceased employee equal to \$15,000 (indexed under section 8462 of title 5, United States Code), plus one-half of the employee's final salary (or average salary, if higher).

"Child" means a child as defined in section 8441(4) of title 5, United States Code.

"Compensation" means a person receiving recurring benefits under chapter 81 of title 5, United States Code.

"CSRS" means subchapter III of chapter 83 of title 5, United States Code.

"Current spouse" means a living person who is married to the employee, separated employee, or retiree at the time of the employee's, separated employee's or retiree's death. "Current spouse" includes a spouse who is legally separated but not divorced from the employee, separated employee, or retiree.

"Current spouse annuity" means the basic annuity (and supplementary annuity, if any) payable to a current spouse.

"Employee" means an employee as defined in section 8401(11) of title 5, United States Code, and a Member as

defined in section 8401(20) of title 5, United States Code. "Employee" includes a person who has applied for retirement under FERS but had not been separated from the service prior to his or her death, even if the person's retirement would have been retroactively effective upon separation.

"FERS" means chapter 84 of title 5, United States Code.

"Former spouse" means a living person who was married for at least 9 months to an employee, separated employee, or retiree who performed at least 18 months of service creditable under FERS and whose marriage to the employee, separated employee, or retiree was terminated before the death of the employee, separated employee, or retiree.

"Former spouse annuity" means the basic annuity (and supplementary annuity, if any) payable to a former spouse.

"Insurable interest beneficiary" means a person designated to receive a survivor annuity under § 842.605 of this chapter.

"Insurable interest reduction" means the reduction in a retiree's annuity because the retiree elected to provide a survivor annuity to an insurable interest beneficiary.

"Marriage" means a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee, Member, or retiree. If a jurisdiction would recognize more than one marriage in law or equity, the Office of Personnel Management (OPM) will recognize only one marriage but will defer to the local courts to determine which marriage should be recognized.

"Minimum retirement age" means the minimum retirement age as defined in § 842.202 of this chapter.<sup>1</sup>

Year of birth	Minimum retirement age
Before 1948	55 years
1948	55 years and 2 months
1949	55 years and 4 months
1950	55 years and 6 months
1951	55 years and 8 months
1952	55 years and 10 months
1953-1964	56 years
1965	56 years and 2 months
1966	56 years and 4 months
1967	56 years and 6 months
1968	56 years and 8 months
1969	56 years and 10 months
1970 and after	57 years

<sup>1</sup> The definition of minimum retirement age which will be codified at 5 CFR 842.202 reads:

"Minimum retirement age" means an age based on an individual's year of birth, as follows:

"Qualifying court order" means a court order that meets the qualifications of § 841.903 of this chapter.

"Retiree" means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. "Retiree," as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity. "Retiree" for purposes of determining a person's status at the time of death means that the person had been separated from the service and had met all the requirements to receive an annuity including having filed an application for the annuity prior to his or her death.

"Separated employee" means a former employee who has been separated from the service but who has not met all the requirements for retirement under FERS or who has not filed an application for retirement under FERS.

"Step-child" means a child who is the issue of a current or former spouse of the employee or retiree but is not the issue of the employee or retiree. A child is not a step-child unless the relationship between the employee or retiree and the child's parent is a marriage.

"Supplementary annuity" means the recurring payment under section 8442(f) of title 5, United States Code.

"Unexpended balance" means the unrefunded amount consisting of—

(a) Retirement deductions made from the basic pay of an employee under Subpart E of Part 841 of this chapter;

(b) Amount deposited by an employee for periods of service (including military service) for which—

(1) No retirement deductions were made; or

(2) Deductions were refunded to the employee; and

(c) Interest compounded annually on the deductions and deposits at a rate which, for any calendar year, will be equal to the overall average yield to the Civil Service Retirement Fund during the preceding fiscal year from all obligations purchased by the Secretary of the Treasury during that fiscal year under section 8348 (c), (d), and (e) of title 5, United States Code, as determined by the Secretary of the Treasury. Interest on deductions and deposits does not include interest—

(1) If the service covered by the contributions totals 1 year or less; or

(2) For a fractional part of a month in the total service.

#### § 843.103 Application required.

(a) No person is entitled to benefits under this part unless an application on

behalf of that person is filed with OPM no later than 30 years after the death of the employee, separated employee, or retiree on whose service the benefit is based.

(b) Applications for benefits under this part must be filed on the form provided by OPM for that purpose.

#### Subpart B—One-time Payments

Authority: 5 U.S.C. 8461; Sections 843.205, 843.208, and 843.209 also issued under 5 U.S.C. 8424.

##### § 843.201 Purpose.

This subpart explains the requirements under FERS—

(a) For payment of employee contributions to the Civil Service Retirement Fund—

(1) As a refund of contribution, to separated employees; or

(2) As a death benefit, to survivors of employees, separated employees, and retirees; and

(b) For payment of any accrued, but unpaid, annuity to survivors of retirees.

##### § 843.202 Eligibility for payment of the unexpended balance to a separated employee.

(a) Except as provided in §§ 843.208 and 843.209 or in section 3716 of title 31, United States Code, on administrative offset for Government claims, a separated employee who has been separated from a covered position for at least 31 days and who is ineligible for an annuity commencing within 31 days after the date of filing an application for refund is eligible for a payment of the unexpended balance.

(b) Periods of service for which employee contributions have been refunded are not creditable service in determining whether the employee has sufficient service to have title to an annuity or for any other purpose.

##### § 843.203 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if no one is eligible for an annuity.

If there is no survivor who is entitled to monthly survivor annuity benefits on the death of an employee, separated employee, retiree, or survivor annuitant, the unexpended balance is payable, except as provided in section 3716 of title 31, United States Code, on administrative offset for Government claims, to the person(s) entitled in the normal order of precedence described in section 8424 of title 5, United States Code.

##### § 843.204 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if someone is eligible for an annuity.

(a) Except as provided in section 3716 of title 31, United States Code, on administrative offset for Government claims, even if an annuity is payable, the person entitled in the order of precedence described in section 8424 of title 5, United States Code, may be paid—

(1) Partial deposits for civilian service performed on and after October 1, 1982; and

(2) Partial deposits for post-1956 military service; and

(3) The accrued benefit.

(b) Except as provided in Subpart G of Part 842 of this chapter or § 843.311, when someone is eligible for an annuity, the person entitled in the order of precedence may not be paid—

(1) Partial or completed deposits for nondeduction civilian service performed before October 1, 1982, unless the service covered by the deposit is not creditable under FERS; or

(2) Completed deposits for nondeduction civilian service performed on and after October 1, 1982, unless the service covered by the deposit is not creditable under or FERS; or

(3) Completed deposits for post-1956 military service, unless the service covered by the deposit is not creditable under FERS.

(c) Payments of the partial or completed deposits mentioned in paragraph (b) of this section are subject to section 3716 of title 31, United States Code (administrative offset for Governmental claims).

##### § 843.205 Designation of beneficiary—form and execution.

(a) A designation of beneficiary must be in writing, signed and witnessed, and received in the employing office (or in OPM, in the case of a retiree, or a compensation officer, or a separated employee) before the death of the designator.

(b) A change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by this section, will not have any force or effect.

(c) A witness to a designation of beneficiary is ineligible to receive payment as a beneficiary.

(d) Any person, firm, corporation, or legal entity may be named as beneficiary.

(e) A change of beneficiary may be made at any time and without the knowledge or consent of the previous

beneficiary. This right cannot be waived or restricted.

(f) A designation of beneficiary is automatically cancelled whenever a separated employee is paid the unexpended balance.

(g)(1) If the shares designated equal less than 100 percent, the undesignated portion will be paid according to the order of precedence provided in section 8424 of title 5, United States Code.

(2) If the shares designated exceed 100 percent, each designee's share will be in proportion to the share originally designated. Each share is computed by multiplying the percentage designated for that designee by a fraction whose numerator is 100 and whose denominator is the total number of percent designated.

**§ 843.206 Designation of beneficiary—proof of receipt.**

(a) Upon receipt of a designation of beneficiary, the agency (or OPM) will mark the designation to show the date of receipt.

(b) The date of receipt of designation of beneficiary is presumed to be the date marked by the agency (or OPM).

**§ 843.207 Agent of next of kin.**

When a deceased employee or retiree has not named a beneficiary and one of the next of kin entitled makes a claim for the accrued benefit, other next of kin entitled to share in the unexpended balance or accrued benefit may designate the one who made the claim to act as their agent to receive their distributive shares.

**§ 843.208 Notification of current and/or former spouse before payment of unexpended balance to a separated employee.**

(a) Payment to an employee of the unexpended balance may be made only if current and former spouses are notified of the former employee's application.

(b) Proof of notification will consist of a signed and witnessed statement by the current and/or former spouse on a form provided by OPM acknowledging that he or she has been informed of the former employee's application for the unexpended balance and the consequences of the refund on the current or former spouse's possible annuity entitlement. This statement must be presented to the employing agency or OPM when filing the application for the unexpended balance.

(c) If the current and/or former spouse refuses to acknowledge the notification or the employee is otherwise unable to obtain the acknowledgment, the employee must submit—

(1) Affidavits signed by two individuals who witnessed the employee's attempt to personally notify the current or former spouse. The witnesses must attest that they were in the presence of the employee and the current or former spouse and that the employee's purpose should have been clear to the current or former spouse; or

(2) The current mailing address of the current or former spouse. OPM will attempt to notify (by certified mail—return receipt requested) the current or former spouse at the address provided by the employee. The unexpended balance will not be paid until OPM receives the signed return receipt.

**§ 843.209 Waiver of notification requirement.**

The current and/or former spouse notification requirement will be waived upon a showing that the current and/or former spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(a) A judicial or administrative determination that the current and/or former spouse's whereabouts cannot be determined; or

(b) Affidavits by the former employee and two other persons, at least one of whom is not related to the former employee, attesting to the inability to locate the current and/or former spouse and stating the efforts made to locate the current and/or former spouse.

**§ 843.210 Transfers between retirement systems.**

Transfers of employees' contributions between the Civil Service Retirement Fund and other retirement systems for Federal or District of Columbia employees when made in accordance with Federal statute for the purpose of transferring retirement service credit to the other retirement system are not subject to the notice requirements of this subpart.

**Subpart C—Current and Former Spouse Benefits**

Authority: 5 U.S.C. 8461; § 843.309 also issued under 5 U.S.C. 8442.

**§ 843.301 Purpose.**

This subpart explains the survivor benefits payable under FERS to current and former spouses based on the death of retirees, employees, and separated employees.

**§ 843.302 Time for filing applications for death benefits.**

A current or former spouse of a deceased retiree, employee, or separated employee may file an application for benefits under this

subpart, personally or through a representative, at any time within 30 years after the death of the retiree, employee, or separated employee.

**§ 843.303 Marriage duration requirements.**

(a) The current spouse of a retiree, an employee, or a separated employee can qualify for a current spouse annuity only if—

(1) The current spouse and the retiree, employee, or separated employee had been married for at least 9 months, as explained in paragraph (b) of this section; or

(2) A child was born of the marriage, as explained in paragraph (c) of this section; or

(3) The death of the retiree, employee, or separated employee was accidental as explained in paragraph (d) of this section.

(b) For satisfying the 9-month marriage requirement of paragraph (a)(1) of this section, the aggregate time of all marriages between the spouse applying for a current spouse annuity and the retiree, employee, or separated employee is included.

(c) For satisfying the child-born-of-the-marriage requirement of paragraph (a)(2) of this section, any child, including a posthumous child, born to the spouse and the retiree, employee, or separated employee is included. This includes a child born out of wedlock if the parents later married or of a prior marriage between the same parties.

(d)(1) A death is accidental if it results from homicide or from bodily injuries incurred solely through violent, external, and accidental means. The term "accidental" does not include a death caused by or the result of intentional self-destruction or intentionally self-inflicted injury, while sane or insane.

(2) A State judicial or administrative adjudication of the cause of death for criminal or insurance purposes is conclusive evidence of whether a death is accidental.

(3) A death certificate showing the cause of death as accident or homicide is *prima facie* evidence that the death was accidental.

**§ 843.304 Commencing and terminating dates of survivor annuities.**

(a) A current or former spouse annuity under this subpart commences on the day after the death of the person on whose service the annuity is based.

(b) A current or former spouse annuity under this subpart terminates on the last day of the month before the current or former spouse remarries before age 55 or dies.

(c) A current spouse annuity under this subpart terminated for reasons other than death may be restored under § 843.305.

(d) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

#### § 843.305 Reinstatement.

(a) If a current spouse annuity is terminated because of a remarriage of the recipient, the annuity is reinstated on the day of the termination of the remarriage by death, annulment, or divorce if—

(1) The surviving spouse elects to receive this annuity instead of another survivor benefit to which he or she may be entitled (under FERS or another retirement system for Government employees) by reason of the remarriage; and

(2) Any lump sum paid on termination of the annuity is repaid (in a single payment or by withholding payment of the annuity until the amount of the lump sum has accrued).

(b) If present or future entitlement to a former spouse annuity terminates because of remarriage of the recipient or potential recipient, the entitlement is permanently extinguished. An annulment of the remarriage does not reinstate the entitlement.

#### § 843.306 Basic benefits on death of a non-disability retiree.

(a) Except as provided in §§ 843.307 and 843.312, and paragraph (b) of this section, if an annuitant dies and is survived by a current spouse, the current spouse is entitled to a current spouse annuity equal to 50 percent of an annuity computed under section 8415 of title 5, United States Code, with respect to the retiree, unless—

(1) The right to a current spouse annuity was waived under § 842.603 of this chapter (and no election was subsequently made under § 842.610 of this chapter nullifying the waiver); or

(2) In the case of a marriage after retirement, the retiree did not file an election under § 842.612 of this chapter.

(b) A current spouse who married the retiree after retirement is entitled to an annuity under paragraph (a) of this section only upon electing this annuity instead of any other survivor benefit to which such spouse may be entitled under this subpart, Subpart B of this

part, or under another retirement system for Government employees.

#### § 843.307 Basic benefits on death of a disability retiree.

(a) Except as provided in § 843.312, the widow or widower of a retiree who retired based on disability under section 8452 of title 5, United States Code, (disability annuitant) is entitled to a current spouse annuity based on the service of the disability annuitant computed under paragraph (b) of this section.

(b)(1) In the case of a current spouse entitled to an annuity based on the service of a disability annuitant who died after attaining age 62, the amount of the current spouse annuity is one-half of the amount of the annuity to which such disability annuitant was entitled as computed under subchapter IV of chapter 84, United States Code (including any appropriate reduction under section 8452(a)(2) of title 5, United States Code, and any adjustments under section 8462 of title 5, United States Code) as of the day before the date of the disability annuitant's death.

(2) In the case of a current spouse entitled to an annuity based on the service of a disability annuitant who dies before age 62, the amount of the current spouse annuity equals 50 percent of the amount to which the disability annuitant would have been entitled under section 8452(b) of title 5, United States Code, if the disability annuitant had attained age 62 on the day before his or her death. However, in determining the amount under section 8452 of title 5, United States Code, creditable service includes the period of time between the date of death and the date of the 62nd anniversary of the birth of the annuitant, but average pay is adjusted (under section 8462 of title 5, United States Code) only through date of death.

#### § 843.308 Supplementary benefits on death of a retiree.

(a) Except as provided in § 843.312 and paragraph (d) of this section, a current spouse of a deceased retiree who is entitled to a current spouse annuity based on the retiree's service is also entitled to a supplementary annuity.

(b) The amount of the supplementary annuity under this section equals the lesser of—

(1) The amount by which the survivor's assumed CSRS annuity exceeds the annuity payable to the current spouse under § 843.306 or § 843.307; or

(2) The amount equal to the widow's or widower's insurance benefits that

would be payable to him or her under title II of the Social Security Act (without regard to section 202(f)(2) of the Act) based on the wages and self-employment income of the deceased annuitant, except that for purposes of this calculation—

(i) The social security earnings test (section 203 of the Act) does not apply; and

(ii) The benefit is computed—

(A) As of the date on which the retiree dies; and

(B) As if the survivor had attained age 60 and made application for those benefits under subsection (e) or (f) of section 202 of the Act; and

(iii) In computing the primary insurance amount—

(A) For years of service under FERS, only the retiree's basic pay is considered to be wages; and

(B) For each year after age 21 for which the retiree did not work under FERS, the retiree's wages are deemed to equal the amount in Appendix B of this subpart corresponding to that year multiplied by the retiree's basic pay for his or her first full year of employment under FERS divided by the amount in Appendix B of this subpart corresponding to his or her first full year of employment under FERS.

(c)(1) The supplementary annuity terminates at the beginning of the month in which the survivor first satisfies the minimum age requirement under section 202(e)(1)(B)(i) or 202(f)(1)(B)(i) of the Social Security Act.

(2) The supplementary annuity is not payable to a survivor—

(i) Who would not be entitled to benefits under section 202 (e) or (f) of the Social Security Act based on the wages and self-employment income of the deceased annuitant (determined, as of the date of the annuitant's death, as if the survivor had attained age 60 and made appropriate application for benefits, but without regard to any restriction relating to remarriage); or

(ii) For any calendar month in which the survivor is entitled (or would, on proper application, be entitled) to benefits under section 202(g) of the Social Security Act (relating to mother's and father's insurance benefits), or under section 202 (e) or (f) of the Act by reason of having become disabled, based on the wages and self-employment income of the deceased annuitant.

(d) For purposes of this section—

(1) "Assumed CSRS annuity," as used in the case of a survivor, means the amount of the annuity to which such survivor would be entitled under CSRS

based on the service of the deceased annuitant, which is determined—  
 (i) As of the day after the date of the annuitant's death;  
 (ii) As if the survivor had made appropriate application therefor; and  
 (iii) As if the service of the deceased annuitant were creditable under CSRS.  
 (2) "Basic pay" means "basic pay" as defined in section 8401 of title 5, United States Code.

(e) An amount payable under this section will be adjusted under section 8462 of title 5, United States Code, and will be treated in the same way as an amount payable under § 843.306 or § 843.307.

**§ 843.309 Basic employee death benefit.**

(a) Except as provided in § 843.312, if an employee or Member dies after completing at least 18 months of civilian service creditable under section 8411 of title 5, United States Code, and is survived by a current spouse, the current spouse is entitled to the basic employee death benefit equal to the sum of—

- (1) Fifty percent of the final annual rate of basic pay (or of the average pay, if higher) of the employee; and
- (2) Fifteen thousand dollars as adjusted under section 8462 of title 5, United States Code.

(b) The current spouse may elect to receive the basic employee death benefit in one of the following forms—  
 (1) A one-time payment; or  
 (2) Thirty-six equal monthly installments of 3.05642 percent of the amount of the basic employee death benefit.

**§ 843.310 Annuity based on death of an employee.**

Except as provided in § 843.312, if an employee dies after completing at least 10 years of service, a current spouse is entitled to an annuity equal to 50 percent of the annuity computed under section 8415 of title 5, United States Code (without reduction for age), with respect to the employee. The annuity is in addition to the benefit described in § 843.309.

**§ 843.311 Annuity based on death of a separated employee.**

(a) Except as provided in § 843.312, if a separated employee who has completed at least 10 years of service dies after having separated from the service with title to an deferred annuity under section 8413 of title 5, United States Code, but before having established a valid claim for an annuity, and is survived by a current spouse to whom he or she was married on the date of separation, the current spouse may elect to receive—

- (1) An annuity under paragraph (b) of this section; or
- (2) The unexpended balance, if the current spouse is the individual who would be entitled to the unexpended balance.

(b) Except as provided in § 843.312 and paragraph (c) of this section, the current spouse annuity under this section equals 50 percent of an annuity computed under section 8415 of title 5, United States Code, for the separated employee. If the separated employee died before having attained the minimum retirement age, the computation is made as if the separated employee had attained the minimum retirement age.

- (c)(1) The current spouse annuity commences on the day after the separated employee would have attained—  
 (i) Age 62 if the separated employee had less than 20 years of creditable service,  
 (ii) Age 60 if the employee had at least 20 years of creditable service but less than 30 years of creditable service; or  
 (iii) The minimum retirement age if the employee had at least 30 years of creditable service.

(2)(i) The current spouse may elect to receive an adjusted annuity beginning on the day after the death of the separated employee.  
 (ii) The rate of the adjusted annuity equals the annuity computed under paragraph (b)(1) of this section multiplied by the factor in Appendix A of this subpart for the age of the retiree as of the birthday before the retiree's death.

**§ 843.312 Payment to former spouses.**

(a) Any benefit (or a portion of any benefit) payable to a current spouse under this subpart is payable to a former spouse instead if the former spouse is entitled to that benefit under the terms of a qualifying court order or an election under Subpart F of Part 842 of this chapter.

(b) A current spouse annuity may not exceed the difference between—

- (1) The amount of the annuity that would otherwise be payable to the current spouse under this subpart; and
- (2) The amount of the annuity payable to any former spouse of the deceased employee, retiree, or separated employee based on an election made under Subpart F of Part 842 of this chapter or a qualifying court order.

(c) The basic employee death benefit paid to a current spouse may not exceed the difference between—

- (1) The amount that would otherwise be payable to the current spouse under § 843.310; and

(2) The portion of the basic employee death benefit payable to a former spouse based on a qualifying court order.

**Appendix A to Subpart C of Part 843— Present Value Conversion Factors for Earlier Commencing Date of Annuities of Current and Former Spouses of Deceased Separated Employees**

With at least 10, but less than 20 years of creditable service—

Age of separated employee at birthday before death:	<i>Multiplier</i>
26.....	0.0323
27.....	.0354
28.....	.0389
29.....	.0427
30.....	.0468
31.....	.0513
32.....	.0562
33.....	.0615
34.....	.0674
35.....	.0738
36.....	.0808
37.....	.0885
38.....	.0970
39.....	.1063
40.....	.1165
41.....	.1277
42.....	.1401
43.....	.1537
44.....	.1688
45.....	.1855
46.....	.2040
47.....	.2245
48.....	.2473
49.....	.2727
50.....	.3010
51.....	.3325
52.....	.3676
53.....	.4064
54.....	.4492
55.....	.4963
56.....	.5481
57.....	.6052
58.....	.6682
59.....	.7381
60.....	.8159
61.....	.9027

With at least 20, but less than 30 years of creditable service—

Age of separated employee at birthday before death:	<i>Multiplier</i>
36.....	0.0989
37.....	.1083
38.....	.1187
39.....	.1300
40.....	.1425
41.....	.1563
42.....	.1715
43.....	.1882
44.....	.2066
45.....	.2271
46.....	.2497
47.....	.2748
48.....	.3027

	Multiplier
49.....	.3338
50.....	.3685
51.....	.4071
52.....	.4501
53.....	.4977
54.....	.5502
55.....	.6079
56.....	.6714
57.....	.7415
58.....	.8188
59.....	.9046

With at least 30 years of creditable service—

Age of separated employee at birthday before death—	Multipliers by separated employee's year of birth		
	After 1964	From 1949 to 1964	Before 1949
46.....	0.3366	0.3717	0.4106
47.....	.3704	.4091	.4519
48.....	.4081	.4507	.4978
49.....	.4500	.4970	.5490
50.....	.4968	.5486	.6060
51.....	.5489	.6062	.6696
52.....	.6068	.6702	.7403
53.....	.6710	.7411	.8187
54.....	.7419	.8194	.9051
55.....	.8199	.9055	
56.....	.9056		

Appendix B to Subpart C of Part 843—  
Average Total Wages Table

Calendar Year:	Average total wages of all workers
1951.....	\$2,799.16
1952.....	2,973.32
1953.....	3,139.44
1954.....	3,155.64
1955.....	3,301.44
1956.....	3,532.36
1957.....	3,641.72
1958.....	3,673.80
1959.....	3,855.80
1960.....	4,007.12
1961.....	4,086.76
1962.....	4,291.40
1963.....	4,396.64
1964.....	4,576.32
1965.....	4,658.72
1966.....	4,938.36
1967.....	5,213.44
1968.....	5,571.76
1969.....	5,893.76
1970.....	6,186.24
1971.....	6,497.08
1972.....	7,133.80
1973.....	7,580.16
1974.....	8,030.76
1975.....	8,630.92
1976.....	9,226.48
1977.....	9,779.44
1978.....	10,556.03
1979.....	11,479.46

	Average total wages of all workers
1980.....	12,513.46
1981.....	13,773.10
1982.....	14,531.34
1983.....	15,239.24
1984.....	16,135.07

#### § 843.405 Dependency.

To be eligible for survivor annuity benefits, a child must have been dependent on the employee or retiree at the time of the employee's or retiree's death.

#### § 843.406 Proof of dependency.

(a) A child is considered to have been dependent on the deceased employee or retiree if he or she is—

- (1) A legitimate child; or
- (2) An adopted child; or
- (3) A stepchild or recognized natural child who lived with the employee or retiree in a regular parent-child relationship at the time of the employee's or retiree's death; or

(4) A recognized natural child for whom a judicial determination of support was obtained; or

(5) A recognized natural child to whose support the employee or retiree made regular and substantial contributions.

(b) The following are examples of proofs of regular and substantial support. More than one of the following proofs may be required to show support of a natural child who did not live with the employee or retiree in a regular parent-child relationship and for whom a judicial determination of support was not obtained.

(1) Evidence of eligibility as a dependent child for benefits under other State or Federal programs;

(2) Proof of inclusion of the child as a dependent on the decedent's income tax returns for the years immediately before the employee's or retiree's death;

(3) Cancelled checks, money orders, or receipts for periodic payments received from the employee or retiree for or on behalf of the child;

(4) Evidence of goods or services that show regular contributions of considerable value;

(5) Proof of coverage of the child as a family member under the employee's or retiree's Federal Employees Health Benefits enrollment; and

(6) Other proof of a similar nature that OPM may find to be sufficient to demonstrate support or parentage.

(c) Survivor benefits may be denied—

(1) If evidence shows that the deceased employee or retiree did not recognize the claimant as his or her own despite a willingness to support the child; or

(2) If evidence casts doubt upon the parentage of the claimant, despite the deceased employee's or retiree's recognition and support of the child.

#### Subpart D—Child Annuities

Authority: 5 U.S.C. 8461; § 843.406 also issued under 5 U.S.C. 8441.

#### § 843.401 Purpose.

This subpart explains the survivor benefits payable under FERS to children based on the deaths of employees and retirees.

#### § 843.402 Eligibility requirements.

A surviving child of an employee or retiree who dies after completing 18 months of civilian service creditable under FERS is entitled to an annuity under this subpart.

#### § 843.403 Proof of parentage.

(a) A judicial determination of parentage conclusively establishes the paternity of a child.

(b) Except as provided in paragraph (a) of this section, a child born to the wife of a married person is presumed to be the child of the wife's husband. This presumption may be rebutted only by clear and convincing evidence that the husband is not the father of the child.

(c) When paternity is not established under paragraph (a) or (b) of this section, paternity is determined by a preponderance of the credible evidence as defined in § 1201.56(c)(2) of this title.

#### § 843.404 Proof of adoption.

(a) An adopted child is—

(1) A child adopted by the employee or retiree before the death of the employee or retiree; or

(2) A child who lived with the employee or retiree and for whom a petition for adoption was filed by the employee or retiree and who is adopted by the current spouse of the employee or retiree after the death of the employee or retiree.

(b) The only acceptable evidence to prove status as an adopted child under paragraph (a)(1) of this section is a copy of the judicial decree of adoption.

(c) The only acceptable evidence to prove status as an adopted child under paragraph (a)(2) of this section is copies of—

(1) The petition for adoption (clearly showing the date filed); and

(2) The judicial decree of adoption.

**§ 843.407 Disabilities.**

A child is eligible for continued annuity because the child is incapable of self-support if the Social Security Administration finds that the child is eligible for continued social security child's benefits because the child is incapable of self-support.

**§ 843.408 Commencing and terminating dates of child annuities.**

(a) An annuity under this subpart—

(1) Commences on the day after the retiree or employee dies;

(2) Commences or resumes on the first day of the month in which the child later becomes or again becomes a student as described by § 843.313, if any lump sum paid is returned to the Civil Service Retirement Fund; or

(3) Commences or resumes on the first day of the month in which the child later becomes or again becomes incapable of self-support because of a mental or physical disability incurred before age 18 (or a later recurrence of such disability), if any lump sum is returned to the Fund.

(b) An annuity under this subpart terminates on the last day of the month before the child—

(1) Becomes 18 years of age unless he or she is a student as described in § 843.410 or is incapable of self-support;

(2) Becomes capable of self-support after becoming 18 years of age unless he or she is a student as described in § 843.410;

(3) Becomes 22 years of age if he or she is a student as described in § 843.410 and—

(i) Capable of self-support; or

(ii) Incapable of self-support because of a mental or physical disability incurred after age 18;

(4) Ceases to be such a student as described in § 843.410 after becoming 18 years of age unless he or she is incapable of self-support; or

(5) Dies or marries.

(c) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day

of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

**§ 843.409 Rates of annuities.**

(a) For each month, the amount of annuity payable to each surviving child under this subpart is—

(1) The difference between the basic child's annuity rate for that month and the total amount of child's insurance benefits under Title II of the Social Security Act payable for that month to all children of the employee or retiree based on the total earnings (including any non-Federal wages or self employment subject to FICA taxes) of the employee or retiree;

(2) Divided by the total number of children entitled to annuity based on the service of that employee or retiree.

(b) On the death of the current spouse or the former spouse or termination of the annuity of a child, the annuity of any other child or children is recomputed and paid as though the spouse, former spouse, or child had not survived the former employee or Member.

**§ 843.410 School attendance.**

For an adult child to be eligible to continue to receive an annuity as a student, the adult child must continue to meet all other requirements applicable to a child survivor who has not attained age 18. In addition, OPM must receive certification, in a form prescribed by OPM, that the adult child is regularly pursuing a full-time course of study in an accredited institution. A full-time course of study is a noncorrespondence course which, if successfully completed, will lead to completion of the education within the period generally accepted as minimum for completion, by a full-time day student, of the academic or training program concerned.

**§ 843.411 Direct payments to children.**

For purposes of section 8466(c) of title 5, United States Code, persons who

have attained age 18 are considered adults, regardless of the age of majority in the jurisdiction in which they reside.

**Subpart E—Insurable Interest Annuities**

Authority: 5 U.S.C. 8461.

**§ 843.501 Purpose.**

This subpart explains the benefit payable under FERS to an insurable interest beneficiary based on the death of a retiree who elected to take an annuity reduction to provide such benefits.

**§ 843.502 Eligibility.**

An insurable interest beneficiary is eligible for an annuity under this subpart upon the death of a retiree if the retiree had elected (under § 842.606 of this chapter) to receive an insurable interest rate with the insurable interest beneficiary as his or her survivor.

**§ 843.503 Commencing and terminating dates.**

(a) An annuity under this subpart commences on the day after the retiree dies.

(b) An annuity under this subpart terminates on the last day of the month before the insurable interest beneficiary dies.

(c) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

**§ 843.504 Rate of annuity.**

The amount of an annuity under this subpart is 55 percent of the retiree's annuity after the insurable interest reduction.

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# Federal Register

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Friday  
January 16, 1987

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## Part V

### Department of Defense

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48 CFR Parts 227 and 252  
Department of Defense Federal  
Acquisition Regulation Supplement  
Patents, Data, and Copyrights; Proposed  
Rule and Request for Comments

## DEPARTMENT OF DEFENSE

## 48 CFR Parts 227 and 252

## Department of Defense Federal Acquisition Regulation Supplement Patents, Data, and Copyrights

AGENCY: Department of Defense (DOD).

ACTION: Proposed rule and request for comments.

Cross Reference: See the "Notices" section of this Federal Register for a related document (FR Doc. 87-991) published by DOD on Technical Data.

**SUMMARY:** The Defense Acquisition Regulatory Council is considering a change to Subpart 227.4 of the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 953 of the Defense Acquisition Improvement Act of 1986 (Pub. L. 99-500).

**DATE:** Comments on the proposed revision should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below, on or before February 17, 1987, to be considered in the formulation of the final rule. Please cite DAR Case 84-187 in all correspondence related to this issue.

**ADDRESS:** Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD(P)DARS, c/o OASD(A&L) (MRS), Room 3C841, The Pentagon, Washington, DC 20301-3062.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

**SUPPLEMENTARY INFORMATION:****A. Background**

On September 10, 1985, the DAR Council published a proposed rule (50 FR 36887 of September 10, 1985), implementing portions of the Technical Data sections of Pub. L. 98-525, the Defense Procurement Reform Act of 1984. The public comment period was extended to end on January 9, 1986 (50 FR 41180, October 9, 1985). The DAR Council published an interim rule based on a modification of existing DFARS coverage and incorporating specific requirements of Pub. L. 98-525 (50 FR 43158) on October 24, 1985).

Also, the DAR Council distributed a proposed rule regarding validation of restrictive markings on technical data on September 25, 1985. The rule was published for comment jointly by the Department of Defense, General Services Administration and National Aeronautics and Space Administration

as part of the Federal Acquisition Regulation (50 FR 40416, October 3, 1985).

This proposed rule is based on those changes required by Pub. L. 99-500. The June 1986 Final Report to the President by the President's Blue Ribbon Commission on Defense Management entitled "A Quest for Excellence," and the public comments on the proposed rules of September 10, 1985 and October 3, 1985 were also considered in drafting these rules.

Section 953 of the Defense Acquisition Improvement Act of 1986 (Pub. L. 99-500) directed the Secretary of Defense to prescribe regulations to define the legitimate interest of the United States, its contractors and subcontractors in technical data pertaining to items and processes. Section 953 also required revisions to the Defense Department's procedures for validation of proprietary data restrictions and definitions for the terms "developed" and "private expense."

Major changes in the proposed rule include the following:

1. The legitimate rights of the Government, its contractors and subcontractors in technical data relating to items and processes developed in part with Federal funds and in part at private expense are defined. In these situations, if the contractor's contribution is significant the Government will generally receive Government purpose license rights, rather than unlimited rights as provided in the current policy. The Government will also receive Government purpose license rights where it would otherwise be entitled to unlimited rights if the contractor is a small business firm or non-profit organization that agrees to commercialize the technology.

2. The terms "developed" and "private expense" are defined.

3. The validation procedures are revised to conform with the requirements in section 953.

4. The rules have been clarified and simplified. They have also been reorganized to more clearly reflect the process and sequence to acquire technical data and rights in technical data.

**Note:** This proposed rule includes both new and revised coverage which has been renumbered and restructured from that currently in the DFARS. However, it does not contain those sections of the current DFARS which are identified elsewhere in this notice and which will be printed in full text as part of the final rule.

**B. Regulatory Flexibility Act**

The Proposed rule is not expected to impact adversely upon small entities

within the meaning of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and preparation of an Initial Regulatory Flexibility Analysis is, therefore, not required. Consistent with the Act and 10 U.S.C. 2320(a)(2)(E), as amended by Pub. L. 99-500, the proposed rule has been drafted in a manner which will enhance competitive opportunities and reduce compliance burdens for small entities. For example, the rule establishes a policy that, in the case of small businesses, the Government will normally take only Government Purpose License Rights in technical data resulting from the development of an item, component or process funded predominantly at Government expense, provided the small business concern agrees to commercialize the technology. This policy is expected to stimulate the competitive posture of small businesses in the commercial sector. Similarly, by providing that the Government will be entitled to technical data rights sufficient for competition reprourement when development is funded in whole or in part at Government expense, the ability of small business to participate in breakout and reprourement acquisition is enhanced. Comments are invited from small businesses and other interested parties.

**C. Paperwork Reduction Act**

The proposed rule does not create information collection requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

**D. Announcement of Public Meeting**

Although the public comment period established by this Notice complies with requirements of Pub. L. 98-577, the DAR Council is concerned that interested parties be afforded maximum opportunity to critically analyze the proposed rule in light of its length and complexity. Therefore, in order to maximize the opportunity for the public and industry to participate in this rulemaking process, while ensuring that the statutory implementation deadline of 16 April 1987 is achieved, the DAR Council will convene a public meeting on 30 January 1987 at 9:00 a.m. in the Main Auditorium of the General Services Administration Central Office, 18th and F Streets, NW., Washington, DC. At that time, the Council will respond to questions concerning the nature of revisions contained in the proposed rule and will afford ample time to interested parties to present their initial views concerning the revisions. Members of the public and representatives of industry are

encouraged to prepared remarks for oral presentation to attendees. It is believed that the meeting will promote a better understanding of the proposed rule, facilitate preparation of written comments by attendees, and assist the DAR Council in making appropriate changes to the rule prior to the statutory deadline. Questions concerning the meeting agenda should be directed telephonically to Mr. Charles Lloyd, Executive Secretary, DAR Council ((202) 697-7266).

#### List of Subjects in 48 CFR Parts 227 and 252

##### Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, it is proposed that 48 CFR Parts 227 and 252 be amended as follows:

1. The authority citation for 48 CFR Parts 227 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35 and DoD FAR Supplement 201.301.

#### PART 227—PATENTS, DATA, AND COPYRIGHTS

##### Unrevised Regulatory Coverage

2. The following existing sections and subsections of DFARS Subpart 227.4 are to be used when reading this coverage. For convenience, a conversion table is provided indicating the renumbered DFARS sections and subsections. Minor editorial corrections to these sections may be made prior to publication of a final rule.

Proposed renumbering	Current DFARS
227.480	227.402
227.481	227.404
227.481-1	227.404-1
227.481-2	227.404-2
227.476	227.405
227.477	227.406
227.480	227.407
227.478	227.408
227.478-1	227.408-1
227.478-2	227.408-2
227.478-3	227.408-3
227.478-4	227.408-4
227.478-5	227.408-5
227.478	227.409
(Section title deleted)	227.410
227.475-2	227.410-1
227.475-3	227.410-4
227.475-4	227.410-5
227.475-1	227.410-6
227.475-6	227.411
227.473-6	227.414
227.475-7	227.415

3. Subpart 227.4 is amended by adding the following sections. The table of contents set forth below contains only the new sections.

#### Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

Sec.

- 227.470 Scope.
- 227.471 Definitions.
- 227.472 Acquisition policy for technical data and rights in technical data.
- 227.472-1 General.
- 227.472-2 Establishing minimum requirements.
- 227.472-3 Early identification.
- 227.472-4 Statutory prohibition.
- 227.472-5 Standard rights in technical data.
- 227.472-6 Obtaining greater rights in technical data.
- 227.472-7 Waiving unlimited rights in technical data.
- 227.472-8 Subcontracts.
- 227.473 General procedures.
- 227.473-1 Early identification of government rights.
- 227.473-2 Obtaining greater rights in "Private Expense" data.
- 227.473-3 Certifications.
- 227.473-4 Marketing and identification requirements.
- 227.473-5 Validation of restrictive markings on technical data.
- 227.473-7 Non-disclosure agreements.
- 227.474 Alternative methods of obtaining greater rights.
- 227.474-1 [Reserved]
- 227.474-2 [Reserved]
- 227.474-3 Direct licenses.
- 227.474-4 Expiration of restrictive rights legends.
- 227.479 Contracts awarded under Small Business Innovation Research Program (SBIR Program).
- 227.482 Solicitation provisions and contract clauses.

#### Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

##### 227.470 Scope.

(a) Sections 227.470 through 227.482 set forth the Department of Defense policies, procedures, implementing instructions, solicitation provisions, and contract clauses relating to requirements for the acquisition of technical data and computer software as well as rights in technical data, other data, computer software, and copyrights. These sections also set forth policies, procedures, implementing instructions, solicitation provisions, and contract clauses pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

(b) Specific information concerning requirements for the acquisition of computer software is found in DoD Directive 5000.19-L, Volume II, "Acquisition Management Systems and Data Requirements Control List".

(c) These sections do not encompass rights in computer software acquired under GSA authorized ADP Schedule Pricelist contracts. Such rights are

governed by the terms of the GSA contracts.

##### 227.471 Definitions.

"Commercial computer software", as used in this subpart, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this subpart, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer data base", as used in this subpart, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program", as used in this subpart, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software", as used in this subpart, means computer programs and computer data bases.

"Computer software documentation", as used in this subpart, means technical data, including computer listings, and printouts, in human-readable form which (a) documents the design or details of computer software, (b) explains the capabilities of the software, or (c) provides operating instructions for using the software to obtain desired results from a computer.

"Data", as used in this subpart, means recorded information, regardless of form or characteristic.

"Detailed manufacturing or process data", as used in this subpart, means technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes.

"Developed," as used in this subpart, means that the item, component or process exists and works as intended. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed and/or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of testing is required in addition to analysis depends on the nature of the item, component, or process and the state of the art. To be considered "developed" the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market.

"Form, fit, or function data", as used in this subpart, means technical data pertaining to items, components, or processes for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements (e.g., specification control drawings, catalog sheets, envelope drawings, qualification requirements, etc.).

"Government purpose license rights", as used in this subpart, means rights to use, duplicate, or disclose technical data (or in the SBIR Program only computer software), in whole or in part and in any manner, for Government purposes only and to have or permit others to do so for Government purposes only. Government license rights include purposes of competitive procurement but do not grant to the Government the right to have or permit others to use technical data (or the SBIR Program only computer software) for commercial purposes.

"Limited rights", as used in this subpart, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data be: Released or disclosed in whole or in part outside the Government; used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or used by a party other than the Government, except when:

(a) Release, disclosure or use is necessary for emergency repair or overhaul; provided that such release, disclosure, or use thereof outside the Government shall be made subject to a prohibition against further use, release,

or disclosure and that the party furnishing the data be notified by the contracting officer of such release, disclosure or use;

(b) Release or disclosure of to a foreign government, that is in the interest of the United States and is required for evaluation or informational purpose under the conditions of (a) above, except that such release or disclosure may not include detailed manufacturing or process data, or

(c) Any other purposes specifically stated in the contract or separate license agreement.

"Private Expense", as used in this subpart, means that the cost of development has not been paid in whole or in part by the Government and that such development was not sponsored by or required as an element of performance under a Government contract or subcontract; provided, however, independent research and development and bid and proposal costs are deemed to be at private expense.

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to—

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(c) Copy computer programs for safekeeping (archives) or backup purposes; and

(d) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)-(d) above that are listed or described in a contract or described in a license or agreement made a part of a contract.

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). Such term does not include computer software or data incidental to contract administration, such as financial and/or management information.

"Unlimited rights", as used in this subpart, means rights to use, duplicate, release, or disclose, technical data or

computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or to permit others to do so.

"Unpublished", as used in this subpart, means that technical data or computer software which has not been released to the public nor been furnished to others without restriction on further use or disclosure. For the purpose of this definition, delivery of limited rights technical data to or for the Government under a contract does not, in itself, constitute release to the public.

#### 227.472 Acquisition policy for technical data and rights in technical data.

##### 227.472-1 General.

The acquisition of technical data and the rights to use such data requires a balancing of competing interests.

(a) *The Government's Interests.* The Government has extensive needs for many kinds of technical data and the rights to use such data. Its needs may well exceed those of private commercial customers. For defense purposes, millions of separate equipment and supply items, ranging from standard to unique types, must be acquired, operated, and maintained, often at points remote from the source of supply. Functions requiring varied kinds of technical data include training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging, and logistics operations. Technical data resulting from research and development and production contracts must be obtained, organized and disseminated to many different users. Finally, the Government must make technical data widely available in the form of contract specifications in the interest of increasing competition, lowering costs and providing for mobilization by developing and locating alternative sources of supply and manufacture.

(b) *The Contractor's Interests.* Commercial organizations have a valid economic interest in technical data pertaining to items, components, or processes which they have developed. Such technical data is often closely held in the commercial sector because its disclosure to competitors could jeopardize the competitive advantage it was developed to provide. Public disclosure of such technical data can cause serious economic hardship to the originating company and would not be in the interest of the United States in encouraging innovation as well as encouraging contractors to develop at

private expense items, components or processes for use by the Government.

(c) *The balancing of interests.* (1) There is no necessary correlation between the Government's need for technical data and a contractor's economic interest therein. However, in balancing the Government's requirements for technical data against a contractor's interest in protecting its technical data, there may be a considerable identity of interest. This is particularly true in the case of innovative contractors who can best be encouraged to develop at private expense items of military usefulness where their rights in such items are scrupulously protected.

(2) It is equally important that the Government foster successful contractual relationships and encourage a ready flow of data essential to Government needs by confining its acquisitions of technical data to cases of actual need. Certainly the Government must not be barred from bargaining and contracting to obtain the technical data that it needs, even though that technical data normally may not be disclosed in commercial practice. Moreover, when the Government pays for research and development work which produces new knowledge, products, or processes, it has an obligation to foster technological progress through wide dissemination of the new and useful information derived from such work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes.

(3) At the same time, acquiring, maintaining, storing, retrieving, and distributing technical data in the vast quantities generated by modern technology is costly and burdensome for the Government. For this reason alone, it is necessary to control closely the extent and nature of technical data acquisition. Such control is also necessary to ensure Government respect for its contractors' economic interest in technical data relating to their privately developed items.

#### 227.472-2 Establishing minimum requirements.

It is the policy of the Department of Defense to obtain only such minimum technical data and data rights as are essential to meet the Government's needs. Consideration shall be given to such factors as: whether or not the item, component, or process will be competitively acquired; whether repair and overhaul work will be contracted out or serviced in-house; whether the repair or replacement parts will be commercial items, or acquired by form, fit or function data, performance

specifications or by detailed engineering drawings. Once the Government's technical data needs are properly identified, the appropriate technical data rights to meet those needs can be determined. Whether the Government already has or will need to acquire the necessary rights in the technical data or will need to consider alternate procurement procedures, will depend on either the category of the data or whether the item, component, or process was developed exclusively with Federal funds, exclusively at private expense, or in part with Government funds and in part at private expense (See 227.472-5). In deciding how to acquire such data and data rights, or how to otherwise achieve the Government's purposes, it is the policy of the Department of Defense to use procedures that are the least intrusive on the contractor's economic interests as is practicable. (See Subpart 217.72 for additional guidance.)

#### 227.472-3 Early identification.

In order to determine what minimum technical data and data rights to obtain in each acquisition, it is necessary for the Government to identify its various uses of and needs for technical data as early as is practicable in the acquisition of any item, component, or process. Such identification should be made before contract award or, for major weapons systems, prior to entering Full Scale Development. It is also important that contractors be required to provide early identification of any technical data that they intend to deliver with any restrictions on its use.

#### 227.472-4 Statutory prohibition.

In accordance with 10 U.S.C. 2320(a)(2)(F), a contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data beyond those to which the Government is entitled under section 227.472-5. It is permissible, however, to consider in the evaluation of offers such factors as the impact on life cycle costs of limitations on the Government's ability to use or disclose the technical data.

#### 227.472-5 Standard rights in technical data.

The data rights to which the Government is entitled are determined as follows:

(a) If the Government has funded or will fund the entire development of the item, component, or process, then the

Government is entitled to and will normally obtain unlimited rights in the technical data.

(b) If the Government has funded or will fund a part of the development of the item, component, or process, then the Government is entitled to unlimited rights in the technical data. However, the Government should not acquire more data rights than it needs. Therefore, unless the contracting officer determines, during the identification of needs process, that unlimited rights are required, the Government will obtain Government Purpose License Rights if the contractor has or will contribute more than fifty percent of the development cost of the item, component or process or if the contractor is a small business firm or nonprofit organization that agrees to commercialize the technology. The Government will normally obtain unlimited rights in all other cases.

(c) If the item, component, or process is developed by a contractor or subcontractor exclusively at private expense, the Government is entitled to limited rights. Such data must be unpublished and identified as limited rights data. However, if the Government determines that it needs rights in technical data greater than limited rights, the contracting officer may negotiate, pursuant to 227.472-6, with a contractor or subcontractor to acquire additional rights necessary to meet the Government's needs, provided that the additional rights are necessary to enhance competition by developing alternative sources of supply and manufacture. As an alternative, the contracting officer may consider alternate proposals from the contractor or subcontractor to enhance competition.

(d) Notwithstanding (a), (b) and (c) of this section, the Government is entitled to unlimited rights in the technical data in the following categories:

(1) Technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data;

(2) Form, fit or function data pertaining to end-items, components or processes, prepared or required to be delivered under any Government contract or subcontract;

(3) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under a Government contract or subcontract necessary for installation, operation, maintenance or training purposes; and

(4) Technical data which is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

**227.472-6 Obtaining greater rights in technical data.**

If the Government determines that it needs rights in technical data greater than limited rights, the contracting officer may negotiate with a contractor or subcontractor to acquire additional rights necessary to meet the Government's needs, provided that the additional rights are necessary to develop alternative sources of supply and manufacture (See 227.473-2). As an alternative to acquiring additional rights, the contracting officer may consider other proposals from the contractor or subcontractor as to how to achieve the same objectives.

**227.472-7 Waiving unlimited rights in technical data.**

In those cases under 227.472-5 where the Government would normally obtain unlimited rights, the Government may agree to waive these unlimited rights, provided that, in accordance with 10 U.S.C. 2320(a)(2)(G)(ii), the United States receives, as a minimum, a royalty-free license to use, release, or disclose the data for purposes of the United States, including purposes of competitive procurement (i.e. Government Purpose License Rights). However, such lesser rights may only be obtained under this paragraph after a determination by the contracting officer that the Government does not need unlimited rights and that the contractor agrees to commercialize the technology.

**227.472-8 Subcontracts.**

It is the policy of the Department of Defense that prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the technical data of their subcontractors for themselves. Accordingly, a subcontractor, who would have the right pursuant to 227.472-5 to furnish technical data with limited rights, may furnish such limited rights data directly to the Government rather than through the prime contractor.

**227.473 Genral procedures.**

**227.473-1 Early identification of government rights.**

(a) *Prenotification of government rights.* In order for the Government to make informed judgments concerning the competitive reprocurment potential of items, components, processes or

computer software developed at private expense that an offeror intends to deliver under a resultant contract, offerors shall identify to the maximum practicable extent in their responses to solicitations such privately developed items, components, processes, or computer software and the technical data which they:

- (1) Intend to deliver with limited rights;
- (2) Intend to deliver with Government purpose or unlimited rights; or
- (3) Have not yet determined which rights should apply. If delivery of technical data under a resultant contract is expected, the provision at 252.227-7035, Prenotification of Rights in Technical Data, shall be include in the solicitation. If an offeror asserts limited rights to any technical data in its proposal responding to this requirement, Government failure to object to or reject any such assertion shall not be construed to constitute agreement to any such data rights assertion. Offerors will furnish, at the written request of the contracting officer, evidence supporting any such rights, contention when the criteria governing rights in technical data, as set forth in the clause at 252.227-7013, are applied.

(b) *Notification of government rights.* Because continuing information is needed under a contract about a contractor's intention to use in the performance of the contract any items, components, processes or computer software for which technical data would be subject to limited rights or computer software would be subject to restricted rights, the contractor will be required to advise the contracting officer of this fact promptly prior to committing to the use of the privately developed item, component or process. If possible, the schedule should indicate the specific areas to which limited or restricted rights are of concern and the notice requirements should only address those areas.

- (1) Under the clause at 252.227-7013, the contractor is not required to advise the contracting officer as to items, components, processes or computer software for which notice was previously given in the same contract pursuant to the prenotification procedure, or with respect to standard commercial items that are manufactured by more than one source of supply. Also, the contractor need not obtain contracting officer approval to use any item, component, process or computer software in the performance of the contract. If Government control on the contractor's use of privately developed items, components, processes or computer software is desired, special

provisions must be included in the contract.

(2) Subsequent to contractor notification, if the contracting officer agrees that certain technical data would be subject to limited rights, the contracting officer may then determine whether to negotiate for a licensing arrangement, the purchase of additional rights, or to adopt another suitable alternative. Such alternatives may include modifying the specifications so as not to require or permit use of the privately developed items, components, processes or computer software.

**227.473-2 Obtaining greater rights in "Private Expense" data.**

(a) In accordance with DFARS 227.472-6 the Government may obtain greater rights or options for such rights in any technical data pertaining to items, components, or processes developed exclusively at private expense for which the Government would otherwise only be entitled to limited rights. These greater rights may be obtained by negotiation of a lump sum fee, royalty, or other consideration and where appropriate, should also include access to such technical assistance as may be necessary to qualify additional sources. These negotiations may be conducted either by the Government, or upon Government request by the prime contractor or higher-tier subcontractor. Such greater rights shall be stated in the contract schedule as a separate item with a specific price and shall not be obtained under this paragraph unless it is determined after a finding upon a documented record that—

(1) There is a need or requirement for disclosure of "Private Expense" technical data outside the Government for purposes such as for reprocurment or evaluation of the item, component, or process to which the technical data pertains; and

(2) If the specific rights obtained are for reprocurment, then the anticipated net savings in competitive reprocurments from additional sources will likely exceed the acquisition cost of the technical data and rights therein.

(b) In contracts for major systems or major subsystems, it may be in the best interest of the Government to acquire repair parts or components directly from a subcontractor, rather than obtaining greater rights in technical data. In such cases, the clause at 252.227-7017, Rights in Technical Data—Major System and Subsystem Contractor, may be used. Also, the Government's right to purchase such items directly from subcontractors shall be without the

payment of any fee or royalty by the Government or subcontractor for the use of the prime contractor's technical data.

#### 227.473-3 Certifications. [Reserved]

#### 227.473-4 Marking and identification requirements.

(a) Technical data delivered to the Government pursuant to any contract requirement shall be marked with the number of the prime contract, and the name of the contractor and any subcontractor who generated the technical data. Each piece of technical data submitted with limited rights shall also be marked with—

(1) The authorized restrictive legend; and  
(2) An indication (for example, by circling, underscoring, or a note) of that portion of the piece of technical data to which the legend is applicable. The Government shall include such identifying markings on all reproductions thereof.

(b) The contractor has the responsibility to assure that no restrictive markings are placed on technical data except in accordance with the "Rights in Technical Data and Computer Software" clause at 252.227-7013. Copyright notices as specified in Title 17 United States Code, sections 401 and 402, are not considered "restrictive markings".

When the clause at 252.227-7013 "Rights in Technical Data and Computer Software" is required, the clause at 252.227-7018, "Restrictive Markings on Technical Data", shall also be included in the contract. The contractor's procedures required by this clause shall be reviewed by the Contract Administration Office. In addition to the rights afforded to the Government by the clause at 252.227-7018, "Restrictive Markings on Technical Data", the following actions are available to insure proper marking of technical data:

(1) Failure to establish, maintain and follow such marking procedures may be deemed to render technical data nonconforming and subject to FAR Section 46.102 and to withholding of payments under the "Technical Data—Withholding of Payments" clause.

(2) When a pre-award survey is requested by the purchasing office, the quality assurance review shall include as an item of special inquiry an examination of the prospective contractor's procedures for complying with the "Restrictive Markings on Technical Data" clause.

(3) The contractor's procedures for complying with the "Restrictive Markings on Technical Data" clause shall be reviewed when holding post-

award conferences pursuant to FAR Subpart 42.

(c) *Unmarked or improperly marked technical data.* Pursuant to the Validation Procedures of 227.473-5 and the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, the Government has the right to require the contractor on subcontractor to furnish sufficient evidence to justify the propriety of any restrictive markings used by the contractor or technical data delivered to the Government under a contract or subcontract. Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, within six months after delivery of such data the contractor may request permission to place restrictive markings on such data at his own expense and the Government may so permit if the contractor—

(1) Demonstrates that the omission of the restrictive marking was inadvertent,  
(2) Justifies that the use of the markings is authorized, and  
(3) Relieves the Government of any liability with respect to the use of disclosure of such technical data.

(d) If technical data is received with restrictive markings which the Government believes are improper, the Government will nevertheless honor the restrictive legend until the issue is resolved in accordance with the Validation procedures.

(e) If technical data which the contractor is authorized by the contract to furnish with restrictive markings is received with improper markings, the technical data shall be used according to the proper restriction and the contractor shall be required by written notice to correct the markings to conform with those specified in the contract. If the contractor fails to correct the markings within 60 days after notice, Government personnel may correct the markings at the contractor's expense, notify the contractor in writing, and will thereafter use the technical data accordingly.

#### 227.473-5 Validation of restrictive markings on technical data.

(a) Policy and procedures.

(1) *General.* 10 U.S.C. 2321 sets forth rights and procedures pertaining to the validation of restrictive markings asserted by contractors and subcontractors on the use, duplication, or disclosure by the Government and others of technical data delivered under contracts or subcontracts for supplies or services. 10 U.S.C. 2320 provides authority for the Department of Defense to establish remedies when data delivered or made available under a

contract is found to not satisfy the requirements of the contract (e.g., contains improper or unauthorized restrictive legends). The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the contractor or subcontractor. Such review should be accomplished, if possible, before acceptance of the technical data. During the period within three years of final payment on a contract or within three years of delivery of the technical data, whichever is later, the contracting officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (i) is publicly available; (ii) has been furnished to the United States without restriction; or, (iii) has been otherwise made available without restriction. Whenever the contracting officer finds it appropriate to question the validity of restrictive markings on data provided by contractors or subcontractors, the contracting officer shall follow the procedures set forth below. Only the contracting officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the contracting officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".

#### (2) Prechallenge Request for Information.

(i) Prior to making a written determination to challenge, and to assure that the formal challenge process is not unduly or prematurely invoked, the contracting officer should request the contractor or subcontractor to furnish information explaining the basis for any restriction asserted by the contractor or subcontractor on the right of the United States or others to use technical data developed, delivered, or to be delivered, under a contract. In this regard, if the information provided is incomplete, the contracting officer may request the contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or available to, the contractor or subcontractor to justify the validity of the restrictive marking (e.g., a statement of facts accompanied by supporting documentation). Such requests from the contracting officer should be in writing and should state a

reasonable time for submission of the required data.

(ii) The contracting officer should also request information and advice from the cognizant Government activity having interest in, or control of, the data regarding the validity of the markings. If the contracting officer receives advice that the validity of restrictive markings on technical data is questionable, the contracting officer shall request that the individual or office raising the question provide written rationale for the assertion.

(iii) If the contracting officer, after reviewing the information provided pursuant to (a)(2)(i) and (ii) above, and any other available information, determines that reasonable grounds exist to question the current validity of a restrictive marking, and that continued adherence to the marking would make impracticable subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer shall proceed in accordance with paragraph (a)(3) of this section. If, when requesting information under (a)(2)(i) above, the contractor or subcontractor fails to respond to the contracting officer's written request within a reasonable period, the contracting officer shall proceed in accordance with paragraph (a)(3) of this section.

### (3) Challenge.

(i) If the contracting officer determines that a challenge to the restrictive marking is warranted, the contracting officer shall promptly send a written challenge notice to the contractor or subcontractor. The contracting officer's determination to challenge shall be in writing and shall be made within the three year period cited in paragraph (a)(1) above. The challenge to the restrictive legend shall be issued by the contracting officer in a written notice to the contractor that shall:

(A) State the specific grounds for challenging the asserted restrictions;

(B) Require a response within 60 days justifying and providing appropriate evidence as to the current validity of the asserted restriction;

(C) State that a DOD contracting officer's final decision, issued pursuant to paragraph (f) of the clause at 252.227-7037, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

(D) State that a response will be considered a claim within the meaning of the Contract Disputes Act of 1978 and must be certified in the form prescribed in FAR 33.207, regardless of dollar amount, and

(E) State that failure to respond to the challenge notice will constitute agreement by the contractor or subcontractor with Government action to strike or ignore the restrictive legends.

(ii) The contracting officer shall extend the time for response as appropriate if the contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(iii) Any written response from the contractor or subcontractor shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), and must be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(iv) If a contractor or subcontractor has received challenges to the same restrictive markings from more than one contracting officer, the contractor or subcontractor is to notify each contracting officer of the existence of more than one challenge. This notice shall also indicate which unanswered challenge was received first in time by the contractor or subcontractor. The contracting officer who initiated the first in time unanswered challenge is the contracting officer who will take the lead in establishing a schedule for the resolution of the challenge to the restrictive markings. This contracting officer shall coordinate with all the other contracting officers, formulate a schedule for responding to each of the challenge notices, and distribute such schedule to all interested parties. The schedule shall provide to the contractor or subcontractor a reasonable opportunity to respond to each challenge notice. All parties must agree to be bound by this schedule.

### (4) Final decision.

(i) *Final decision when contractor fails to respond.* If the Contractor or subcontractor fails to respond to the challenge notice, the contracting officer will then issue a final decision that the restrictive markings are not valid and that the Government will either strike or ignore the invalid restrictive markings. The final decision shall be issued as a final decision under the Disputes clause at FAR 52.233-1. This final decision is to be issued as soon as possible but not later than 60 days after the expiration of the time period of (a)(3)(i) or (ii) above. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid

restrictive markings in accordance with 52.227-7037.

(ii) *Final decision when contractor or subcontractor responds.*

(A) If, after reviewing the response from the contractor or subcontractor, the contracting officer determines that the contractor or subcontractor has justified the validity of the restrictive markings, the contracting officer shall issue a final decision to the contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive markings. The final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice.

(B) (1) If, after reviewing the response from the contractor or subcontractor, the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice. Such a final decision shall advise the contractor or subcontractor of the rights of appeal under the Contract Disputes Act.

(2) The Government will continue to be bound by the restrictive markings for a period of 90 days from the issuance of the contracting officer's final decision under (a)(4)(ii)(B)(1) of this section. The contractor or subcontractor, if it intends to file suit in the United States Claims Court, must provide a notice of intent to file suit to the contracting officer within 90 days from the issuance of the contracting officer's final decision under (a)(4)(ii)(B)(1) of this section. If the contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the contracting officer within the 90-day period, the Government may cancel or ignore the

restrictive markings, and the failure of the contractor or subcontractor to take the required action constitutes agreement with such Government action.

(3) The Government will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the contracting officer within 90 days from the issuance of the final decision under (a)(4)(B)(7) of this section. The Government will no longer be bound and may strike or ignore the restrictive markings if the contractor or subcontractor fails to file its suit within one year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances significantly affecting the interest of the United States will not permit waiting for the filing of a suit in the United States Court, the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending filing of the suit or expiration of the one-year period without filing of the suit. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(4) The Government will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances significantly affecting the interest of the United States will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending final adjudication. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(5) *Appeal or Suit.*

(i) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is sustained, the restrictive

markings on the technical data shall be cancelled, corrected, or ignored. If upon final disposition it is found that the restrictive marking was not substantially justified, the contracting officer shall determine the cost to the Government of reviewing the restrictive marking and the fees and other expenses incurred by the Government in challenging the marking. The contractor is then liable to the Government for payment of these costs unless the contracting officer determines that special circumstances would make such payment unjust.

(ii) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is not sustained, the Government shall continue to be bound by the restrictive markings. Additionally, if the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the contractor or subcontractor for payment of fees or other expenses incurred by the contractor or subcontractor in defending the validity of the marking.

(6) *Privity of contract.* These procedures for reviewing the validity of restrictive markings on technical data do not create or imply a privity of contract between the Government and subcontractors.

**227.473-7 Non-disclosure agreements.**

Technical data obtained with rights other than unlimited, shall not be released outside the Government unless the recipient of the data agrees to sign a non-disclosure and/or non-use agreement consistent with the conditions of the restrictive rights. Normally, such agreements shall be provided by the originator of the data. However, it should be clearly understood that the Government shall incur no liability for unauthorized use or disclosure by any third party of any such data.

**227.474 Alternative methods of obtaining greater rights.**

**227.474-1 [Reserved]**

**227.474-2 [Reserved]**

**227.474-3 Direct licenses.**

Direct licensing is another approach to enhance competition in privately developed items, components, or processes. In this approach an acquisition strategy is used that calls for a contractor to transfer data and technology directly to another source. While this approach has the advantage of allowing the contractor to maintain direct control over the use of its limited

rights data, it may not be useful when the Government needs to maintain direct control over the data to support the competitive procurement. Such direct licensing arrangements are most useful in special situations such as in leader company contracting in accordance with FAR subpart 17.4. For this reason, direct licenses are generally not appropriate for the acquisition of items, components, or processes having an estimated total acquisition cost of less than \$50 million of RDT&E funds or \$200 million of production funds.

**227.474-4 Expiration of restrictive rights legends.**

(a) As an alternative to obtaining greater rights in limited rights technical data, the Government may negotiate a time limitation on such data. Time limits shall be negotiated on a case-by-case basis and shall balance the contractor's economic interest in the data with the Government's need for competition and an enhanced defense industrial base. The negotiation objective will not exceed seven years. At the expiration point, the Government will normally obtain Government purpose license rights.

(b) If a decision is made to establish a time period for the expiration of limited rights legends, the clause at 252.227-7013, Rights In Technical Data and Computer Software, with its Alternate I, shall be included in solicitations and any resultant contract. The time period, the expiration date of the legends and the rights to be obtained by the Government shall be specified in the contract. Each piece of data furnished under the contract with limited rights shall be marked with the special legend and expiration date set forth in Alternate I to the basic clause at 252.227-7013, Rights in Technical Data and Computer Software.

(c) If it is determined that only a portion of the limited rights data delivered under a contract will be acquired with a time period for the expiration of the special legends, the contract shall specifically identify that portion of the data, and Alternate I to the basic clause 252.227-7013, Rights in Technical Data and Computer Software, may be appropriately modified to limit its application only to that portion.

**227.479 Contracts Awarded Under Small Business Innovation Research Program (SBIR Program).**

(a) Pub. L. 97-219, "Small Business Innovation Development Act of 1982", requires certain agencies to establish a Small Business Innovation Research Program (SBIR Program). The public law

also includes terminology providing for "retention of rights in data generated in the performance of the contract by the small business concern". The Small Business Administration (SBA) issued Policy Directive No. 65-01 on 19 November 1982 to provide policy direction for the conduct of the Small Business Innovation Research Programs within the federal agencies. The policy directive was issued pursuant to the authority contained in the public law.

(b) In the policy directive, the SBA in essence recommended that, except for program evaluation, agencies should protect technical data and computer software generated under an SBIR Program contract (funding agreement) for a period of two years from the completion of the contract under which the technical data and computer software were generated, unless the agencies obtained permission to disclose such data and software from the contractor. The SBA also recommended that, effective at the conclusion of the two-year period, the Government shall have a royalty-free license in the technical data and computer software for Government use. This license has been amended pursuant to Pub. L. 99-500 and Pub. L. 99-591 to specifically include the right to use the technical data for competitive procurement. The SBA further recommended that the contractor, with prior written permission of the contracting officer, be afforded ownership of copyright in technical data and computer software generated under an SBIR Program contract and that the contractor be allowed to publish (subject to national security considerations, if any) such data and software. The policy directive considered it appropriate that the Government should receive a royalty-free license under any copyright and that each publication should contain an appropriate acknowledgement and disclaimer statement.

(c) The clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), incorporates the coverage recommended by the SBA policy directive and shall be included in all contracts awarded under the SBIR Program in which technical data or computer software is required to be prepared, originated, developed, generated, or delivered. The clause differs from the clause at 252.227-7013, Rights in Technical Data and Computer Software, in that it provides for the two (2) year period of limited rights after which the Government receives a Government purpose license in certain technical data and computer software

that would otherwise be subject to unlimited rights. While use of the clause is limited to contracts awarded under the SBIR Program, Contracting Officers may use the basic concept when negotiating for greater rights in limited rights technical data.

#### 227.482 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the basic data clause at 252.227-7013, Rights in Technical Data and Computer Software, in solicitations and contracts when technical data is specified to be delivered or computer software may be originated, developed, or delivered, *provided* that such clause shall not be used in solicitations and contracts—

(i) When existing works are to be acquired in accordance with Section 227.477;

(ii) When special works are to be acquired in accordance with Section 227.476;

(iii) When the work will be performed by foreign sources outside the United States, its territories, possessions, or Puerto Rico, in which case the clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign) applies;

(iv) When performance will be limited solely to architect-engineer services or construction, in which case either the clause at 252.227-7022, Architect-Engineer Work—Unlimited Rights, or the clause at 252.227-7023, Architect-Engineer Work—Sole Property Rights, applies; and

(v) When the contract is awarded under the DoD Small Business Innovation Research Program (SBIR Program), in which case the clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), applies.

(2) The contracting officer shall use the clause with its Alternate I in accordance with the policy at 227.474-4.

(3) The contracting officer shall use the clause with its Alternate II under the circumstances specified at 227.480.

(b) The contracting officer, in order to prevent any misinterpretation of the scope of the clause at 252.227-7013, Rights in Technical Data and Computer Software, in the contract may insert the clause at 252.227-7016, Contract Schedule Items Requiring Experimental, Developmental, or Research Work, in solicitations and contracts when the solicitations and contracts, in whole or in part, call for experimental, development, or research work as an element of performance.

(c) The contracting officer may insert the clause at 252.227-7017, Rights in

Technical Data—Major System and Subsystem Contracts, in solicitations and contracts for major system or major subsystems under the circumstance specified at 227.473-2(b).

(d) The contracting officer shall insert the clause at 252.227-7018, Restrictive Markings on Technical Data, in all solicitations and contracts in accordance with 227.473-4(b).

(e) The contracting officer shall insert the provision at 252.227-7019, Identification of Restricted Rights Computer Software, in solicitations and contracts in accordance with 227.481.

(f) The contracting officer shall insert the clause at 252.227-7020, Rights in Data—Special Works, in solicitations and contracts as required by 227.476.

(g) The contracting officer shall insert the clause at 252.227-7021, Rights in Data—Existing Works, in solicitations and contracts as required by 227.477.

(h) The contracting officer shall insert the clause at 252.227-7022, Government Rights (unlimited) in solicitations and contracts in accordance with 227.478-2(a)(1)(i).

(i) The contracting officer shall insert the clause at 252.227-7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts in accordance with 227.478-2(a)(1)(ii).

(j) The contracting officer shall insert the clause at 252.227-7024, Notice and Approval of Restricted Designs, in solicitations and contracts in accordance with 227.478-5.

(k) The contracting officer shall insert the clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), in solicitations and contracts in accordance with 227.479.

(l) The contracting officer shall insert the clause at 252.227-7026, Deferred Delivery of Technical Data or Computer Software, in solicitations and contracts in accordance with 227.475-2(b).

(m) The contracting officer shall insert the clause at 252.227-7027, Deferred Ordering of Technical Data or Computer Software, in solicitations and contracts in accordance with 227.475-2(c).

(n) The contracting officer shall insert the provision at 252.227-7028, Requirement for Technical Data Certification, in solicitations in accordance with 227.473-3.

(o) The contracting officer shall insert the clause at 252.227-7029, Identification of Technical Data, in all solicitations and contracts in accordance with 227.473-4.

(p) The contracting officer shall insert the clause at 252.227-7030, Technical Data—Withholding of Payment, in

solicitations and contracts in accordance with 227.475-3.

(q) The contracting officer shall insert the clause at 252.227-7031, Data Requirements, in solicitations and contracts in accordance with 227.475-1.

(r) The contracting officer shall insert the clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), in solicitations and contracts in accordance with 227.475-6.

(s) The contracting officer shall insert the clause at 252.227-7033, Rights in Shop Drawings, in solicitation and contracts in accordance with 227.478-2(a)(2).

(t) The contracting officer may insert the provision at 252.227-7035, Prenotification of Rights in Technical Data, in solicitations in accordance with 227.473-1.

(u) The contracting officer shall insert the clause at 252.227-7036, Certification of Technical Data Conformity, in all contracts in accordance with 227.473-3.

(v) The contracting officer shall insert the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, in solicitations and contracts which require the delivery of technical data.

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. The following existing clauses in DFARS Subpart 252.227 are to be used in the reading of this coverage. However, minor editorial corrections may be made prior to publication of a final rule. (Clauses 252.227-7014, Predetermination of Rights in Technical Data, and 252.227-7015, Rights in Technical Data—Specific Acquisition will be deleted from new coverage.)

252.227-7016  
252.227-7017  
252.227-7019  
252.227-7020  
252.227-7021  
252.227-7022  
252.227-7023  
252.227-7024  
252.227-7026  
252.227-7027  
252.227-7028  
252.227-7029  
252.227-7030  
252.227-7031  
252.227-7032  
252.227-7033  
252.227-7034  
252.227-7036

5. Part 252 is amended by revising sections 252.227-7013, 252.227-7018, and 252.227-7025, and adding sections 252.227-7035 and 252.227-7037 to read as follows:

#### 252.227-7013 Rights in technical data and computer software.

As prescribed at 227.482(a)(1), insert the following clause:

##### Rights in Technical Data and Computer Software (May 1987)

(a) *Definitions.* The terms used in this clause are defined in 227.471 of the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS).

(b) *Rights in Technical Data.*

(1) *Limited rights.* The Government shall have limited rights in:

(i) Technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights in accordance with 227.472-6; and

(ii) Unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(3) (i), (iii), or (iv), below. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered;

(B) The name of the contractor and any subcontractor by whom the technical data was generated;

##### Limited Rights Legend

Contract No. \_\_\_\_\_

Contractor: \_\_\_\_\_

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS 227.471 and other limitations as specifically agreed to in writing in accordance with DFARS 227.473-2. A copy of the agreed to limitations shall be affixed to all data subject to such limitations. This legend, together with the indications of the portions of this data which are subject to such limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. The limited rights legend shall be honored only as long as the data continues to meet the definition of limited rights.

(2) *Government Purpose License Rights.* The Government shall have Government purpose license rights in:

(i) Unpublished technical data pertaining to items, components, or processes for which the Government has funded, or will fund, a part of the development cost, unless the contracting officer has determined that the Government requires unlimited rights, and:

(A) The contractor has or will contribute more than 50 percent of the development cost of the item, component, or process; or

(B) The contractor is a small business firm or nonprofit organization that agrees to commercialize the technology; and

(ii) Unpublished technical data listed or described in an agreement incorporated into the schedule of the contract, which the

parties have agreed will be furnished with Government purpose license rights in accordance with DFARS 227.472-6 or 227.472-7. Government purpose license rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered,

(B) The name of the contractor and any subcontractor by whom the technical data was generated, and

##### Government Purpose License Rights Legend

Contract No. \_\_\_\_\_

Contractor: \_\_\_\_\_

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Government Purpose License Rights" in DFARS 227.471. This legend, together with the indications of the portions of this data which are subject to such limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations and shall be honored only as long as the data continues to meet the definition of Government purpose license rights.

(3) *Unlimited rights.* Unless other rights have been agreed to in writing in accordance with DFARS 227.472-7, the Government shall have unlimited rights in:

(i) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(ii) Form, fit, or function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(iii) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes.

(iv) Technical data, which is otherwise publically available, or has been, or is normally released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure;

(v) Technical data in which the Government has funded, or will fund, the entire development of the item, component, or process.

(vi) Technical data in which the Government has funded, or will fund, a part of the development cost of the item, component, or process, and the contractor has not or will not contribute more than 50 percent of the development cost;

(vii) Technical data in which the Government has funded, or will fund, a part of the development cost of the item, component, or process, and the contractor is a small business firm or nonprofit organization that does not agree to commercialize the technology; and

(viii) Technical data in which the Government has funded, or will fund, a part of the development cost of the item,

component, or process, and, notwithstanding (b)(3) (vi) and (vii) above, the contracting officer has determined, in accordance with DFARS 227-472-5(ii), that the Government requires unlimited rights.

(c) *Rights in Computer Software.*

(1) *Restricted Rights.*

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. *Provided*, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the right included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the contractor with the following legend.

**Restricted Rights Legend**

Use, duplication, or disclosure is subject to restrictions stated in Contract No. \_\_\_\_\_ with \_\_\_\_\_ (Name of Contractor)

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in the public domain may, if the contractor so elects, be marked with the following legend:

**Restricted Rights Legend**

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

(Name of contractor and address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to, and ownership of, the software and documentation shall remain with the contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation

only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government may already have or obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, *Provided*, that the unmodified portions shall remain subject to these restrictions.

(2) *Unlimited Rights in Computer Software.* The Government shall have unlimited rights in:

(i) Computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) Computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) Computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished computer software; and

(v) Computer software, which is otherwise publicly available, or has been, or is normally released, or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(d) *Technical Data and Computer Software Previously Provided Without Restriction.* Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) *Copyright.*

(1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect

to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in DFARS 227.471. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) As between the contractor and the Government, the contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authority under section 201(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the contractor, or should the contractor fail, by the Government:

This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at 252.227-7013 (date).

(f) *Removal of Unauthorized Markings.* (1) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, at the contractor's expense, correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder, if:

(i) The contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) The contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by identification of the restrictions set forth in the contract. In either case, the Government shall give written notice to the contractor of the action taken.

(g) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) *Limitation on Charges for Data and Computer Software.* The contractor

recognizes that it is the policy of the Government not to pay, or to allow to be paid, any changes for data or computer software which the Government has a right to use and disclose to others without restriction and contractor agrees to refund any such payments. This policy applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to US Government prime contracts. However, it does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

(i) *Acquisition of Data and Computer Software from Subcontractors.*

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the contractor's rights in the subcontractor data or computer software which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime contractor.

(3) The contractor and higher-tier subcontractors will not use their power to award subcontract as economic leverage to obtain rights in technical data or computer software from their subcontractors.

(j) *Notice of Government Rights.*

(1) Unless the Schedule provides otherwise, and subject to (j)(2) of this section, the contractor will promptly notify the Contracting Officer in writing of the intended use by the contractor or a subcontractor in performance of this contract of any item, component, or process for which technical data would contain any restriction on the Government's right to use, disclose, or have others use such data.

(2) Such notification is not required with respect to:

(i) Standard commercial items which are manufactured by more than one source of supply; or

(ii) Items, components, or processes for which such notice was given pursuant to prenotification of rights in technical data in connection with this contract.

(3) Unless the schedule provides otherwise, Contracting Officer approval is not necessary under this clause for the contractor to use the item, component, or process in the performance of the contract.

(End of Clause)

**ALTERNATE I (May 1987).** As prescribed at DFARS 227.474-4, add the following paragraph to the basic clause:

( ) (i) Notwithstanding any other provision of this contract, the Government shall have (specify additional Government rights here, i.e., procurement) rights in restrictive rights technical data furnished under this contract, effective on the day immediately following the date specified in

the contract for, the expiration of the restrictive rights legends. Such expiration date shall be marked on each piece of data subject to expiring restrictions furnished under the contract.

(ii) Technical data subject to the expiration of restrictive rights shall be marked with the limited rights legend set forth in paragraph (b)(2)(i) of this section with the title of the legend modified to read:

**Restrictive Rights Legend (Subject to Expiration)**

Contract No. \_\_\_\_\_

Contractor: \_\_\_\_\_

The following statement shall also be added to the legend:

Restrictive rights shall become (specify additional Government rights here i.e., procurement) rights on (insert expiration date).

The modified legend shall be included on any reproduction of the restrictive rights data, in whole or in part.

**ALTERNATE II (MAY 1981).** As prescribed at 227.480, add the following paragraph to the basic clause:

( ) Publication for sale. If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than 24 months after delivery of such data, the contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government's rights to publish for sale any such data so published by the Contractor shall continue as long as the data is protected as a published work under the copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government under this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

**252.227-7018 Restrictive markings on technical data.**

As prescribed at 227.473-4(b) insert the following clause:

**Restrictive Markings on Technical Data (May 1987)**

(a) The contractor shall have, maintain, and follow throughout the performance of this contract, procedures sufficient to assure that restrictive markings are used on technical data required to be delivered hereunder only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. Such procedures shall be in writing. The contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the contractor shall maintain (1) records to show how the procedures of paragraph (a) above where applied in determining that the markings are authorized, as well as (2) such

records as are reasonably necessary demonstrate that any restrictive markings on technical data delivered under this contract are authorized.

(c) The contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered under this contract. The contractor hereby authorizes direct contact between the Government and such person(s) in resolving questions involving restrictive markings.

(d) The Contracting Officer may evaluate or verify the contractor's procedures to determine their effectiveness. Upon request, a copy of such written procedures shall be furnished. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the contractor of the responsibility for complying with paragraphs (a) and (b) above.

(e) If the Contracting Officer should give written notification of any failure to maintain or follow the established procedures, or of any material deficiency in the procedures, the corrective action shall be accomplished within the time specified by the contracting officer.

(f) This clause shall be included in each subcontract under which technical data is required to be delivered. When so inserted, "Contractor" shall be changed to "Subcontractor."

(end of clause)

**252.227-7025 Rights in technical data and Computer Software (SBIR Program).**

As prescribed at 227.479, insert the following clause:

**Rights in Technical Data and Computer Software (SBIR Program) (MAY 1987)**

(a) *Definitions.*

The terms used in this clause are defined in 227.471 of the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS).

(b) *Rights in Technical Data.*

(1) *Limited rights.* The Government shall have limited rights in:

(i) Technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights in accordance with 227.472-6; and

(ii) Unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(3)(i), (iii), or (iv), below. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered;

(B) The name of the contractor and any subcontractor by whom the technical data was generated;

#### Limited Rights Legend

Contract No. \_\_\_\_\_

Contractor: \_\_\_\_\_

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS 227.471 and other limitations as specifically agreed to in writing in accordance with DFARS 227.473-2-6 and 227.473-2. A copy of the agreed to limitations shall be affixed to all data subject to such limitations. This legend, together with the indications of the portions of this data which are subject to such limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. The limited rights legend shall be honored only as long as the data continues to meet the definition of limited rights.

(2) *Government Purpose License Rights.* For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in:

(i) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software.

(ii) Form, fit, or function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract.

(iii) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this contract or any subcontract hereunder necessary for installation, operation, maintenance or training purposes.

(iv) Technical data, which is otherwise publicly available, or has been, or is normally released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure, and

(v) Any other technical data prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to limited or unlimited rights pursuant to subparagraph (b)(1) or (b)(3), herein; or any "private expense" technical data in which the Government may have obtained such greater rights in accordance with DFARS 227.472-7.

Government purpose license rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered,

(B) The name of the contractor and any subcontractor by whom the technical was generated, and

#### Government Purpose License Rights (SBIR Program)

Contract No. \_\_\_\_\_

Contractor: \_\_\_\_\_

For a period of two years after delivery and acceptance of the last deliverable item under this contract, this technical data shall be subject to the restrictions contained in the definition of "Limited" rights in DFARS 227.471. After the two year period, the data shall be subject to the restrictions contained in the definition of "Government purpose license" rights in DFARS 227.471. The Government assumes no liability for unauthorized use or disclosure by others. This legend, together with the indications of the portions of the data which are subject to such limitations, shall be included on any reproduction hereof which contains any portions subject to such limitations and shall be honored only as long as the data continues to meet the definition on Government purpose license rights.

(3) *Unlimited Rights.* The Government shall have unlimited rights in:

(i) Technical data required to be prepared or delivered under this contract or any subcontract hereunder that was previously delivered to the Government with unlimited rights; and

(ii) Technical data that is publicly available or has been or is normally released or disclosed by the contractor without restriction on further use or disclosure.

(c) *Rights in Computer Software.*

(1) *Restricted Rights.*

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. *Provided*, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the contractor with the following legend.

#### Restricted Rights Legend

Use, duplication, or disclosure is subject to restrictions stated in Contract No. \_\_\_\_\_ with \_\_\_\_\_ (name of Contractor) \_\_\_\_\_ and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in the public domain may, if

the contractor so elects, be marked with the following legend:

#### Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

(Name of contractor and address)

When acquired by the Government, commercial computer software and related documentation, so legended shall be subject to the following:

(A) Title to, and ownership of, the software and documentation shall remain with the contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government may already have or obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, *Provided*, that the unmodified portions shall remain subject to these restrictions.

(2) *Government Purpose License Rights.* For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable time under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in:

(i) Computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract; and

(iii) Any other computer software prepared or required to be delivered under this

contract or subcontract hereunder, which is not otherwise subject to restricted or unlimited rights pursuant to subparagraph (c)(1) or (c)(3) herein. Government purpose license rights shall be effective provided that each unit of software is marked with an abbreviated license rights legend reciting that the use, duplication, or disclosure of the software is subject to the same restrictions included in the same contract (identified by number) with the same contractor (identified by name). The Government assumes no liability for unauthorized use, duplication, or disclosure by others.

(3) *Unlimited Rights.* The Government shall have unlimited rights in:

(i) Computer software required to be prepared or delivered under this or any subcontract hereunder that was previously delivered or previously required to be delivered to the Government under any contract or subcontract with unlimited rights;

(ii) Computer software that is publicly available or has been or is normally released or disclosed by the contractor without restriction on further use or disclosure; and

(iii) Computer data bases, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain.

(d) *Technical Data and Computer Software Previously Provided Without Restriction.*

Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) *Copyright.*

(1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in DFARS 227.471. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the contractor

without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) As between the contractor and the Government, the contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authority under section 201(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the contractor, or should the contractor fail, by the Government:

This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at 252.227-7025 (date).

(f) *Removal of Unauthorized Markings.*

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, at the contractor's expense, correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder, if:

(i) The contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) The contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by identification of the restrictions set forth in the contract.

In either case, the Government shall give written notice to the contractor of the action taken.

(g) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) *Limitation on Charges for Data and Computer Software.* The contractor recognizes that it is the policy of the Government not to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction and contractor agrees to refund any such payments. This policy applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to US Government prime contracts. However, it does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

(i) *Acquisition of Data and Computer Software from Subcontractors.*

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor shall use this same clause in the

subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the contractor's rights in the subcontractor data or computer software which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime contractor.

(3) The contractor and higher-tier subcontractors will not use their power to award subcontract as economic leverage to obtain rights in technical data or computer software from their subcontractors.

(j) *Notice of Government Rights.*

(1) Unless the Schedule provides otherwise, and subject to (j)(2) below, the contractor will promptly notify the Contracting Officer in writing of the intended use by the contractor or a subcontractor in performance of this contract of any item, component, or process for which technical data would contain any restrictions on the Government's right to use, disclose, or have others use such data.

(2) Such notification is not required with respect to:

(i) Standard commercial items which are manufactured by more than one source of supply; or

(ii) Items, components, or processes for which such notice was given pursuant to prenotification of rights in technical data in connection with this contract.

(3) Unless the schedule provides otherwise, Contracting Officer approval is not necessary under this clause for the contractor to use the item, component, or process in the performance of the contract.

(End of Clause)

#### § 252.227-7035 Prenotification of rights in technical data.

As prescribed at DFARS 227.482(t), insert the following provision:

#### Prenotification of Rights in Technical Data (May 1987)

(a) *Prenotification of Government Rights.*

In order for the Government to make informed judgments concerning the competitive reproducible potential of items, components, processes or computer software developed at private expense that an offeror intends to deliver under a resultant contract, offerors shall identify to the maximum practicable extent in their responses to this solicitation such privately developed items, components, processes, or computer software and the technical data which they:

(1) Intend to deliver with limited rights;

(2) Intend to deliver with Government purpose or unlimited rights; or

(3) Have not yet determined which rights should apply. This requirement does not apply to standard commercial items which are manufactured by more than one source of supply. If an offeror asserts limited rights to any technical data in its proposal responding to this requirement, Government failure to

object to or reject any such assertion shall not be construed to constitute agreement to any such data rights assertion. Offerors will furnish, at the written request of the contracting officer, evidence to support any such rights contention.

(End of Provision)

**§ 252.227-7037 Validation of restrictive markings on technical data.**

As prescribed in 227.482(v), insert the following clause:

**Validation of Restrictive Markings on Technical Data**

(a) *Definition.* "Technical data", as used in this clause, means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies acquired or to be acquired by the Government. Such term does not include computer software or financial, administrative, cost or pricing, or management data, or other information incidental to contract administration.

(b) *Justification.* The contractor or subcontractor at any tier is responsible for maintaining records adequate to justify the validity of markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract, and shall be prepared to furnish to the contracting officer a written justification for such restrictive markings in response to a challenge under (d) below.

*Prechallenge Request for Information.*

(1) The contracting officer may request the contractor or subcontractor to furnish a written explanation for any restriction asserted by the contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the contracting officer remains unable to ascertain the basis of the restrictive marking, the contracting officer may further request the contractor or subcontractor to furnish additional information in the records of, or otherwise is the possession of or reasonably available to, the contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The contractor or subcontractor shall submit such written data as requested by the contracting officer within the time required or such longer period as may be mutually agreed.

(2) If the contracting officer, after reviewing the written data furnished pursuant to (c)(1) above, and any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer may formally challenge the validity of the marking as described in (d) below.

(3) If the contractor or subcontractor fails to respond to the contracting officer's request

for information under (c)(1) above, and the contracting officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer may formally challenge the validity of the marking as described in (d) below.

(d) *Challenge.*

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the contracting officer determines that a challenge to the restrictive marking is warranted, the contracting officer shall send a written challenge notice to the contractor or subcontractor. Such challenge shall:

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within 60 days justifying, and providing appropriate evidence as to, the current validity of the asserted restriction; and

(iii) State that a DoD contracting officer's final decision, issued pursuant to (f) below, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

(2) Failure to respond to the challenge notice will constitute agreement by the contractor or subcontractor with Government action to cancel, correct, or ignore the restrictive legends.

(3) The contracting officer shall extend the time for response as appropriate if the contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(4) The contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), and shall be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(5) A contractor or subcontractor receiving challenges to the same restrictive markings from more than one contracting officer shall notify each contracting officer of the existence of more than one challenge. The notice shall also state which contracting officer initiated the first in time unanswered challenge. The contracting officer initiating the first in time unanswered challenge after consultation with the contractor or subcontractor and the other contracting officers, shall formulate and distribute to all interested parties a schedule for responding to each of the challenge notices. The schedule shall afford the contractor or subcontractor an equitable opportunity to respond to each challenge notice. All parties agree to be bound by this schedule.

(e) *Final Decision When Contractor or Subcontractor Fails to Respond.* Upon a failure of a contractor or subcontractor to submit any response to the challenge notice, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR

52.233-1, pertaining to the validity of the asserted restriction. This final decision shall be issued within sixty (60) days after the expiration of the time period of (d)(1)(ii) or (2) above. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid restrictive marking.

(f) *Final Decision When Contractor or Subcontractor Responds.*

(1) If the contracting officer determines that the contractor or subcontractor has justified the validity of the restrictive marking, the contracting officer shall issue a final decision to the contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision constitutes validation as addressed in 10 U.S.C. 2321. The final decision shall be issued within sixty (60) days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the contracting officer's final decision under (f)(2)(i) of this clause. The contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the contracting officer within ninety (90) days from the issuance of the contracting officer's final decision under (f)(2)(i) of this clause. If the contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the contracting officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the contracting officer within ninety (90) days from the issuance of the final decision under (f)(2)(i) of this clause. The Government will

no longer be bound, and the contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings, if the contractor or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances significantly affecting the interest of the United States will not permit waiting for the filing of a suit in the United States Claims Court, the contractor or subcontractor agrees that the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure, pending filing of the suit or expiration of the one (1) year period without filing of the suit. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the contractor that urgent or compelling circumstances significantly affecting the interest of the United States will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, the contractor or subcontractor agrees that the agency may cancel and ignore such restrictive markings as an interim measure

pending final adjudication. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(g) *Final Disposition of Appeal or Suit.*

(a) If the contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the contracting officer's decision is sustained—

(i) The restrictive marking on the technical data shall be cancelled, corrected, or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If the contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the contracting officer's decision is not sustained—

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) *Duration of Right to Challenge.* The Government may review the validity of any restriction on technical data, delivered or to

be delivered under a contract, asserted by the contractor or subcontractor. During the period within three years of final payment on a contract or within three years of delivery of the technical data, whichever is later, the contracting officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (1) is publicly available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. Only the contracting officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the contracting officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".

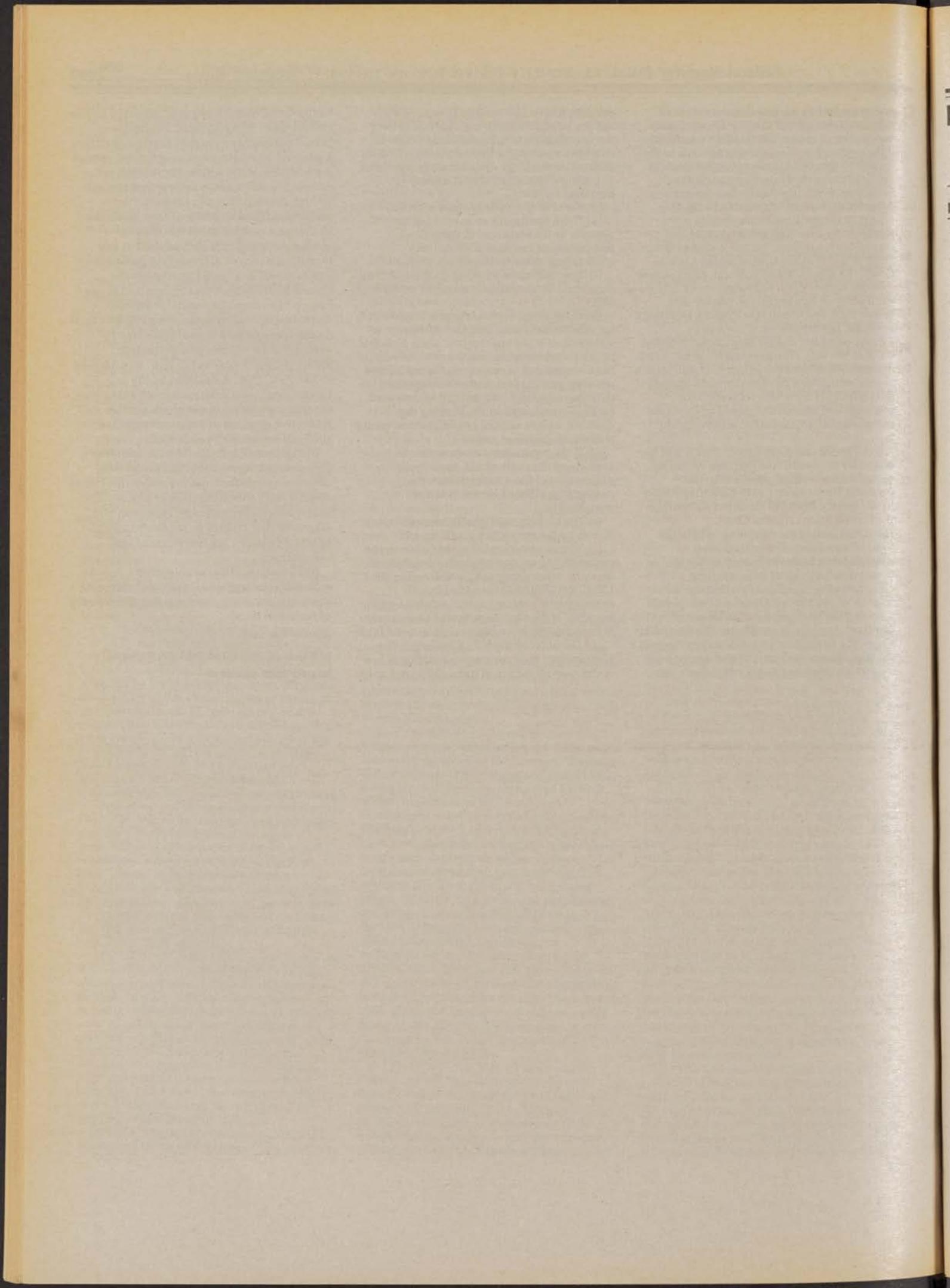
(i) *Privity of Contract.* The contractor or subcontractor agrees that the contracting officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates or implies privity of contract between the Government and subcontractor.

(j) *Flowdown.* The contractor or subcontractor agrees to insert this clause in subcontracts at any tier requiring the delivery of technical data.

(End of Clause)

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**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion in today's List of Public Laws.

